SECTION 2

TRANSPORTATION ACTIVITIES THAT MAY GIVE RISE TO TORT LIABILITY

A. PLAINTIFF'S BURDEN TO PROVE CAUSE IN FACT AND PROXIMATE CAUSE

A.1. Introduction

A plaintiff must prove causation to recover in an action for negligence.[1] There are numerous cases in which the plaintiff's proof was insufficient to prove that the transportation department's conduct or omission was the cause of the plaintiff's injury.

Two aspects of causation are addressed here: causation in fact and proximate, or legal, cause. As one court has stated, a determination of proximate cause requires an analysis both of cause in fact and "legally cognizable cause."[2] Proximate cause of an event is that cause "which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred."[3]

The "establishment of the requisite causal connection is…an element of a plaintiff's cause of action for negligence…."[4] However, the law requires more than just a connection between the cause of action and the injury or damage: "Obviously the legal test includes a requirement that the wrongful conduct must be a *cause in fact* of the harm; but if this stood alone the scope of liability would be vast indeed…."[5] The law has developed restrictions and limitations, in particular the concept of "proximate" or "legal" cause.[6]

A.2. Cause in Fact

Where an alleged highway defect was the cause of the accident, it must be shown that "the defective condition [was] the cause of the accident or injuries resulting therefrom."[7] As discussed under Part A.3, *infra*, lack of causation may be decided on a motion for summary judgment when the court is able to determine that a reasonable jury could not conclude that the defendant's alleged misconduct was the cause of the plaintiff's injury.[8] The question of cause in fact may be tested by asking whether the injury would have occurred *but for* the defendant's negligence.[9] "But for" causation is an act or omission that is a cause of an event, because the event would not have occurred without the act.[10] Even though "some reasonable showing of cause in fact or a close equivalent is always a requisite of liability," such a showing may not suffice.[11] Thus, one question for the court is whether the proof is sufficient.[12]

Whether the alleged negligence was the cause in fact of the injury also may be determined based on whether the misconduct was a substantial factor in bringing about the injury."[13] The substantial factor test may involve the consideration of several issues, including: other factors that contributed in producing the harm; whether the actor's conduct was a continuous and active force; whether the actor created a situation that was harmless unless acted upon by other forces for which the actor was not responsible; and the elapsed time between the act and the harm.[14]

Although each case is different, in general a plaintiff alleging injuries from a highway defect or dangerous condition of the roadway environment

> should establish wherever possible the length of time the defective or dangerous condition existed, the manner of its creation, the density of traffic in the vicinity, the presence [or lack thereof] of signals, signs, or warnings of danger in the vicinity of the accident, any factors explanatory of the cause of, or responsibility for, the dangerous condition, and the steps by the defendant [that] could have, by the exercise of care or caution, avoided the accident causing the plaintiff's injuries.[15]

The transportation department may be expected to challenge the plaintiff's proof on the length of time the alleged condition existed; how it was created, or who created it; the traffic conditions at the time of the alleged condition; the need or adequacy of signs, signals, or barriers;[16] the existence or nonexistence of other causative factors; and, of course, whether the plaintiff was at fault.[17]

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[1] Day v. Willis, 897 P.2d 78, 81 (Alaska 1995).

[2] Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 393 (D. Md. 2001).

[3] State v. Langenkamp, 137 Ohio App. 3d 614, 739 N.E.2d 404 (Ohio App. 3d Dist. 2000).

[4] 2 HARPER & JAMES, THE LAW OF TORTS § 20.1, at 85 (2d ed.), hereinafter THE LAW OF TORTS.

[5] *Id.* at 85–86.

[6] *Id.*

[7] 4 SCHWEITZER & RASCH, CYCLOPEDIA OF TRIAL PRACTICE, § 827, at 66 (2d. ed.).

[8] Petit v. Celebrity Cruises, Inc., 153 F. Supp. 2d 240 (S.D.N.Y. 2001).

[9] THE LAW OF TORTS, *supra* note 4, *§* 20.2, at 91.

[10] Petit v. Celebrity Cruises, Inc., 153 F. Supp. 2d at 252 (S.D.N.Y. 2001), *quoting* THE LAW OF TORTS § 41 at 265; *and see* Sexton v. United States, 132 F. Supp. 2d 967, 974 (M.D. Fla. 2000) ("To prove cause in fact, a plaintiff must establish that 'but for' the defendant's act or omission, no injury would have occurred.").

[11] THE LAW OF TORTS, *supra* note 4, *§* 20.4, at 130.

[12] *Id. §* 20.2, at 93.

[13] Tex. Dep't of Transp. v. Olson, 980 S.W.2d 890, 893, 1998 Tex. App. LEXIS 6565 (Ct. App., Ft. Worth, 1998); *and see* Gordon v. Havasu Palms, 2001 Cal. App. LEXIS 835 (Oct. 24, 2001), at *13 ("A defendant's conduct is a cause in fact of the plaintiff's injury if it was a substantial factor in bringing about the injury.").

[14] Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d at 393.

[15] SCHWEITZER & RASCH, *supra* note 7, § 833 at 92–93.

[16] THE AASHTO POLICY ON GEOMETRIC DESIGN OF HIGHWAYS AND STREETS or the MUTCD may provide guidance in answering some of these issues.

[17] SCHWEITZER & RASCH, *supra* note 15.

Thus, in *Squadrito v. State*,[18] the court ruled that from the evidence presented, it appeared that the claimants based their allegation of negligence on the State's failure to provide safe and appropriate traffic lights at an intersection. However, the plaintiffs "failed to produce any credible evidence to show that the traffic lights were not working properly, or that there was anything wrong with them."[19] The court observed also that plaintiffs failed to prove that there had been any prior accidents at the "busy intersection." The court held that "[t]he traffic signals at this intersection were designed and installed after extensive studies of the traffic conditions" and that they were duly approved and tested from time to time and found to be working properly.[20] In dismissing the claims, the court held that the claimants had failed to prove any negligence or want of care on the part of the State.[21]

A.3. Proximate or Legal Cause

No liability will be imposed upon the state unless it is alleged and proven that the state's negligence is a proximate cause of the accident.[22] The plaintiff is required to plead and prove that the "defective highway was the sole proximate cause of [the] injuries."[23] Policy considerations underlie the doctrine of proximate cause, which is "intertwined" with foreseeability.[24] One court has stated that whether alleged misconduct amounts to a "legally cognizable cause" of the plaintiff's injury involves considerations of fairness and social policy, as well as "principles of common sense in light of surrounding facts and circumstances."[25] "'Proximate cause' is that cause, act or omission which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred, the injury being the natural and probable consequence of the wrongful act."[26]

Usually, whether the defendant's negligence proximately caused the plaintiff's injuries is a question of fact for the jury.[27]

> The broad question as to whether the defective condition in the highway constituted the proximate cause of the accident is generally one for the jury to decide in the light of all the surrounding circumstances, as is the question whether the injured person was using the highway in the exercise of reasonable care.[28]

A court cannot find proximate cause "by indulging in speculation or by impermissibly pyramiding inference on inference."[29] However, when reasonable minds could reach only one conclusion, the existence of proximate cause is a question of law. There can be more than one proximate cause of an accident.[30]

Although the highway agency is liable to anyone injured as a result of a defective condition of the road, "it must appear that the injuries sustained are the natural result of the condition complained of, and are such as might reasonably be foreseen."[31] As stated, the elements of proximate cause are cause in fact and foreseeability.[32] The evidence must show that the plaintiff's injury was a natural and probable consequence of conditions for which the defendant was responsible.[33] Motorists, on the other hand, must be "vigilant in their observances and avoidances of defects and obstructions likely to be encountered."[34]

The transportation department may move for a summary judgment on the ground that the plaintiff will be unable to establish that the department's alleged negligence was the proximate cause of the accident. If the motion for summary judgment is properly supported by affidavits or other evidence and any inferences that may be drawn from the facts, the burden shifts to the party opposing the motion to show that triable issues of material fact exist; "[a] party cannot avoid summary judgment based on mere speculation and conjecture…and must produce a triable issue of

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[18] 34 Misc. 2d 758, 229 N.Y.S.2d 540 (Ct. Cl. 1962).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Ring v. State, 270 A.D.2d 788, 705 N.Y.S.2d 427 (3d Dep't 2000).

[23] Agranov v. Guilford, 1993 Conn. Super. LEXIS 454 (Conn. Super. Ct., Feb. 16, 1993).

[24] THE LAW OF TORTS, *supra* note 4, § 20.4, at 131; § 20.5, at 133. *See* Lay v. State of Kan., Dep't of Transp., 23 Kan. App. 2d 211, 928 P.2d 920 (1996) for a discussion of the necessity of the consequences of the negligence to be a foreseeable and direct cause of the alleged injury.

[25] Smith v. Washington Metro. Area Transit Auth., 133 F. Supp. 2d 395, 400 (D. Md. 2001) (In an action arising out of the death of a passenger from a heart attack while climbing a stationary escalator, the court denied the defendant's motion for summary judgment.).

[26] 65 C.J.S., *Negligence*, § 188, at 519–20 (notes omitted).

[27] Boyd v. Trent, 262 A.D.2d 260, 690 N.Y.S.2d 732, 1999 N.Y. App. Div. LEXIS 6055 (App. Div. 2d Dep't 1999); Grappe v. State, Dep't of Transp. & Dev., 462 So. 2d 1337, 1340, 1985 La. App. LEXIS 8131 (La. App. 3d Cir., 1985), *later proceeding*, 462 So. 2d 1343, 1985 La. App. LEXIS 8130 (La. App. 3d Cir. 1985), *cert. denied*, 466 So. 2d 1302, 1985 La. LEXIS 8509 (La. 1985) ("Causation is a question of fact as to which the trial court's determinations are entitled great weight and should not be disturbed absent manifest error.").

[28] SCHWEITZER & RASCH, *supra* note 7, § 827, at 67

[29] Sexton v. United States, 132 F. Supp. 2d 967 (M.D. Fla. 2000).

[30] Tex. Dep't of Transp. v. Olsen, 980 S.W.2d 890, 893, 1998 Tex. App. LEXIS 6565 (Ct. App., Ft. Worth, 1998).

[31] SCHWEITZER & RASCH, *supra* note 7, § 827 at 62.

[32] Tex. Dep't of Transp. v. Olson, 980 S.W.2d 890, 982–93, 1998 Tex. App. LEXIS 6565 (Ct. App., Ft. Worth, 1998).

[33] Larkins v. Hayes, 267 A.D.2d 524, 699 N.Y.S.2d 213 (3d Dep't 1999).

[34] Finkelstein v. Brooks Paving Co., 107 So. 2d 205, 207 (Fla. Dist. Ct. App. 1958).

material fact."[35] At the time of the motion, the defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon, or the defendant "may utilize the tried and true technique of negating (disproving) an essential element of the plaintiff's cause of action,"[36] i.e., that *prima facie* shows that an essential element of the plaintiff's claim cannot be established.[37]

If there is an insufficient showing for the court to allow the issue of proximate cause to go to trial, the complaint may be dismissed. In a case involving a vehicle collision with a traffic signal pole, the appellate court affirmed the dismissal of the complaint. The court stated that the plaintiff

> must allege some ultimate fact which indicates a particularly dangerous condition which would make it likely, and thus foreseeable, that vehicles would deviate from the roadway and collide with the particular pole alleged to have been negligently maintained.… Here, there are no allegations of ultimate facts from which foreseeability could be inferred.[38]

Expert testimony may be essential in establishing causation, which is usually a jury question,[39] but it should be noted that the jury is not bound to accept opinion testimony as conclusive.[40] Expert testimony may establish both cause in fact and proximate cause. Moreover, expert testimony may raise a triable issue of fact and preclude a summary judgment for the defendant.[41] In *Childers v. Phelps County*,[42] the plaintiff alleged that the County's inadequate signage contributed to the driver's failure to negotiate a curve successfully. The Supreme Court of Nebraska held, *inter alia*, that it was proper to permit an expert witness in the case to testify regarding the proximate cause of the accident. The engineer had testified that the proximate cause of the accident was the County's failure to have in place adequate signing to assure that the driver would not be confused by the location. According to the court, the expert's "opinion was based upon reasonable engineering certainty, taking into account his understanding of the conditions that confronted [the driver], the fact that the location at issue was typical of the type of area that causes driver confusion, and his knowledge of predictable driver error."[43]

Causation in fact is not the same as the plaintiff's burden to establish that the alleged negligence was the proximate or legal cause of the accident. In *Shortridge v. Ohio Dept. of Public Safety,*[44] after a prior accident an hour before the plaintiff's accident at the same location, the transportation department had not completed the task of replacing a downed stop sign. The court held that the Ohio Department of Transportation's (ODOT) action was not the proximate cause of the accident even though the sign had not been replaced. The court held that the plaintiff's failure "to look ahead of her vehicle" and observe traffic conditions was the proximate cause of the accident.[45]

Because of the conduct of another person, the transportation department may be able to show that there was an intervening or superceding cause of the accident.[46] However, it has been held that, absent the action of a third party, a motorist's own unforeseeable conduct causing him or her to leave the road was not a superceding cause of an accident so as to absolve the transportation department of liability.[47]

In trying to prove causation, the plaintiff may attempt to rely on prior accidents that were allegedly similar to the plaintiff's. In *Buskey v. State,*[48] involving the death of a motorist in a crossover collision on a state highway, the court noted that the State should be held liable only for crossover accidents in which its negligence was a substantial factor. In *Buskey*, the plaintiff was unable to show the similarity of prior

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[35] Aguilar v. Atlantic Richfield Corp., 92 Cal. Rptr. 2d 351, 377 (Cal. App. 4th Dist. 2000).

[36] Aguilar, 92 Cal. Rptr. 2d at 378, *quoting* Brantley v. Pisaro, 42 Cal. App. 4th 1591, 1598, 50 Cal. Rptr. 2d 431.

[37] *See* Sutton v. Golden Gate Bridge, 68 Cal. App. 4th 1159, 81 Cal. Rptr. 2d 155 (1st Dist. 1998), n.6; and Fuller v. Department of Transp., 107 Cal. Rptr. 2d 823 (Cal. App. 4th Dist. 2001) (affirming the grant of summary judgment on the ground that the state had design immunity in the setting of the speed limit.).

[38] Scott v. Florida Dep't of Transp*.,* 752 So. 2d 30, 34 (Fla. App. 1st Dist. 2000).

[39] SCHWEITZER & RASCH, *supra* note 7 at 67.

[40] Union Pac. R.R. Co. v. Sharp, 330 Ark. 174, 952 S.W.2d 658 (1997).

[41] Temple v. Chenango County, 228 A.D.2d 938, 644 N.Y.S.2d 587, 589 (3d Dept. 1996) (whether the lack of a guardrail was the proximate cause of plaintiff's injuries was a factual issue); *see also* Cruz v. City of New York, 218 A.D.2d 546, 630 N.Y.S.2d 523, 526 (1st Dept. 1995) ("The affidavit of plaintiff's engineer was sufficient to raise a triable issue of fact as to whether the City erected or caused a hazardous condition," a large hole in the highway, that was the proximate cause of the accident.); Mickle v. N.Y. State Thruway Auth., 182 Misc. 2d 967, 701 N.Y.S.2d 782, 789 (Ct. Cl. 1999) (Authority held liable for failure to adhere to the provisions of the MUTCD for the failure to place Do Not Enter sign at a barrier separating northbound and southbound lanes of the highway); and Boyd v. Trent, 262 A.D.2d 260, 690 N.Y.S.2d 732, 733 (2d Dep't 1999) (The defendant's motion for summary judgment was denied where there was an issue of fact as to whether the absence of a speed advisory sign in accordance with the MUTCD was a proximate cause of the accident.).

[42] 252 Neb. 945, 568 N.W.2d 463 (1997).

[43] Childers, 568 N.W.2d at 469.

[44] 90 Ohio Misc. 2d 50, 696 N.E.2d 679 (Ohio Ct. Cl. 1997).

[45] *Id* at 682 (1997).

[46] Prysock v. Metropolitan Transp. Auth., 251 A.D.2d 308, 673 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 6336 (2d Dep't 1998) (intervening act of driving onto railroad tracks broke any causal nexus between the defendant's negligence and the accident).

[47] Von Der Heide v. Commonwealth, Dep't of Transp., 553 Pa. 120, 718 A.2d 286, 1998 Pa. LEXIS 2121 (1998).

[48] 159 Misc. 2d 792, 606 N.Y.S.2d 528 (Ct. Cl. 1993).

accidents: “simplistic and nonspecific claims of negligence in regard to crossover accidents are not an adequate basis on which to ground liability.”[49] The court held that the proximate cause of the accident was the negligent driving by an intoxicated driver, not the State’s failure to construct a median barrier at the location of the accident. It should be noted, on the other hand, that a driver's intoxicated state may not automatically relieve the highway authority of liability for its alleged failure to provide a safe roadway.[50]

In *Rickerson v. State of New Mexico and City of Roswell*,[51] the plaintiffs suggested that either four-way stop signs or signalization installed when the city first concluded that the intersection was inadequately controlled might well have induced both drivers to approach the intersection at the time of the accident. The court agreed that "[i]f that is a reasonable inference, then a jury could find that appellees' inaction also contributed to the death of plaintiffs' decedent"[52] and held:

> We do not think such an inference beyond the bounds of a jury's consideration under the facts presently developed in this case. The request by the City in 1977 for assistance from the State in installing a traffic signal must have been triggered by a considered judgment that the intersection was not adequately controlled at that time, and a continuing inadequacy into the future could be foreseen. A negligently dangerous condition operated upon by commission of another negligent act which might not unreasonably be foreseen to occur, is regarded as a proximate cause of the injury finally resulting from the condition.[53]

In *McMillan v. Michigan State Highway Comm'n.*,[54] involving the question of whether a pole within 3 ft of the traveled portion of the highway constituted a traffic hazard, the court stated:

> The answer to this question necessarily includes considerations of duty, proximate cause, and the function of the court and jury. Proximate cause can be thought of as a policy determination which is often indistinguishable from the duty question.... Prosser and Keeton address the interrelationship between duty and proximate cause: "*Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury.* Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. *It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible.*"[55]

The court went on to state that

> "[i]t is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur? Such a form of statement does not, of course, provide any answer to the question, or solve anything whatever; but it may be helpful since "duty"—also a legal conclusion—is perhaps less likely than "proximate cause" to be interpreted as if it were a policy-free fact finding. Thus, 'duty' may serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. The question whether there is a duty has most often seemed helpful in cases where the only issue is in reality whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit."[56]

The court ruled that the plaintiff should not be precluded, as a matter of law, from presenting her case to the jury. The question of whether a duty existed, and the question of whether the cause (here, the placement of the poles) was so significant and important to be regarded as a proximate cause of the plaintiff's loss, depended "'in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.'"[57]

In spite of a plaintiff's claims that the highway was inadequate and unsafe and that its condition was the proximate cause of the plaintiff's injury, the issue of whether the facility was adequate at the time of its earlier construction may be crucial. If the facility were adequate when built, then it may be held that the alleged defective condition was not the proximate cause of the accident. On the other hand, if the department had notice that the facility since its construction had become a dangerous condition of public property, then the condition may be held to be the proximate cause of the injury.

The state’s violation of safety standards may be the proximate cause of an accident as in *Nevins v. Ohio Dept. of Highways*.[58] In *Nevins,* the court held, *inter alia*, that the evidence at trial was sufficient to uphold findings that the transportation department had been requested to post, but had not done so, a sign at a “gore median” dividing an Interstate highway (I-70) to the exit to another Interstate highway (I-675), where

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[49] Buskey, 606 N.Y.S.2d at 531.

[50] Slaubaugh v. Slaubaugh, 466 N.W.2d 573, 578 (N.D. 1991), *appeal after remand*, 499 N.W.2d 99, 1993 N.D. LEXIS 79 (N.D. 1993).

[51] 94 N.M. 473, 612 P.2d 703, 1980 N.M. App. LEXIS 849 (Ct. App. 1980).

[52] Rickerson, 612 P.2d at 705.

[53] *Id.* (citations omitted).

[54] 426 Mich. 46, 393 N.W.2d 332 (1986).

[55] *Id.* at 334, *quoting* PROSSER & KEETON, THE LAW OF TORTS, § 42, at 272–74 (5th ed.) (emphasis in original).

[56] *Id.* (emphasis in original).

[57] *Id.* at 339, *quoting* Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977).

[58] 132 Ohio App. 3d. 6, 724 N.E.2d 433 (Ohio App. 10th Dist. 1998).

the plaintiffs' van struck a gore divider. The gore was not adequately marked by reflective channeling strips, and ODOT had not restored lighting to the interchange, thereby decreasing visibility in the vicinity.

In affirming a judgment against ODOT, the court held that it could be reasonably inferred that traffic traveling at 65 mph on an open highway may seek to exit at an interchange. The court agreed that but for the lack of interchange lighting, gore pavement markings, and the lack of a warning sign, the motorist would not have struck the concrete median. The court held that ODOT's negligence was the proximate cause of the accident and that any negligence of the motorist was not a superceding cause.[59]

It has been held that the transportation department's actions were not the proximate cause of a motorcyclist's accident even though the plaintiff's expert maintained that the city should have painted the road in question as a four lane rather than a two lane road, such that the cyclist would not have attempted to pass a tractor trailer on the right side. The court stated that the expert's

> speculation is not entitled to the weight of an opinion, or, for that matter, any weight whatsoever. "[B]ald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment.…"
>
> Even were we to accept [the plaintiff's expert's] conjecture as an admissible opinion, we would conclude that it is insufficient to defeat the City's motion. Plaintiff…offered nothing more "than a mere choice between conflicting opinions."[60]

As in the *Elmer* case, the proximate cause of the plaintiff's accident may have been the result of the plaintiff's negligence, not the State's. For instance, in *Zecca v. State*,[61] the court ruled that, given other actions taken by the transportation department in compliance with the *Manual on Uniform Traffic Control Devices* (MUTCD) in advance of a construction zone, the Department of Transportation's (DOT) decision not to erect no-passing signs was not unreasonable. Moreover, there was no showing that the DOT's plan to complete all resurfacing work prior to the placement of permanent pavement markings violated accepted traffic design engineering principles. The appellate court agreed with the Court of Claims that the proximate cause of the accident was the plaintiff's negligence in passing another vehicle.[62]

In a somewhat earlier case,[63] the court ruled, *inter alia,* that the plaintiff failed to show that the difference between temporary pavement markings and permanent markings was a contributing factor to the accident or rendered the road unreasonably hazardous. Tar-like patches on the pavement did not have a "controlling influence" on the vehicle or the claimant's ability to negotiate the curve.[64]

In sum, cause in fact and proximate cause are important burdens that the plaintiff must meet before the transportation department may be held liable for alleged negligence. Expert testimony may be very important, even essential, for the plaintiff to establish causation.

B. WARNING SIGNS, TRAFFIC LIGHTS, OR PAVEMENT MARKINGS—INSTALLATION AND MAINTENANCE

B.1. Absence of General Duty to Install Warning Signs, Traffic Lights, or Pavement Markings

Providing highway warning signs, traffic lights, or pavement markings are important tasks for transportation departments in providing safe roads and highways; thus, departments may be held liable for negligence in providing or in failing to provide adequate ones as required by the circumstances.

The courts have held, however, that in the absence of a statute, the state has no general duty to install or provide highway signs, lights, or markings. A duty may arise to install them at the location of a dangerous condition, a "point of hazard," or a "point of special danger."[65] The initial inquiry, thus, is whether the state has any duty in the first instance to provide highway warning signs, traffic lights, or pavement markings.[66] Numerous cases hold that failure to provide such highway aids is not actionable, particularly if the state had discretion regarding what action or response was appropriate.[67]

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[59] Nevins, 724 N.E.2d at 445.

[60] Elmer v. Kratzer, 249 A.D.2d 899, 672 N.Y.S.2d 584, 586 (4th Dep't 1998).

[61] 247 A.D.2d 776, 669 N.Y.S.2d 413 (3rd Dep't 1998).

[62] *Id*. at 414.

[63] Montgomery v. State, 614 N.Y.S.2d 801, 803 (App. Div., 3rd Dep't 1994).

[64] *Id.*

[65] Pick v. Szymczak, 451 Mich. 607, 548 N.W.2d 603, 609, 1996 Mich. LEXIS 1378 (1996); *see also* PROSSER & KEETON, THE LAW OF TORTS, at 143 (4th ed.).

[66] Some states may make a distinction between "regulating signs" and "warning signs." *Compare* CAL. GOV'T CODE §§ 830.4 and 830.8. For instance, there may be no duty to *install* speed limit signs, Stop signs, traffic signals, and pavement markings, but after they are installed, there is a duty to *maintain* them. For "warning signs," there is no duty to install them unless the condition is one not reasonably apparent to a driver exercising due care.

[67] French v. Johnson County, 929 S.W.2d 614, 617 (Tex. App. Waco 1996) (In a case involving an accident on a bridge built in 1943, the county's failure to install guardrails, replace the bridge, or post warnings after the date of the tort claims act did not constitute an act or omission waiving immunity; the decision not to post warning signs was a discretionary function.); Urow v. District of Columbia, 316 F.2d 351 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 826, 84 S. Ct. 69, 11 L. Ed. 2d 59 (1963) (no liability for failure to exercise discretionary, quasi-legislative powers to control traffic at an intersection.).

Whether there is a duty to install warning signs, traffic lights, or pavement markings may depend on the interpretation of a local statute. There are precedents that interpret statutes imposing liability for failure to repair roads and highways to mean that the failure to install adequate warning signs both was and was not a violation of duty under such statutes.[68] States have no general obligation to place signs or warnings on highways, because these decisions are either legislative, policy, or planning level in nature, decisions that must be made by the legislative or executive branches of the government.[69] Thus, a decision not to place No Passing signs on a highway, when construction work had obliterated lane markings, was found not to be a basis on which to hold the state liable. Moreover, it was shown that the decision had evolved with adequate study, that it had a reasonable basis, and that the transportation department had adhered to the MUTCD.[70] The courts do not care to second guess their coequal branches of government. However, after the decision is made to provide signs, signals, or markings, the state has a duty to place and maintain them with reasonable care.[71] That is, after the state has provided a traffic warning, for instance, it has assumed a duty to the public, and the public reasonably has a right to rely on the warnings. Where the department must maintain highways free of hazards, its duty may include the proper maintenance of directional signs,[72] traffic signals,[73] stop signs,[74] and even signs warning of known deer crossing points along the highways.[75]

As for signs warning of hazardous conditions on bridges, in *Salvati v. Department of State Highways*,[76] the issue was whether the State had provided adequate warning of bridge icing by two reflectorized signs erected 1,000 ft from the entrance to the bridge, each reading Watch For Ice On Bridge. In reversing a judgment rendered against the transportation department, the court held that the signs were adequate to warn of the potential danger. The court ruled that the State's signing satisfied the technology available at the time it was installed, because the technology had not advanced to such a point that the State could have installed a flashing sign that was automatically activated by ice on the bridge.

Many of the cases discussed hereafter, however, require the public agency to provide warnings, traffic lights, or pavement markings because of exigent circumstances.[77] As the court noted in *Tanguma v. Yakima County,*[78] the transportation agency has a duty to post signs warning of a dangerous condition either when they are prescribed by law or when the location is inherently dangerous. Not surprisingly, the courts have held that whether there is a duty to provide highway warning signs, traffic signals, or pavement markings depends on the nature and circumstances of the roadway condition. That is, the condition may be sufficiently dangerous that a reasonably prudent person would provide warning signs, signals, or markings for the motorist's protection.

Although the duty of the state to exercise reasonable and ordinary care in the maintenance of its highways may be required at a particular location,[79] the court in

[68] Fritz v. Howard Twp., 570 N.W.2d 240 (S.D. 1997) (factual issues existed on whether there was a breach of certain statutory duties); Dohrman v. Police Jury of Lawrence County, 143 N.W.2d 865 (S.D. 1966); Robertson v. Jones, 832 P.2d 432 (Okla. Ct. App. Div. 2, 1991), *cert. denied*, (June 29, 1992) (90-degree curve in a local road was not a "special defect" under a state statute requiring warnings for special defects); Sanzone v. Board of Police Comm'rs, 219 Conn. 179, 592 A.2d 912 (1991) (under highway defect statute, malfunctioning traffic light was part of the defective road).

[69] French v. Johnson County, 929 S.W.2d 614 (Tex. App. Waco 1996); Weiss v. N.J. Transit, 128 N.J. 376, 608 A.2d 254 (1992) (where tort claims act provided for an explicit grant of immunity for the failure to provide traffic signals, the immunity provision prevailed even if there was a cause of action for other inaction, such as the delay in implementing a plan to install a traffic signal at a railroad crossing).

[70] Zecca v. State, 247 A.D.2d 776, 669 N.Y.S.2d 413, 414, 1998 N.Y. App. Div. LEXIS 1859 (1998).

[71] Chart v. Dvorak, 57 Wis. 2d 92, 203 N.W.2d 673, at 677–78 (1973).

[72] Crowell v. Philadelphia, 531 Pa. 400, 613 A.2d 1178, 1992 Pa. LEXIS 405 (1992) (no governmental immunity for wrongfully placed directional sign even though the plaintiff-motorist was intoxicated at the time of the accident).

[73] Williams v. State Highway Dep't, 44 Mich. App. 51, 205 N.W.2d 200 (1972).

[74] 185 N.W.2d at 114–15.

[75] Metier v. Cooper Transport Co., 378 N.W.2d 907 (Iowa, 1985) (decision whether or not to post a warning sign at a particular highway location "was operational in character"); *but see* Ufnal v. Cattaraugus County, 93 A.D.2d 521, 463 N.Y.S.2d 342 (1983), *appeal denied,* 60 N.Y.2d 554 (N.Y. 1983) (decision not to erect deer warning signs based on negative evidence tending to show a lack of need at a certain location was a "discretionary governmental decision").

[76] 415 Mich. 708, 330 N.W.2d 64 (1982).

[77] Pick v. Szymczak, 451 Mich. 607, 548 N.W.2d 603 (1996) (duty to erect adequate warning signs or traffic control devices at a "point of hazard"), *but see* Colovos v. Department of Transp., 205 Mich. App. 524, 517 N.W.2d 803 (1994), *aff'd*, 450 Mich. 861, 539 N.W.2d 375 (1995), *recons. denied*, 544 N.W.2d 473 (Mich. 1996) (The Court of Appeals held that it was "compelled" by an administrative order to follow a holding that the state had no duty to erect signs or warning devices unless these were located on the improved portion of the road.) *See* Gregory J. Roth, *Michigan Agencies and Legislature Be Warned: The New Duty to Provide Adequate Warning Signs or Traffic Control Devices at Known Points of Hazard,* 74 U. DET. MERCY L. REV. 721 (1997).

[78] 18 Wash. App. 555, 569 P.2d 1225 (1977)*, review denied*, 90 Wash. 2d 1001 (1978).

[79] *See* Annot., *Highways: Governmental Duty to Provide Curve Warnings or Markings*, 57 A.L.R. 4th 342.

Chowdhury v. Los Angeles[80] stated that "[a] public entity does not create a dangerous condition 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs....'" Furthermore, it stated that the government may even turn off signals to avoid confusion and not be held liable for its action.[81]

Whether a particular highway condition caused the injury at issue is a question of fact for the determination of the jury or the court sitting without a jury, where different conclusions reasonably could be drawn from the evidence.[82]

B.2. Duty to Warn of or Correct Known Dangerous Conditions

Where the state or other governmental entity has actual or constructive notice of a dangerous condition, it has a duty either to correct the condition or to give notice thereof by warning signs or signals.

> If...the alleged defect is one that results from the overall plan itself, it is not actionable *unless a known dangerous condition* is established.... The failure to...warn of a *known danger* is, in our view, a negligent omission at the *operational level* of government and cannot reasonably be argued to be within the judgmental, *planning-level* sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity.[83]
>
> (Emphasis added.)

Thus, it has been held that the failure to protect against a known dangerous condition of a highway cannot be classified as falling within the judgmental or planning stage of the planning and operational dichotomy test of discretion discussed in Section 13 *et seq., infra*.[84] A statutory exemption for discretionary acts does not relieve the state of liability for failing to warn of a highway condition known to be dangerous to the traveling public.[85]

B.2.a. Warning Signs

Generally, the state is not compelled to place signs at every curve along the highway; it must provide them at "dangerous places" or unusual places on the highway to enable motorists exercising ordinary care and prudence to avoid injury to themselves and to others.[86] In *Commonwealth, Dept. of Highways v. Automobile Club Ins. Co.,*[87] the court held that a curve, shown to have a 52-degree turn for each 100 ft, with a total curvature of 117 degrees from beginning to end, was a sharp or steep curve and sufficiently dangerous that the state should have provided speed advisory signs, guardrails, or barriers near the curve.[88]

The duty to place or provide warning signs may arise because of the nature of a particular location, but it may not be necessary for the state to provide signs universally over a large area of the highway. The California statute defines a dangerous condition as one that "creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property...is used with due care in a manner in which it is reasonably foreseeable that it will be used."[89]

The legislative comment to Section 835 of the California Government Code explains that

> if an entity placed lights and barriers around a hole sufficient to remove any substantial risk to persons who would be foreseeably using the street with due care, the entity could not be held liable for any injuries caused by the condition, for the condition would not be "dangerous" within the meaning of Section 830. If the lights subsequently failed to function, a person injured from striking the hazard would have to show either that there was some negligence in preparing the lights or that, although the lights failed without fault on the part of the entity, the entity had notice of the failure and did not take appropriate precautions.

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[80] 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657, 662 (Cal. App. 2d Dist. 1995).

[81] *Id.*

[82] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 377, at 869.

[83] Chowdhury v. Los Angeles, 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657, 662 (Cal. App. 2d Dist. 1995). *See also* Jacobs v. Board of Comm'rs of Morgan County, 652 N.E.2d 94 (Ind. Ct. App. 1995) (county was not immune from liability under discretionary function exception to the tort claims act where plaintiff alleged that county was negligent in failing to place signs regarding a highway curve; county did not engage in any "systematic" planning to determine the need for signage at a particular location), *but see* Harkness v. Hall, 684 N.E.2d 1156 (Ind. Ct. App. 1997) (immunity for a design defect claim did provide immunity for a claim alleging defective maintenance and signage).

[84] Wagshal v. District of Columbia, 216 A.2d 172, 174 (D.C. 1966) (There was no immunity for negligently failing to maintain an existing traffic control device:

> [b]ut if a plan that is adopted creates a hazard on the road, either because of its inherent unreasonableness or because of negligence in its administration, then the duty of the District [of Columbia] is the same as it is with respect to any street condition that becomes unsafe.)

[85] Snyder v. Curran Twp., 167 Ill. 2d 466, 657 N.E.2d 988, 212 Ill. Dec. 643, 1995 Ill. LEXIS 195 (1995) (discretionary immunity did not insulate township from liability for improper placement of a road sign).

[86] Commonwealth, Dep't of Highways v. Automobile Club Ins. Co., 467 S.W.2d 326, 328 (Ky. 1971). The state is not required to erect guardrails or barriers of sufficient strength to withstand any degree of force. *Id.*

[87] Commonwealth, Dep't of Highways, 467 S.W.2d at 329 (Ky. 1971).

[88] *But see* Robertson v. Jones, 832 P.2d 432, 434 (Okla. Ct. App. Div. 2, 1991), *cert. denied*, (June 29, 1992) (The court held that a 90-degree curve in a local road was not a "special defect" under a state statute requiring warnings for special defects; the "City was exercising its discretion by not placing a sign at the corner which Plaintiff failed to negotiate.").

[89] CAL. GOV'T CODE § 830. *See also* CAL. GOV'T CODE § 830.2 (Based on the surrounding circumstances, a minor, trivial, or insignificant risk may not amount to a dangerous condition.)

In *Callahan v. San Francisco,*[90] the plaintiff was traveling as a passenger in an automobile on a street that dead-ended at an intersecting street. The weather was foggy and the T-intersection had no signs or devices warning that the road terminated abruptly with a cliff dropping into a lake. (The driver of the vehicle had been drag racing just prior to the intersection.) The evidence was that there had been no prior accidents at the intersection similar to the one involving the plaintiff and that only 29 accidents (one accident per 685,000 vehicles) at the intersection had involved this direction of travel in 4 ½ years. Thus, the court held as a matter of law that the City was not negligent and that the intersection was a safe one, except when a vehicle was driven at excessive or hazardous speed. Because a dangerous condition did not exist, the City was not required to provide warnings by signals, signs, or other markings.[91] Moreover, before a failure to post warning signs will result in liability, it must be shown that the absence of a sign was a proximate cause of the accident.[92]

Indeed, the failure to sign may be the basis for an independent cause of action. In *Cameron v. State,*[93] involving an accident on a road with a steep downgrade and a rather sharp "S" curve, at the close of the evidence the trial court granted the State's motion for a nonsuit, because there was an insufficiency of proof of a dangerous condition of the highway and, in any event, the state had design immunity under California Government Code Section 830.6. The Supreme Court of California reversed. First, the "state presented no evidence that the superelevation which was actually constructed on the curve in question…was the result of or conformed to a design approved by the public entity vested with discretionary authority."[94] Second, "[t]he state's failure to…warn was an independent, separate concurring cause of the accident."[95]

A sudden, sharp, obscured curve, for example, such as a 5-degree curve, which was very unusual and dangerous according to one court, required a warning sign commensurate with the danger,[96] but it has been held that a 3-degree curve, which could be seen 1,000 to 1,500 ft away, and where there were 9-ft minimum shoulders and only a gradual slope drop of 2 ½ ft to an adjoining field, did not require a guardrail or a warning sign.[97] Nor is there any general duty to install reflectorized signs where a conventional sign was present.[98] In other cases, the number of signs placed by the transportation department was sufficient,[99] or the absence or alleged inadequacy of a sign was held not to be the proximate cause of the accident.[100]

B.2.b. Traffic Lights

There is a split of authority as to whether the state or other public agency is liable for failure to erect traffic lights,[101] but most jurisdictions appear to hold that the decision to provide or not to provide traffic lights is either the exercise of immune discretion or the performance of a purely governmental function.[102] One Nevada case has held that the decision not to install any form of traffic control device for the protection of pedestrians at an intersection was outside the protection for discretionary immunity.[103] In a few municipalities, there is no liability even for the failure to maintain a traffic light.[104] Generally, liability for the failure to provide or maintain traffic lights or signals at intersections depends on the particular circumstances. In *Arizona State Highway Dept. v. Bechtold,*[105] the signal was flashing a green indication to both drivers, and there had been two prior accidents at the same location on the same date. The evidence was that repairs earlier in the day following the first accident had been inadequate and, further, that the department had no-

[90] 15 Cal. App. 3d. 374, 93 Cal. Rptr. 122 (1971).

[91] CAL. GOV'T CODE §§ 830.8 and 830.

[92] Harkness v. Hall, 684 N.E.2d 1156 (Ind. Ct. App. 1997) (failure of a county to maintain and sign a highway was proximate cause of the accident); Kennedy v. Ohio Dep't of Transp., 63 Ohio Misc. 2d 328, 629 N.E.2d 1101 (Ct. Cl. 1992) (The Ohio Department of Transportation (ODOT) established that the road's traffic control devices conformed to the Ohio MUTCD; there was no liability to the decedent's estate where the decedent, intoxicated, drove past three separate barricades closing the area where a machine was parked across the roadway.); Forest v. State, 493 So. 2d 563 (La. 1986), *reh'g denied*, (Oct. 9, 1986) (absence of amber flashing lights contributed to a finding of liability); and Suligowski v. State, 179 N.Y.S.2d 228, 233 (1958) (In a skidding accident on a wet pavement, the court held that the absence of the sign was not the proximate cause of the accident.).

[93] 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777, 780 (1972).

[94] Cameron, 497 P.2d at 782.

[95] *Id.* at 784.

[96] Vervik v. State, Dep't of Highways, 302 So. 2d 895, 901 (La. 1974).

[97] Janofsky v. State, 49 N.Y.S.2d 25 (Ct. Cl. 1944).

[98] Annot., *Highways: Governmental Duty to Provide Curve Warnings or Markings,* 57 A.L.R. 4th 342, §§ 4, 5(a) and (b).

[99] Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454, 462, 1997 Cal. App., LEXIS 737 (1997) (Eight signs warning of flooding were sufficient.).

[100] Reeves v. Kmart Corp., 229 Mich. App. 466, 582 N.W.2d 841, 1998 Mich. App. LEXIS 130 (1998) (absence of speed signs on exit ramp); Wechsler v. Wayne County Road Comm'n, 215 Mich. App. 579, 546 N.W.2d 690, 1996 Mich. App. LEXIS 59 (1996); Colovos v. State, Dep't of Transp., 450 Mich. 860, 539 N.W.2d 375, 1995 Mich. LEXIS 1917 (1995).

[101] Annot., *Liability of Governmental Unit for Collision with Safety and Traffic-controlled Devices in Traveled Way*, 7 A.L.R. 2d 226.

[102] Pierotti v. La. Dep't of Highways, 146 So. 2d 455 (La. App., 3d Cir., 1962); Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960), *aff'd* 14 A.D.2d 825, 218 N.Y.S.2d 534 (4th Dep't 1961); Hulett v. State, 4 A.D.2d 806, 164 N.Y.S.2d 929 (1957).

[103] Foley v. Reno, 680 P.2d 975 (Nev. 1984).

[104] Radosevich v. County Comm'rs of Whatcom County, 3 Wash. App. 602, 476 P.2d 705 (1970).

[105] 105 Ariz. 125, 460 P.2d 179 (1969).

tice later the same day that another accident at that location had been caused presumably by malfunctioning traffic signals. The court held that the State had a duty to maintain and repair traffic control signals in a manner that would keep them in a reasonably safe condition.[106]

A number of cases have held that after traffic lights or electronic signals are installed, the transportation department's exercise of discretion is exhausted and there is a duty to maintain the lights or signals in good working order.[107] If there were no showing of a malfunction prior to the accident, then the transportation department may not be held liable because of the absence of any showing of actual or constructive notice.[108]

The state must, of course, be allowed a reasonable time after receipt of notice of a malfunction to take corrective action. *Bowman v. Gunnells*[109] was an action to recover for injuries sustained in a collision at an intersection allegedly caused by the fact that a bulb in a traffic light had burned out. Because the accident occurred approximately 2 hours after the city was notified of the nonfunctioning light, the complaint failed to state a cause of action for negligence. The bulb had been duly replaced within 4 hours, a reasonable period, after the city had notice that the light was inoperative.

[106] *See also* Zank v. Larson, 552 N.W.2d 719 (Minn. 1996) (city's determination regarding the timing of traffic control signals was discretionary and immune under the government immunity statute); Davis v. Cleveland, 709 S.W.2d 613 (Tenn. Ct. App. 1986) (no liability for alleged negligence of defendants in setting sequential change of traffic lights at the intersection); Bjorkquist v. Robbinsdale, 352 N.W.2d 817 (Minn. Ct. App. 1984) (allegation that timing of the clearance interval between change of traffic lights from red to green was unduly brief and that the improper timing of the light change was the proximate cause of his being struck down by an automobile at the intersection rejected by the court); Wainscott v. State, 642 P.2d 1355 (Alaska 1982) (decision to provide flashing red and yellow lights instead of a sequentially changing traffic signal at the intersection in question was one made at the protected planning level and, therefore, was immune); and Rapp v. State, 648 P.2d 110 (Alaska, 1982) (court again ruled in favor of the State, citing as the basis of its holding the decision in Wainscott v. State*, supra*).

[107] Robinson v. State, Dep't of Transp., 465 So. 2d 1301 (Fla. App. 1985), *rev. denied*, 476 So. 2d 673; Montgomery County v. Voorhees, 86 Md. App. 294, 586 A.2d 769 (1991); Stephen v. Denver, 659 P.2d 666 (Colo. 1983); Stevenson v. State, Dep't of Transp., 290 Or. 3, 619 P.2d 247 (1980); Fankhauser v. City of Mansfield, 48 Ohio Op. 2d 103, 249 N.E.2d 789 (1969); and Wagshal v. District of Columbia, 216 A.2d 172 (D.C. 1966).

[108] Zuniga v. Metropolitan Dade County, 504 So. 2d 491 (Fla. Dist. Ct. App., 3d Dist., 1987).

[109] 243 Ga. 809, 256 S.E.2d 782 (1979), *on remand,* 151 Ga. App. 229, 259 S.E.2d 211 (1979) (*per curiam*) (There being nothing "in the record to show any like malfunction before the accident, there [was] no genuine issue of material fact as to the County's actual or constructive notice.").

B.2.c. Pavement Markings

The liability of states arising out of pavement markings may be an issue as well. There are cases holding the states liable for improper, inadequate, or misleading pavement markings.[110] In *Dawley v. New York State,*[111] the claimant sued the State for negligence in constructing, maintaining, and safeguarding a highway. Because there were no pavement markings, the road seemed to proceed straight ahead, when, in fact, it curved to the east. No Caution, Slow, Stop, Curve, or other signs were on the highway. Moreover, "[t]here was no white line in the center of the highway to indicate the highway curve to the east."[112] The court held that the evidence sustained findings that the curve was dangerous and that the State was negligent in failing to provide proper warnings and barriers. Other cases involving pavement markings are *Rogers v. State*[113] and *State v. I'Anson,*[114] and in both cases the department was held liable for negligence in providing an improperly marked and striped portion of the highway. In both instances, the courts ruled that the departments' actions were low level, operational, maintenance activity that did not fall within any immunity for discretionary functions.

Special pavement markings may not be required at an intersection where the evidence does not establish that there existed a hazardous or dangerous condition.[115] However, the state may be held liable for taking action that is itself misleading and dangerous. For example, in *German v. Kansas City,*[116] the City was held liable where its employees failed to mark adequately by signs, lane markings, barricades and the like, and failed to warn motorists that the roadway was reduced from four lanes to two-lane, two-way traf-

[110] Fisher v. State, 702 N.Y.S.2d 418, 2000 N.Y. App. Div. LEXIS 597 (3d Dept. 2000) (misleading pavement marking violated MUTCD); *but see*: Elmer v. Kratzer, 249 A.D.2d 899, 672 N.Y.S.2d 584, 585-86, 1998 N.Y. App. Div. LEXIS 4978 (4th Dep't 1998) (city was immune for its decision to classify a road as a truck route, which the city had painted as a two lane rather than as a four lane road); Siler v. Guillotte, 410 So. 2d 1265 (La. Ct. App., 3d Cir., 1982) (dismissing claims against the State); and State Dep't of Highways & Public Transp. v. Carson, 599 S.W.2d 852, 854 (Tex. Civ. App., El Paso, 1980, *writ refused n.r.e.* and *reh'g of writ of error overruled* (Nov. 12, 1980). (Oct. 1, 1980) (no liability for alleged faulty or misleading pavement markings).

[111] 186 Misc. 571, 61 N.Y.S.2d 59 (Ct. Cl. 1946).

[112] 61 N.Y.S.2d at 61.

[113] 51 Haw. 293, 459 P.2d 378 (1969).

[114] 529 P.2d 188 (Alaska 1974).

[115] *See also* State Dep't of Highways & Public Transp. v. Carson, 599 S.W.2d 852 (Tex. Civ. App. El Paso 1980, *writ refused n.r.e. and reh'g of writ of error overruled* (Nov. 12, 1980). (Oct. 1, 1980) (no liability for alleged faulty or misleading pavement markings); and Stornelli v. State, 11 A.D.2d 1088, 206 N.Y.S.2d 823 (1960), *appeal denied,* 9 N.Y.2d 609 (1961); Egnoto v. State, 11 A.D.2d 1089, 206 N.Y.S.2d 824 (1960)*, appeal denied*, 14 A.D. 2d 828, 218 N.Y.S.2d 534 (4th Dep't 1961).

[116] 512 S.W.2d 135 (Mo. 1974).

fic. Such negligence created a dangerous and deceptive condition that misled the plaintiff into a collision and injury.[117] Other cases have held transportation departments liable where the road appeared to proceed in one direction or the other and either there was no warning of the condition or there were misleading highway signs.[118] In *Mora v. State,*[119] the court held that the state, not the highway contractor, in that instance had the duty to mark the highway for "no passing" zones. Liability for misleading signs also may be imposed by local statute.[120]

C. DEFECTS IN THE PAVEMENT SURFACE

C.1. The Transportation Department's Duty to the Public

The term "defect" means any opening, hole, depression, washout, or breakup in the road surface resulting from natural causes, ordinary wear and tear, or erosion and attrition due to weather. What constitutes a defect is usually the subject of intense debate. For example, it has been held that there was no liability for a condition that was merely a 2 1/2- to 4-in. drop-off.[121] On the other hand, the state's motion to dismiss, based on "no defect," was denied where the state had constructive notice of a hole in the curb that was 20 in. long and 8 in. deep.[122] More cases are noted in B.2 of this sub-section.

The state's duty to observe defects in the roadway is often an issue, particularly in the absence of a statute requiring that the state have written or other notice. The cases have considered various means of imputing notice of the condition to the state. Although it has been held that a police officer's knowledge of a defect may be imputed to the state,[123] or that evidence that a road at the point of the accident had been filled with potholes was sufficient for constructive notice,[124] it likewise has been held that the transportation department's prior repair of a defect in the surface did not constitute notice of the defect that caused the plaintiff's accident.[125] The issue of notice may be satisfied through evidence based on other kinds of departmental records,[126] or where it was shown that the defendant itself created the defect.[127] There are other cases in which the transportation department was held not to have had notice of the defect in the highway pavement[128] or not to have had written notice of plaintiff's claim prior to suit.[129] Indeed, it should be noted that a written notice may be required by statute, as noted in *Katz v. City of New York*.[130]

Even if there is sufficient proof of notice of the defect, there may be a significant dispute concerning whether the defect was the proximate cause of the accident. One case held that proximate cause existed even though the vehicle did not actually hit the pothole,[131] yet another court held, based on expert testimony, that a hole of the dimensions of the involved defect was not the proximate cause of the fatal accident and that there were other possible causes of the accident.[132] The case of *Durrett v. State*[133] concerned proof of the proximate cause of the accident where there was no eyewitness testimony concerning the actual striking of a pothole by the vehicle.

As with other dangerous conditions of the highway, liability depends on whether there is a duty, a breach of which is the proximate cause of the accident; whether there is actual or constructive notice of the defect; and whether there is a remedy against the state for common-law negligence for the design and maintenance of highways or for a "highway defect."

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[117] German, 512 S.W.2d at 146.

[118] Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (Ct. Cl. 1960).

[119] 68 Ill. 2d 223, 369 N.E.2d 868 (1977).

[120] Gazoo v. Columbia, 260 S.C. 371, 196 S.E.2d 106 (1973).

[121] Aetna Cas. & Sur. Co. v. State, 712 So. 2d 216 (La. App. 1st Cir. 1998, *writ denied* (La. 1998)).

[122] Nado v. State, 161 Misc. 2d 178, 612 N.Y.S.2d 741, 1993 N.Y. Misc. LEXIS 604 (Ct. Cl. 1993).

[123] State v. Nichols, 609 S.W.2d 571 (Tex. Civ. App. 1980). *See also* Ciccarella v. Graf, 116 A.D.2d 615, 497 N.Y.S.2d 704, 705 (1986) (bus driver's testimony was sufficient to support a finding that the county had constructive notice of the pothole).

[124] Davilla v. Southern Pacific Transp. Co., 444 So. 2d 1293 (La. App. 5th Cir. 1984), *review denied,* 447 So. 2d 1079 (La. 1984), *but see* Hennigan v. Vernon Parish Police Jury, 415 So. 2d 584 (La. App. 3d Cir. 1982) (hole in a bridge floor had been repaired on several occasions).

[125] Jones v. Brookhaven, 227 A.D.2d 530, 642 N.Y.S.2d 708 (1996).

[126] Gallery v. City of New York, 182 Misc. 2d 555, 699 N.Y.S.2d 266, 1999 N.Y. Misc. LEXIS 499 (1999) (map depicting defect over 1 year prior to accident admissible on issue of notice to defendant of defect in sidewalk).

[127] Bisulco v. New York City, 186 A.D.2d 84, 588 N.Y.S.2d 26, 1992 N.Y. App. Div. LEXIS 10924 (1992) (In a case involving the "pothole law," N.Y. Adm. Code § 7-201(c)[2], the lack of notice did not defeat a claim where the city was affirmatively negligent in causing or creating the defective condition.).

[128] Doucet v. State, Department of Highways, 309 So. 2d 382 (La. App. 3d Cir. 1975), *cert. denied*, 312 So. 2d 340 (1975); and Mistich v. Matthaei, 277 So. 2d 239 (La. App. 4th Cir. 1973).

[129] David v. City of New York, 700 N.Y.S.2d 235, 1999 N.Y. App. Div. LEXIS 13292 (1999) (judgment for plaintiff reversed because city did not have actual, prior written notice prior to plaintiff's *claim*).

[130] 87 N.Y.2d 241, 661 N.E.2d 1374, 638 N.Y.S.2d 593 (1995) (written notice required by N.Y. Adm. Code § 7-201(c) for defects or hazardous conditions in streets or sidewalks at a specified location; prior map depicting the defect was insufficient notice).

[131] Miller v. Evangeline Parish Police Jury, 663 So. 2d 398 (La. App. 3d Cir. 1995).

[132] Brooks v. N.Y. State Thruway Auth., 73 A.D.2d 767, 423 N.Y.S.2d 543 (1979), *aff'd* 51 N.Y.2d 892, 434 N.Y.S.2d 974, 415 N.E.2d 963 (1980).

[133] 416 So. 2d 562 (La. App. 1st Cir. 1982), *cert. denied,* 421 So. 2d 247 (La. 1982).

Generally, the issue is a jury question as the circumstances probably are between the two extremes. There is no criterion by which the performance of the State's duty to keep its roads in a reasonably safe condition can be measured precisely.

C.2. Cases Allowing and Denying Recovery

Each case, thus, depends on the particular facts involved. The following cases provide an overview of situations in which the state or other public body was held to be negligent, or was held not to be negligent, in failing to keep the highway surface in a reasonably safe condition for public travel.

In *Texas Dept. of Transp. v. Dorman*,[134] under the applicable statute, loose gravel, a drop-off at the edge of the highway, and the absence of a center stripe constituted a special defect that was the proximate cause of the accident. Where a highway surface is "rutted," causing water to pond and stand in the roadway, resulting in an accident because of hydroplaning, it was held that "[t]he standing water was a dangerous condition that drivers could not see...."[135] In *Aucoin v. State,*[136] a drop-off at the shoulder, the area's poor slope, and a limited amount of horizontal clearance were held to be a dangerous condition of the highway.

In *Jones v. Louisiana Department of Highways,*[137] the plaintiff, the operator of a motor vehicle, and three minor children who were passengers were injured when the car, proceeding at approximately 40 mph, struck a hole in the highway measuring 8 to 14 in. in depth and 12 to 24 in. in circumference. The hole caused the automobile to veer off the roadway and roll over into a ditch. The plaintiffs introduced uncontradicted testimony that the road was in poor condition and that the defect had existed for at least 2 weeks prior to the accident.

In upholding the lower court's finding that the highway department was negligent, the appellate court ruled that the department owed a duty to the public to maintain the state's highways in a reasonably safe condition and that the department was required to maintain an efficient system of inspection and repair. The fact that such a serious defect existed on an already poor roadway was sufficient proof that the department breached its duty to the public.[138]

There are cases involving alleged injury-producing defects in the highway surface in which the courts held that the state or other public authority had not breached a duty to keep the roads under its jurisdiction in a condition reasonably safe for public travel and use. For example, in *Ross v. State*,[139] the court ruled that a dip or adverse superelevation in the curve of the road in question was not an "imminently dangerous" condition of the highway.[140]

Young v. City of Gretna[141] was an action under a highway defect-type statute to recover for an injury suffered when a vehicle overturned, allegedly because of a pothole. The appeals court affirmed the trial court's finding that none of the potholes in the vicinity of the accident was of such a size, dimension, and character that it would cause a vehicle, driven at a reasonable rate of speed, to overturn. Because of the plaintiff's failure to prove that the alleged defect was of such a kind and nature as to cause an unreasonable risk of harm or injury to motorists, the appellate court held that the trial court properly denied a recovery under the statute. See other cases that denied a recovery under the applicable statute where there was a failure to establish that the defect was of such kind and character as to cause unreasonable risk of harm to the traveling public.[142]

In sum, in the absence of statute, the character of the defect determines whether a defect existed. The length of time the alleged defect existed on or in the highway is an important consideration in determining whether the state had sufficient notice of a defective condition that gave rise to a duty to correct the condition. As seen, not every irregularity in the highway will be sufficient to impose liability on the state.

D. SNOW AND ICE CONTROL

D.1. Transportation Department's Duty Concerning Treatment of Snow and Ice Conditions

This section will discuss specific situations arising during snow and ice conditions that may or may not result in the department being held liable for negligence. These areas include liability for salting and sanding operations, dangerous conditions caused by snow or ice, use of warning signs, spot sanding operations, plowing operations, and artificial conditions that cause recurring icing.

Judicial opinions often fail to explain the circumstances that may give rise to a transportation department's duty to remove snow and ice. Generally, courts hold that transportation departments have no duty to

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[134] 1999 Tex. App. LEXIS 4309 (1999).

[135] Texas Dep't of Transp. v. Jordon, 1996 Tex. App. LEXIS 5789 (Ct. of App. 5th Dist. 1996), *15.

[136] 712 So. 2d 62, 1998 La. LEXIS 991 (La. 1999).

[137] 338 So. 2d 338 (La. App. 3d Cir. 1976).

[138] Jones, 338 So. 2d at 341. *See also* Graham v. Rudison, 348 So. 2d 711 (La. App. 1977).

[139] 704 N.E.2d 141, 145-46, 1998 Ind. App. LEXIS 2264 (1998).

[140] *See also* Schroeder v. State of Minn., 1998 Minn. App. LEXIS 1436 (1998) (no liability for the State's patching of pavement where it had settled at the point where the pavement met the bridge).

[141] 470 So. 2d 274 (La. App. 5th Cir. 1985), *cert. denied,* 474 So. 2d 948 (La. 1985).

[142] Lognion v. Calcasieu Parish Police Jury, 503 So. 2d 1092 (La. App. 3d Cir. 1987), *cert. denied,* 507 So. 2d 227 (La. 1987); and Mansour v. State Farm Mutual Auto. Ins. Co., 510 So. 2d 1305 (La. App. 3d Cir. 1987); and Worsham v. Walker, 498 So. 2d 260 (La. App. 1st Cir. 1986).

undertake precautionary or remedial action to remove snow and ice conditions unless the duty is required by law or unless the highway was so inherently dangerous that it was misleading to a traveler exercising reasonable care.[143] At least one court has held that urban governments have a greater duty to keep their streets reasonably clear than their rural counterparts.[144] Thus, in *Allyson v. Dept. of Transp.*,[145] the court stated that in the absence of a weather hazard that was not reasonably apparent to a person exercising due care, the transportation department had no duty to post speed limit signs, establish "chain control" on icy sections of the road, plow snow off state highways, spread cinders or deicing chemicals on icy sections of the road, or post warnings of icy road conditions.

There is no duty, in the absence of a statute, to remove general accumulations of ice and snow from the streets and highways, except when a public entity has notice, either actual or constructive, of a dangerous or hazardous condition caused by snow and ice on the highway.[146] In such a situation, the state has a duty to exercise reasonable care, either to alleviate the hazard or to give warning of it.[147] Although the erection of adequate warning signs may be one option for the transportation department, it has not exercised reasonable care when it posts signs that do not adequately warn motorists of the impending danger.

A plaintiff's right to recover from a city for negligence in snow and ice removal also need not always be authorized by statute. Incorporated municipalities' duty to alleviate specific snow and ice hazards, in contrast to natural accumulations of snow or ice, existed at common law.[148] One reason that municipalities were held liable for negligent failure to remove snow and ice was that the courts deemed such activity to be proprietary, not governmental, in nature.[149] In contrast, the right to sue state transportation departments has been authorized by statute or by the courts when they abrogated sovereign immunity.[150] However, statutes that merely empower a transportation department to take action to alleviate snow and ice hazards generally do not give a plaintiff a private right of action in tort against the department.[151]

The generally accepted rule is that there is no duty, in the absence of statute, to remove general accumulations of ice and snow from the streets and highways.[152] As stated, where a transportation department has notice, either actual or constructive, of a hazardous condition caused by snow and ice on the highway, there may be a duty to exercise reasonable care either by alleviating the hazard or by giving adequate warning of it.[153] If the law imposes a duty to act on the part of the transportation department, then the jury, or fact finder, ordinarily will be permitted to determine whether the department has acted properly under the

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[143] Tyler v. Pierce County, 188 Wash. 229, 62 P.2d 32, 34 (1936) (no duty to maintain barriers and post signs).

[144] Cloughessey v. City of Waterbury, 51 Conn. 405, 50 Am. Rep. 38 (1884).

[145] 53 Cal. App. 4th 1304, 62 Cal. Rptr. 2d 490, 497–99, 1997 Cal. App. LEXIS 251 (Cal. App. 4th Dist. 1997).

[146] Carney v. McAfee, 1986 Ohio App. LEXIS 9509 (Ct. of App., 6th Dist., 1986), *9.

[147] Dykstra v. Department of Transp., 208 Mich. App. 390, 528 N.W.2d 754 (1995) (negligence alleged in salting operations; affirmance of summary judgment for the defendants); Hansen v. State, 528 N.W.2d 547, 549 (Iowa 1995) (affirmance of summary judgment based on compliance with the State's snow clearing policy); Bland v. Davison County, 507 N.W.2d 80 (S.D. 1993) (State must act with reasonable care required by the circumstances; factual issue precluded summary judgment for the state); Bird v. Walton, 69 Wash. App. 366, 848 P.2d 1298 (1993) (State discharged duty of care where it made almost continuous attempt to sand highway up to the moment of the accident); and Reese v. Wayne County, 193 Mich. App. 215, 483 N.W.2d 671 (1992) (no obligation to keep roads clear of natural accumulations).

[148] 19 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS, §§ 54.84 (James Perkowitz-Solheim et al. eds.).

[149] *Id*. § 54.036, at 14–15.

[150] 40 AM. JUR. 2D *Highways, Streets, and Bridges* §§ 535 and 536 (1999 ed.).

[151] Allyson v. Department of Transp., 53 Cal. App. 4th 1304, 62 Cal. Rptr. 2d 490, 501 (4th Dist. 1997) ("Caltrans, *absent the qualification recited in section 831*, has no duty running to any given motorist at any time to: ... (3) plow snow off state highways, (4) spread cinders and/or deicing chemicals on icy sections of [the] road, (5) post warnings of icy road conditions"); Mills v. Springfield, 166 Ohio St. 412, 142 N.E.2d 859 (1956); and Smith v. District of Columbia, 189 F.2d 671 (D.C. Cir. 1951).

[152] Bonnau v. Mich. Dep't of Transp., 450 Mich. 980, 547 N.W.2d 656, 1996 Mich. LEXIS 48 (1996) (The plaintiff must establish that the governmental defendant's act of removing snow and ice introduced a new element of danger not present as a result of the natural accumulation or condition.); Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 541 A.2d 1029 (1988) (immunity for snow removal activities does not bar action for breach of duty to warn); and Paternoster v. N.J. Dep't of Transp., 190 N.J. Super. 11, 461 A.2d 759 (1983) (whether conduct during snow removal was "palpably unreasonable" was a jury question).

[153] Cohen v. Hamden, 27 Conn. App. 487, 607 A.2d 452 (1992) (no notice of ice on street); Gaspard v. State, 596 So. 2d 336 (La. App. 3d Cir. 1992, *cert. denied,* 600 So. 2d 664 (no notice of ice on bridge or of evidence of sufficient opportunity to give warning or remedy the problem); State Dep't of Highways and Public Transp. v. Bacon, 754 S.W.2d 279 (Tex. App. 1988) (failure to provide warning of icy condition on a bridge), *writ denied* (Dec. 7, 1988) *and reh'g of writ of error overruled* (Mar. 22, 1989); Commw., Pa. Dep't of Transp. v. Phillips, 87 Pa. Commw. 504, 488 A.2d 77 (1985) (transportation department received notice of icy condition only day before fatal accident); Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (road maintenance foreman drove over the highway over 2 hours prior to the accident resulting in the State having notice), *appeal after remand,* 572 P.2d 775 (Alaska 1977); State v. Guinn, 555 P.2d 530 (Alaska 1976) (State's truck parked partially on the highway for a period of 3 weeks in 2 ft of snow resulting from the State's snow plowing operations); and Walker v. County of Coconino, 12 Ariz. App. 547, 473 P.2d 472, 475 (1970).

circumstances. "The jury should [be] permitted to determine whether the public entities acted reasonably in failing to salt or sand the areas known to be dangerous, failing to post warning signs, or failing to block off the entire road."[154]

It must be remembered that the plaintiff has the burden of proving that the state transportation department owed the plaintiff a duty, that the department breached that duty, that the breach proximately caused the accident in question, and that the department had constructive or actual notice "of the precise condition alleged to have caused the injuries in question."[155]

D.2. The Standard of Care for Snow and Ice Removal

In *Meta v. Cherry Hill*,[156] the court discussed the duty and standard of care for snow and ice control and stated:

> The duty, especially regarding snow removal following a storm, must be measured by a number of factors. In applying the measure it is necessary to do so with an understanding of the nature of the problem facing the municipalities. Instantaneous removal in climates such as ours is neither required [n]or feasible. Much depends upon the size of the task the particular municipality is called upon to face, the severity of the storm, the miles of streets and public places to be cleared, the amount of equipment provided and the personnel made available for the purpose, and the practicality and efficiency of the efforts to meet the problem.[157]

Another statement of the standard of care is found in *Kaatz v. State*,[158] where the court stated:

> In order for a plaintiff to show that the state exposed him to an unreasonable risk of harm he would have to demonstrate that the likelihood and gravity of the harm threatened outweighed the utility of the state's conduct and the burden on the state for removing the danger. In making that determination in the case at bar, all of the following factors would be relevant: whether the state had notice of the dangerous condition, the length of time the ice and snow had been on the highway, the availability of men and equipment, and the amount of traffic on the highway.[159]

Because it would be unduly burdensome to require transportation departments to maintain the roads free of ice at all times, courts generally do not compel them to do the impossible. Moreover, the dangers presented by such conditions generally are known and assumed by highway travelers.[160] Older cases held that the law did not require what was unreasonable, nor did it condemn an act or omission as negligent that could be done or prevented only by extraordinary exertion or by the expenditure of extraordinary sums of money.[161]

Liability also may be based on a condition created by the transportation department's own action, such as allowing a defect to exist in a street that contributed to or caused an icy condition.[162] However, in *Davenport v. Borough of Closter*,[163] the court ruled that, although a pedestrian alleged that the defendant had created an unreasonably dangerous condition, the condition was created by the defendant's snow removal activities, which were immune from suit by statute. The department is not liable, of course, if it is established that the vehicle did not skid on the ice. The mere happening of an accident creates no presumption of liability against the state,[164] since proof of the cause of the accident may not be based upon mere speculation; a patch of ice in and of itself imposes no liability on the state.[165]

In an effort to define when snow and ice conditions are hazardous, for which the department may be held liable, the courts have considered whether the ice or snow was rough, uneven, or rutted. Such conditions aid in determining whether traffic or pedestrians have altered a natural accumulation of snow and ice, thus creating a dangerous condition of which the public entity should have notice because of the physical change.[166]

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[154] Meta v. Cherry Hill, 152 N.J. Super. 228, 377 A.2d 934, 936 (1977) (summary judgments for defendants reversed).

[155] Manning v. Ohio Dep't of Transp., 1997 Ohio App. LEXIS 1679 (Ohio Ct. App. 1997) (large icy patch on the highway); and Hash v. State, 247 Mont. 497, 807 P.2d 1363 (1991) (jury question whether the State knew or should have known of hazardous, icy condition on the highway).

[156] 152 N.J. Super. 228, 377 A.2d 934 (1977).

[157] 377 A.2d at 937, *quoting* Amelchenko v. Freehold, 42 N.J. 541, 201 A.2d 726 (1964).

[158] 540 P.2d 1037 (Alaska 1975).

[159] *Id.* at 1042, *quoting* State v. Abbott, 498 P.2d 712 (Alaska 1972).

[160] State Dep't of Highways & Public Transp. v. Kitchen, 867 S.W.2d 784 (Tex. 1993) (motorists should anticipate icy bridge conditions when the weather is conducive to such conditions).

[161] Mills v. Springfield, 142 N.E.2d 859, 864 (Ohio App. 1956); McCave v. Canton, 140 Ohio St. 150, 42 N.E.2d 762 (1942).

[162] Bonnau v. Mich. Dep't of Transp., 450 Mich. 980, 547 N.W.2d 656, 1996 Mich. LEXIS 48 (1996); and Flournoy v. State, 275 Cal. 2d 806, 80 Cal. Rptr. 485 (1969) (liability for failure to warn of dangerous condition in that the bridge at issue was vulnerable to ice formation).

[163] 294 N.J. Super. 635, 684 A.2d 100, 1996 N.J. Super. LEXIS 408 (1996).

[164] *See, e.g,* CAL. GOV'T CODE § 830.5(a).

[165] Mason v. Adams, 961 P.2d 540, 545 (Colo. Ct. App. 1997) ("[W]hen the State proximately causes a dangerous condition by negligently depositing and leaving excess sand and gravel on a public highway, it can be held liable," even if there was no notice of the condition), (*cert. denied*, 1998 Colo. LEXIS 586 (Colo., Aug. 24, 1998)); Lockaby v. Knoxville, 1997 Tenn. App. LEXIS 206 (Ct. App. Tenn. 1997) (water from nearby property caused ice to form on highway; case remanded); McKee v. Price County, 1997 Wis. App. LEXIS 1334 (Ct. App. Wis. 1997) (snow plowing operations); and Hobbs v. State, 55 A.D.2d 710, 388 N.Y.S.2d 729, 731 (1976).

[166] Walker v. County of Coconino, 12 Ariz. App. 547, 473 P.2d 472, 474 (1970); and Smith v. D.C., 189 F.2d 671, 674 (D.C. Cir. 1951).

Transportation departments were not liable where they had exercised due diligence in applying chemicals or abrasives to icy road hazards, such as where an accident occurred "very shortly" before the road was treated, and the authority diligently attempted, though unsuccessfully, to remedy the icy condition.[167] Liability may be avoided where the road has been well covered by chemicals or abrasives.[168] The question of whether the transportation department may be held liable for snow and ice conditions has arisen in a variety of situations, such as for ice on bridges;[169] for ice caused by runoff water on the road;[170] for alleged improper warning of icy conditions;[171] for conditions on gravel roads;[172] for "spot sanding" of roads;[173] and for the crews' mounding of snow against guardrails during plowing operations.[174] Specifically, however, with respect to plowing operations there may be an issue under the applicable statute as to whether an ordinary duty of care applies or whether the plaintiff must show that there has been a breach of a "reckless disregard" standard of care.[175]

Although there is no duty to remove general accumulations of snow or ice that occur in the usual course of a winter storm,[176] the courts have imposed a duty on transportation departments to use chemicals or abrasives on the highway when they had notice of a particular or isolated hazardous condition and failed to take reasonable action.[177] Where the duty to apply abrasives or chemicals to hazardous road conditions has been assumed or imposed by law, the transportation department is held to a standard of ordinary care.[178] Transportation agencies have been held liable for failing to apply chemicals or sand in accordance with standard procedures in their maintenance manuals.[179] On the other hand, in a case where the jury had found "the City negligent because it failed to pre-salt and failed to monitor weather conditions,"[180] the appellate court reversed. The court held, *inter alia,* that "there was no evidence of actual notice to the City of the existence of the ice on the bridge, and clearly, there was insufficient time for constructive notice of the presence of such ice."[181]

In sum, the courts have imposed a duty of reasonable care on transportation departments with respect to specific, hazardous snow or ice conditions, as distinguished from general conditions or natural accumulations of snow and ice.

D.3. Statutes Affecting Transportation Department's Duty for Snow and Ice Control

There are statutes that provide for immunity for the effect of "weather conditions" on the use of highways.[182] A few cases have involved the interpretation of such statutes. *Horan v. State*[183] involved the interpretation

[167] Tromblee v. State, 52 A.D.2d 666, 381 N.Y.S.2d 707 (1976) and Dodd v. State, 31 Misc. 2d 112, 223 N.Y.S.2d 32 (1961).

[168] Gordon v. City of New Haven, 5 Conn. Super. 199 (1937).

[169] Salvati v. Department of State Highways, 415 Mich. 708, 330 N.W.2d 64 (1982), *reh'g denied,* 417 Mich. 1105 (1983) (signing satisfied the technology available at the time); Moraus v. State, 396 So. 2d 596 (La. App. 3d Cir. 1981) (compliance with the MUTCD did not absolve the Department under the circumstances at an overpass); and Estate of Klaus v. Mich. State Highway Dep't, 90 Mich. App. 277, 282 N.W.2d 805 (1979) (Department was negligent in failing to take necessary and reasonable precautions to prevent a skidding accident that occurred the next day on the iced-over bridge).

[170] Hoffmaster v. County of Allegheny, 121 Pa. Commw. 266, 550 A.2d 1023 (1988), *appeals denied,* 522 Pa. 606, 562 A.2d 828 (1989); and Shepard v. State, Dep't of Roads, 214 Neb. 744, 336 N.W.2d 85 (1983) (Where the State had constructive knowledge that a recurrent condition would cause icing in freezing weather, the State was negligent in failing either to post signs warning of the danger of icing or to treat the area once the icing occurred.).

[171] Sweetman v. State Highway Dep't of Roads, 137 Mich. App. 14, 357 N.W.2d 783 (1984) (compliance with MUTCD was not in and of itself sufficient).

[172] Hume v. Otoe County, 212 Neb. 616, 324 N.W.2d 810 (1982) (Evidence was that the road near the intersection was no different from the condition of all gravel roads in the county at the time the accident happened.).

[173] Freund v. State, 137 A.D.2d 908, 524 N.Y.S.2d 575 (1988), *appeal denied,* 72 N.Y.2d 802, 530 N.Y.S.2d 554, 526 N.E.2d 45 (1988) ("spot sanding" satisfied the requirements of due care).

[174] Gomez v. N.Y. State Thruway Auth., 73 N.Y.2d 724, 532 N.E.2d 93 (1988) (mounding of snow constituted actionable negligence).

[175] Cottingham v. State, 182 Misc. 2d 928, 701 N.Y.S.2d 290, 1999 N.Y. Misc. LEXIS 516 (Ct. Cl. 1999) (ordinary negligence principles applied to snow plow operations, not a "reckless disregard standard"), *but see* McDonald v. State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (1998) (Where a snowplow operator was already engaged in plowing operations, the reckless disregard standard applied to a tort claim against the State.)

[176] Allyson v. Department of Transp., 53 Cal. App. 4th 1304, 62 Cal. Rptr. 2d 490, 497–99, 1997 Cal. App. LEXIS 251 (Cal. App. 4th Dist. 1997).

[177] Bruce v. State, 1 Misc. 2d 104, 146 N.Y.S.2d 767, 768 (1955) ("long and well-established history of ice conditions at this point").

[178] *See generally* MCQUILLIN, *supra* note 148, § 54.79.

[179] Hunt v. State, 252 N.W.2d 715 (Iowa 1977) and Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

[180] Carney v. McAffee, 1986 Ohio App. LEXIS 9509 (Ct. of App., 6th Dist., 1986), *10.

[181] *Id.*

[182] For example, in In re Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543, 549, 1997 Minn. App. LEXIS 369 (1997), the statute, Minn. Stat. § 3.736, subd. 3(d) (1996), provided in part that "[g]overnments are immune from liability for a 'loss caused by snow or ice conditions on a highway…except when the condition is affirmatively caused by the negligent acts of a state employee.'" The court noted also that "statutory snow and ice immunity protects government entities from liability for damages caused by the natural consequences of snow plowing...pursuant to established snow removal policies." 561 N.W.2d at 549. *See also* CAL. GOV'T CODE § 831.

[183] 212 N.J. Super. 132, 514 A.2d 78 (1986).

of two New Jersey statutes. New Jersey Statutes Annoted Sections 59:4-7 provided for governmental immunity in cases where a personal injury was "caused solely by the effect on the use of streets and highways of weather conditions."[184] New Jersey Statutes Annotated Section 59:4-2 imposed a duty on governmental agencies to warn of known dangerous conditions. It was undisputed that the accident in question was caused by skidding on ice that formed on a bridge before it occurred on the adjacent highway and that no warning of the hazard of preferential icing had been posted. The court affirmed a summary judgment for the governmental defendants having joint control of the bridge:

> The substance of plaintiff's argument is that the injury was not caused solely by the weather, but that the failure of defendants to warn of the likelihood of this potential contributed as a causal event. He embellishes this argument by insisting that N.J.S.A. 59:4-2 imposes a duty when there is a dangerous condition to warn of that condition. As the trial judge recognized and as we agree, if these arguments were thought to be sound, the weather immunity statute would, in effect, be written out of the books. It is apparent that weather contributes to the occurrence of injury from an accident only when that weather creates a dangerous condition. If the weather does not create a dangerous condition, then there is nothing with which to charge the government in any event.[185]

Thus, the court construed the "weather conditions" statute so as to provide immunity in the case of icy conditions, notwithstanding the other statute requiring that the government give warning of known dangerous conditions.

Bellino v. Village of Lake in the Hills[186] also involved a statute that provided immunity for "weather conditions" and imposed liability for failing to warn of known dangerous conditions. However, no proof was offered to show that the municipality had actual or constructive notice of a dangerous condition.

Draskowich v. Kansas City[187] involved a Kansas statute that established governmental immunity for claims arising out of "snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity."[188] In holding that the slippery condition was "affirmatively caused" within the meaning of the statutory language, the court stated: “Under these factual circumstances, we hold that affirmative acts of the City caused the accident. The ice on the highway was not the result of natural weather conditions, but developed only after the [City] employees turned the water back on and allowed the street to be flooded.”[189]

As a condition precedent to recovery, some statutes require that written notice of a snow or ice condition be given to the governmental entity having jurisdiction over the road where the condition occurred. Several courts have considered whether the statutory notice requirement was mandatory or merely directory.

In *Rodriguez v. County of Suffolk*,[190] the court considered a New York statute providing that a township could not be held liable for damages for personal injuries sustained

> solely as a consequence of the existence of snow or ice upon any highway…unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

The court stated that the only exceptions to the operative effect of the statute were upon a showing of affirmative negligence by a township or a showing that the town had created the hazard. Since neither fact was shown, the failure to give the required statutory notice operated as a bar to recovery. The court affirmed a summary judgment for the township.[191]

D.4. Liability in Eminent Domain, Trespass, or Nuisance for Snow Removal and Salting Operations

At least one court has held that an abutting property owner, whose property is damaged by snow removal and roadway salting operations, may sue for nuisance or trespass or in inverse condemnation. In *Foss v.*

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[184] The section reads: "Neither a public entity nor a public employee is liable for an injury caused solely by the effect on the use of streets and highways of weather conditions."

[185] 514 A.2d at 79–80.

[186] 166 Ill. App. 3d 702, 117 111. Dec. 845, 520 N.E.2d 1196 (1988). ILL. REV. STAT. 1985, ch. 85, § 3-105 provided that

> [n]either a local public entity nor a public employee is liable for an injury caused by the effect on the use of streets, highways, alleys, sidewalks or other public ways, or places of weather conditions as such [sic]. For the purpose of this section, the effect on the use of streets, highways, alleys, sidewalks or other public ways of weather conditions includes the effect of wind, rain, flood, ice or snow but does not include physical damage to or deterioration…resulting from weather conditions.

Bellino, 520 N.E.2d at 1198.

[187] 242 Kan. 734, 750 P.2d 411 (1988).

[188] KAN. STAT. ANN. § 75-6104(k).

[189] *See also* Goodine v. State, 468 A.2d 1002 (Me. 1983); Homan v. Chicago and Northwestern Transp. Co., 314 N.W.2d 861 (S.D. 1982) ("[T]o hold that unremoved snow causes a…highway to become out of repair would constitute a remarkable extension of the duty imposed by [the statute]."); and Longworth v. Mich. Dep't of Highways and Transp. 110 Mich. App. 771, 315 N.W.2d 135 (1981).

[190] 123 A.D.2d 754, 507 N.Y.S.2d 227, 228 (1986), *quoting* Town Law § 65-a[1].

[191] *See also* Kirschner v. Woodstock, 146 A.D.2d 965, 536 N.Y.S.2d 912 (1989) (statute barred recovery where notice of snow and ice condition was not given) and Camera v. Barrett, 144 A.D.2d 515, 534 N.Y.S.2d 395 (1988).

Maine Turnpike Auth.,[192] the plaintiffs alleged that the Turnpike Authority's snow removal and salting operations caused runoffs of salt that caused injury to their property. The State Supreme Court noted that the doctrine of sovereign immunity has certain exceptions: "Among these limitations are those arising out of situations in which a municipality or governmental agency has either physically invaded private property or has performed acts not authorized by law which have impaired the use and enjoyment of that property."[193]

Accordingly, the court held that if the Turnpike Authority was not authorized to conduct the salting operations, or if it carried out the salting in an "unreasonable" or "excessive" fashion, "then the Authority is wholly stripped of the protection of the immunity doctrine, and the salt runoff is to be treated as any other invasion of property or interference with the use and enjoyment of such property."[194] Furthermore, the court held that if the injury to the property is sufficient to constitute a "taking" in the constitutional sense, then "just compensation" must be paid for the diminution of the "market value" of property resulting from the taking.[195]

E. WET-WEATHER CONDITIONS AND SKIDDING ACCIDENTS

E.1. The State's Duty to Guard Against Slippery Road Conditions

This section considers transportation departments' liability for the design and maintenance of highways to reduce wet-weather skidding accidents. In particular, the chapter considers the state's duty to guard against or give warning of slippery road conditions, the state's liability for failure to correct hazardous wet-weather skidding locations, and the effect, if any, of any federal legislation or regulations regarding skid resistance on the state's duty. It should be remembered, however, that a tort claims provision for "weather immunity" may apply to wet-weather accidents, as well as to snow and ice conditions on highways.[196]

As seen, a state has a duty to maintain highways, streets, and sidewalks in a reasonably safe condition for travel. Although states cannot be expected to insure that highways are skidproof during wet-weather conditions, under certain circumstances, they may be held liable for slippery roads. One authority states:

> A slippery condition of a highway or street may, under some circumstances, constitute an actionable defect therein, although a mere slippery condition due to natural causes, such as snow or ice, is not ordinarily so regarded. When, through original defective construction, a highway is rendered more dangerous by action of the elements, the public authority may become liable to one injured thereby. For example, where a highway is so constructed that when the surface is wet it becomes very slippery and dangerous to the knowledge of the public authority, liability for an accident due to such cause may follow. It has been held that the fact that "slippery when wet" signs are placed on the highway in accordance with existing regulations does not relieve the public authority from liability for an ensuing accident where they are wholly inadequate to warn the traveling public of the danger that exists. However, it has been held that the public authority is not negligent in maintaining a street over which, when wet, it is unsafe to travel at more than 15 miles per hour, provided appropriate warning is given of that fact.[197]

Although the state has no duty to guard against accidents caused by mere natural conditions, it does have a duty to act where some feature of the highway construction, perhaps aggravated by wet-weather conditions, is a proximate cause of the skidding accident, unless proper precautions are taken or appropriate warnings are given.[198]

In *Texas Dept. of Transportation v. Jordon,*[199] involving an accident where a motorist lost control of a vehicle on a wet highway, the plaintiff argued that rain "collected or 'ponded' in ruts that had been worn into the surface of the highway [] and that the 'ponded' water was a dangerous condition [that] created a 'premises defect.'" There was evidence that motorists often encountered hydroplaning in this area of the highway, but there were no signs warning of standing water on the roadway. The State was held liable. The court noted that "standing water on a roadway is a dangerous condition,"[200] and that in this case the ruts had worsened and caused the highway to trap water when it rained, resulting in hydroplaning.

As stated in *Viet v. State*,[201] "Ordinarily the defendant would not be liable for conditions due solely to weather, but when through original defective construction, wear, or other causes the highway or sidewalk is rendered more dangerous by action of the elements,

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[192] 309 A.2d 339 (Me. 1973).

[193] Foss, 309 A.2d at 342.

[194] *Id*. at 343.

[195] *Id*.

[196] *See, e.g.,* CAL. GOV'T CODE § 831.

[197] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 463, at 861, *see also* § 480 (1999 ed.).

[198] Although not a wet weather case, in Pesser v. Reynolds, 727 So. 2d 507, 511, (La. App., 1st Cir. 1998), the court noted that "[d]esign standards, both at the time of original construction and at the time of the accident, may be relevant factors in determining whether a given stretch of roadway presents an unreasonable risk of harm, but are not determinative of the issue." *See also* Nelson v. Seattle, 134 P.2d 89 (1943).

[199] 1996 Tex. App. LEXIS 5789 (Ct. of App., 5th Dist., 1996), p. *2.

[200] Tex. Dep't of Transp., 1996 Tex. App. LEXIS, p. *18.

[201] 92 Misc. 205, 78 N.Y.S.2d 336, 339 (1948) (skidding accident after resurfacing). *See also* Clary v. Polk County, 372 P.2d 524 (1962) (evidence was sufficient to support a jury finding of the existence of a dangerous and defective condition).

the State or municipality may become liable to one injured thereby."

On the other hand, in a case involving an accident on wet pavement, the court held that the transportation department had no duty to make a reasonably safe ramp even safer by increasing the curve radius and superelevation or by adding curve signs.[202] Where an accident occurred on a wet or icy curve, another court held that the claimant had to prove that the construction was negligent:[203] "The State is not required to rebuild unless the Curve [sic] could not be negotiated at a moderate speed."[204] Moreover, the State has been held not liable for an accident on a highway constructed in accordance with good engineering practices, where the accident was caused by an unusual flow of water over the highway, and where the driver should have observed the water at least 200 ft before reaching it. To place a burden upon the State of keeping highways free from water obstruction at all points, at all times, and under all weather conditions would require a higher standard of care than one of reasonable care in the maintenance of a highway.[205]

Coakley v. State[206] is a case involving both deviation from the design of a highway and wet-weather skidding. The plaintiff's vehicle skidded as it started down a hill with a wet pavement that was changed during construction from concrete to asphalt macadam. The skidding vehicle struck another car resulting in death and personal injuries. The State had not warned of the slippery condition even though a witness testified that he had traveled the route for over 10 years and knew that the highway was very slippery when wet. Two highway construction experts testified that the highway was not constructed in accordance with good engineering practices and that a rut in the highway, located immediately prior to the place of the accident, was not within permitted standards for variations in the surface of the highway. Furthermore, they testified that the sudden change from portland cement to asphalt paving made the highway more hazardous in wet weather.[207] The court found that the slippery surface had existed along the constantly patrolled highway for several years prior to the accident and was enough to establish constructive notice of the condition. The State was held liable for failing to provide adequate warning signs and for constructing and maintaining a slippery highway.

Finally, the actions of the motorist must be examined. Particularly when an accident occurs on a wet roadway and there is skidding, driver error, and not the negligence of the State, may be the causative factor.[208]

E.2. Failure to Correct Hazardous Wet Weather Skidding Locations

States have a continuing duty to maintain highways in a reasonably safe condition. This statement is no less true when a claim involves the negligent failure to maintain highways reasonably free of slipperiness.

In *Hughes v. State,*[209] the State resurfaced the highway on the day of the accident by applying stone and oil; however, loose stones remained either because the State used an excessive amount of stone or because the highway maintenance crew failed to sweep the stones as "suggested" by the specifications for the construction of the highway. Moreover, rain that same day aggravated the condition. The court held that the evidence established that there was a dangerous highway condition created by wet weather conditions for which the State was not relieved of liability. In some instances, the defendant transportation authority's own action led to the creation of the hazardous skidding locations. For instance, it has been held that the application of an unreasonable and unnecessary amount of oil or tar,[210] and the failure to apply materials to counteract a naturally slippery condition,[211] may result in the state being held liable.

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[202] Meek v. Department of Transp., 2000 Mich. App. LEXIS 60 (2000).

[203] Ritter v. State, 74 Misc. 2d 80, 344 N.Y.S.2d 257, 267 (1972).

[204] Note that in Ritter, *supra,* the court held that the state had no duty to erect warning signs for general weather conditions, "because it would be necessary to install such signs universally over large areas of the highways of the state." 344 N.Y.S.2d at 268. A judgment for the claimant was rendered, however, on the ground that the police, having arrived at the accident scene because of an earlier accident, negligently failed to remain at the accident scene to warn motorists of the conditions until the highway crew arrived or until an emergency called the police elsewhere. *Id.* at 268–69.

[205] Manna v. State, 129 N.J. 341, 609 A.2d 757 (1992) (state had design immunity in a case involving a slippery bridge surface) and Restifo v. State, 40 A.D.2d 889, 337 N.Y.S.2d 212 (1972) ("No evidence was produced or presented as to the proportion of asphalt or 'bituminous material' and crushed stone or gravel utilized much less what proportion is proper nor even any evidence as to when or how the pavement was last resurfaced or otherwise treated before the accident and a mere assertion of slipperiness is not enough.") *See also* Heidel v. State, 178 N.Y.S.2d 765 (Ct. Cl. 1958) (water on the highway; judgment for the State).

[206] 26 Misc. 2d 431, 211 N.Y.S.2d 658 (Ct. Cl. 1961).

[207] Coakley, 211 N.Y.S.2d at 661.

[208] Phillips v. Alliance Cas. & Reinsurance Co., 689 So. 2d 481, 485–486, 1996 La. App. LEXIS 3631 (1996).

[209] 165 N.Y.S.2d 896, 897 (1957).

[210] McIntosh v. Jefferson County, 6 N.E.2d 406 (N.Y. 1936). *See also* Karpf v. Adams, 237 N.C. 106, 74 S.E.2d 325 (1953) (exposed asphalt primer coat and rain caused skidding accidents).

[211] Carthay v. County of Ulster, 5 A.D.2d 714, 168 N.Y.S.2d 715, 717 (1957). There was further proof of an improperly banked curve and inadequate barriers, and no road signs gave notice of the road's slippery condition when wet; Spence v. State, 165 N.Y.S.2d 896, 897–98 (1957) (Slippery When Wet signs were wholly inadequate to warn of the danger presented by the location in question); and Ohran v. Yolo County, 104 P.2d 700 (Cal. App. 1940) (A slippery highway may be caused by

Where a highway becomes slippery when wet because of wear and the effects of weather, the state has a duty to maintain and repair it.[212] The obligation of the state for construction and maintenance of highways is to provide a reasonably safe road in accordance with conditions of the terrain, weather, and traffic, which are to be reasonably anticipated.[213] If a portion of the road is defective because of use and weather and thus constitutes a dangerous condition, the state should act to make the road reasonably safe.[214] *Clary v. Polk County*[215] held that the evidence supported findings by the jury that a dangerous and defective condition existed where an accident was caused by an inadequately banked curve, the absence of a guardrail, and the presence of a slick, hazardous oil surface aggravated by wet weather.

The fact that the slippery condition was a latent one that was discoverable only when the highway was wet is one of the circumstances to be considered in determining whether the condition should have been discovered over a long period of time.[216] The length of time that the condition existed clearly has a bearing on a finding that the department had, or should have had, notice. It would not be sufficient, however, for a plaintiff suing the state for failure to maintain minimum pavement skid resistance to assert merely that the highway was generally slippery; the evidence would have to show the hazardous condition of the highway at the time of the accident.

The attorney should ascertain whether federal funds were used to improve the surface of the highway. Pursuant to 23 United States Code (U.S.C.) § 409, any records of low skid resistance necessitating a project to upgrade a highway should not be discoverable or admissible into evidence. In *Reynolds v. City of New York,*[217] in a case involving "rain-slicked" pavement on the lower roadway of the Manhattan Bridge, the court held that it was error for the trial court to admit into evidence certain documentary and testimonial evidence pertaining to the "Federally-funded safety enhancement of the bridge.…"[218] The study at issue "was specially prepared to develop a highway safety construction project through the use of Federal funds." Apparently, among the evidence excluded was the fact of the "proposal…to resurface the entire length of the lower roadway to improve its skid resistance."[219]

E.3. The Effect of the Highway Safety Act on a State's Duty to Skid-Proof Highway Surfaces

The U.S.C., title 23, § 402(a), now provides that

> [e]ach state shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths.… Such programs shall be in accordance with *uniform guidelines* promulgated by the Secretary.… [S]uch uniform guidelines shall include, but not be limited to…highway design and maintenance (including lighting, markings, and *surface treatment*)…." (emphasis supplied).

There is no private cause of action under § 402.[220] Duty must be determined based on state law.[221] If the courts have not imposed a duty on the states to skid-proof highway surfaces, would the state have a duty to users by virtue of any obligations imposed by the Highway Safety Act or assumed by the state under the act? The case of *Daye v. Commonwealth of Pennsylvania*[222] held that the Highway Safety Act of 1966 does not create any additional duty on the states, the breach of which inures to any person injured on a state highway. In *Daye,* an accident occurred when a chartered school bus skidded on a wet pavement in Pennsylvania. The plaintiffs argued that the State was liable because of its failure to design, construct, and maintain the highway in compliance with the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq*., and the Highway Safety Act, 23 U.S.C. § 401 *et seq*.

The plaintiffs alleged that in view of the high number of reported accidents at or near the scene of the accident, the State was negligent in not preventing surface water from draining across the roadway and in not installing adequate guardrails. According to a National Transportation Safety Board report, incorporated in one plaintiff's brief,

> the probable cause of this accident was either dynamic or viscous hydro-planning of the front wheels of the bus which initiated a skid from which the driver could not recover. Contributing factors included low basic skid resistance of the pavement in wet weather and the probable presence of water draining across the pavement in an abnormal manner.[223]

The plaintiff contended that "the Federal-Aid Highway Act and the Highway Safety Act create an implied cause of action for injuries resulting from any violation of the standards set forth therein or regulations prom-

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excessive bituminous cement coming to the surface (bleeding) of the pavement.).

[212] 40 C.J.S., *Highways,* § 254, 258.

[213] Bird v. State, 152 N.Y.S.2d 65 (Ct. Cl. 1956) and Rasher v. State, 154 N.Y.S.2d 621 (1956).

[214] Camuglia v. State, 197 Misc. 180, 94 N.Y.S.2d 579, 580 (1950).

[215] 372 P.2d 524 (Ore. 1962).

[216] Freeport Transport, Inc. v. Commonwealth Dep't of Highways, 408 S.W.2d 193 (1966) (The court held that the department should have had notice of the dangerous condition that had existed for 8 months.).

[217] 254 A.D.2d 159, 679 N.Y.S.2d 372, 1998 N.Y. App. Div. LEXIS 11172 (1998) (The admission of a report rendered inadmissible by federal statute required a new trial.).

[218] Reynoldo, 678 N.Y.S.2d at 372.

[219] *Id.* at 375 (Rubin, J., dissenting).

[220] Morris v. United States, 585 F. Supp. 1543 (D.C. Mo. 1984); First Nat. Bank of Effingham v. United States, 565 F. Supp. 119 (D.C. Ill. 1983); and Cox v. State, 100 Misc. 2d 924, 443 N.Y.S.2d 141 (Ct. Cl. 1981).

[221] Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983).

[222] 344 F. Supp. 1337 (E.D. Pa. 1972).

[223] Daye, 344 F. Supp. at 1340, n.5.

ulgated thereunder."[224] The court reviewed the various provisions of the Acts' requirements of approval of state plans, specifications, and safety devices, and noted that § 402(a) of the Highway Safety Act "authorizes the Secretary to establish uniform standards of performance criteria."[225] The court held that neither the Federal-Aid Highway Act nor the Highway Safety Act create an implied cause of action for one to recover damages for personal injuries caused by an alleged violation of the standards or regulations.[226]

A claimant's cause of action in tort must arise on the basis of state law and, if state law does not afford a claimant a cause of action for negligence arising out of highway operations, the fact that the state was not in compliance with the Highway Safety Act or regulations issued pursuant thereto does not alter the plaintiff's situation. In *Daye,* the federal court recognized that under Pennsylvania law, the State and its department of transportation were immune from liability for damages for negligence in the conduct of highway operations. (One of the precedents, however, upon which the federal court in *Daye* relied has since been reversed by the Pennsylvania Supreme Court.)[227]

Finally, it may be noted that 23 U.S.C. § 152 provides that "each State shall conduct and systemically maintain an engineering survey of all public roads to identify hazardous locations, sections and elements…, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement."

This section, however, should be read in conjunction with 23 U.S.C. § 409, amended in 1991. The section precludes the discovery or admissibility into evidence in a federal or state court, *inter alia,* of any reports, surveys, and data regarding any occurrence at a location mentioned or addressed in such information that has been compiled pursuant to § 152.[228]

F. INJURIES CAUSED BY OBSTRUCTIONS OR DEFECTS IN THE HIGHWAY SHOULDER

F.1. Conditions Under Which the Motorist May Lawfully Use the Shoulder

The shoulder of the roadway is not designed and constructed for purposes of ordinary travel. The courts normally take judicial notice of this fact and require no proof of it. The issue, however, is whether the standard of care that exists for the traveled portion of the highway is or should be the same for the nontraveled portion, or whether, because of the design, construction, and intended use of the shoulder, there is a different standard of care applicable to accidents caused by defects on the shoulder.[229]

Possible liability-producing situations include dangerous drop-offs between the pavement and the shoulder; ruts, ditches, holes, or depressions in the shoulder; loose or soft shoulder conditions; rocks on the shoulder; culverts in the shoulders; posts, poles, or trees in the shoulder; and maintenance vehicles or equipment parked on the shoulder. Assuming that the transportation department had a duty to the plaintiff under the circumstances, the claimant must show that the transportation department did not maintain the roadway consistent with its standard of care.

Court rulings have not been consistent on the basis of liability when a motorist has an accident on the shoulder. More recently, several courts have held that the shoulder is a part of the highway for the purpose of statutes governing liability for damages caused by highway defects.[230] In those jurisdictions the motorist does not have to prove that he or she had justification or good cause for leaving the paved surface and traveling on the shoulder of the roadway. The more traditional view has been that motorists could lawfully use the shoulder only in an emergency.[231] This is known as the "emergency doctrine," but it has not been precisely defined. The court in *Rolando* stated only that "the crucial issue presented is whether the claimant was confronted with an emergency which necessitated his moving to the shoulder…."[232] In *Guyotte v. State,*[233] the court stated that "even assuming the state was negligent in the maintenance or construction of the shoulder, [the] claimant could only recover if he established that an emergency necessitated his driving upon the shoulder." Similarly, in *Naulty v. State,*[234] the court noted that "the principle that the shoulder of the

[224] *Id.* at 1341.

[225] *Id*. at 1348.

[226] *Id.*

[227] Spector v. Commonwealth of Pennsylvania, 341 A.2d 481 (Pa. 1975), *rev'g* Rader v. Pa. Turnpike Comm., 407 Pa. 609, 182 A.2d 199 (1962).

[228] *See, e.g.,* Miller v. Bailey, 621 So. 2d 1174 (La. App., 3d Cir. 1993), *writ denied,* 629 So. 2d 358 (inadmissibility of state trooper's letter to the DOT).

[229] *See* Graves v. Page, 703 So. 2d 566 (La. 1997), *reh'g denied,* (Dec. 12, 1997) (motorist has right to assume that highway shoulder is maintained in reasonably safe condition); *compare* DiBenedetto v. Flora Township, 153 Ill. 2d 66, 178 Ill. Dec. 777, 605 N.E.2d 571 (1992) (defendant not liable for unused portions of the road) and Luceri v. Wayne County Bd. of Road Comm'rs, 185 Mich. App. 82, 460 N.W.2d 566 (1990) (duty to maintain highway in reasonably safe condition does not include illuminating obstacles beyond the improved portion of the roadway).

[230] Morris v. Juneau County, 219 Wis. 2d 543, 579 N.W.2d 690, 696–97, 1998 Wis. LEXIS 88 (1998).

[231] Rolando v. Department of Transp., 58 A.D.2d 694, 396 N.Y.S.2d 111 (1977); Guyotte v. State, 22 A.D.2d 975, 254 N.Y.S.2d 552 (1964), *appeal denied,* 15 N.Y.2d 483 (1965); Naulty v. State; 25 Misc. 2d 76, 206 N.Y.S.2d 210 (1960); McCauley v. State, 9 A.D.2d 488, 195 N.Y.S.2d 253 (1960), *rev'd on other grounds*, 8 N.Y.S.2d 938, 204 N.Y.S.2d 174, 168 N.E.2d 843 (1960); and Harrison v. State, 19 Misc. 2d 578, 197 N.Y.S.2d 662 (Ct. Cl. 1959), *aff'd* 19 A.D.2d 564, 239 N.Y.S.2d 809 (1963).

[232] Rolando, 396 N.Y.S.2d at 113.

[233] 22 A.D.2d 975, 254 N.Y.S.2d 552 (1964).

[234] 25 Misc. 2d 76, 206 N.Y.S.2d 210 (1960).

highway must be maintained in a reasonably safe condition for use when [an] occasion requires…has been applied only when operation on the shoulder rather than on the pavement was a reasonable recourse by reason of some emergency or special condition."[235]

The determination of whether an emergency existed has been an issue of fact—whether the particular situation facing the driver involved in an accident amounted to an emergency sufficient to justify the driver deliberately leaving the paved surface and traveling on the shoulder. Because the issue was fact specific, the courts have ruled that the emergency doctrine, where it was recognized, barred recovery in a small number of cases. After establishing an emergency, plaintiffs have generally been successful in cases where they proved that the state failed to properly maintain the condition of the shoulder.[236] The New York courts have backed away from the emergency doctrine. In *Bottalico v. State*,[237] the Court of Appeals distinguished *Rolando* and *Guyotte*, *supra*, on the basis that they were decided under the "abandoned rule of contributory negligence."[238] The Court of Appeals held that the State could be held liable in a case where the plaintiff's injuries were caused in part by driving negligently off the roadway onto a shoulder maintained in a dangerous condition:

> No meaningful legal distinction can be made between a traveler who uses a shoulder with justification and one who uses it negligently insofar as how such conduct relates to whom a duty is owed to maintain the shoulder. The comparative fault of the driver, of course, is relevant to apportioning liability.[239]

Indeed, courts have rejected the emergency doctrine elsewhere. For example, *Terranella v. Honolulu*[240] involved an accident in which a car turned over after striking ruts in the shoulder of the road. The defense interposed the emergency doctrine, asserting that the plaintiff could not establish liability without proof that the plaintiff moved the vehicle from the paved surface of the highway to the shoulder because of an emergency situation. In rejecting this contention the Supreme Court of Hawaii stated:

> Defendant City and County resist this appeal by arguing that it owes no duty to maintain the shoulders of a highway other than to a driver who is compelled to leave the traveled portion of a highway in an emergency situation.… As authority for this proposition appellee cites a group of New York decisions.…
>
> We do not concur with the reasoning of appellee and the decisions of the New York courts. We think the required determination of what is and what is not an "emergency" would be exceedingly difficult and could only lead to hopeless confusion. Furthermore, such a rule would create a temptation on the part of an injured driver in cases involving defects in shoulders to describe the circumstances surrounding a departure from the paved portion of a highway as having been required by an "emergency" regardless of his real reason for using the shoulder.

In *Rue v. State, Department of Highways,*[241] the Supreme Court of Louisiana ruled that the lack of an emergency situation did not bar a recovery:

> [T]he Highway Department's duty to maintain a safe shoulder encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on, the shoulder. We conclude that plaintiffs' conduct if indeed it was sub-standard is no bar to her recovery of damages occasioned chiefly because the Highway Department failed to maintain a safe highway shoulder.

More recently, in *Neteke v. State*,[242] the court stated that the transportation department must maintain the shoulders of the highway and the area off the shoulders within the highway right-of-way in such condition that the shoulders do not present an unreasonable risk of harm to those using the areas in a reasonably prudent manner. The State's duty extends to motorists who are momentarily inattentive.[243]

F.2. Representative Cases in which Plaintiffs Sustained Injuries on the Highway Shoulder

F.2.a. Drop-Off Between the Pavement and the Shoulder

A situation that seems to recur frequently is when the transportation agency resurfaces the pavement with the result that the shoulder is not even with the newly paved surface. Adjusting the shoulder often lags behind the repaving, sometimes for days, weeks, or even months. Motorists who drive off the paved surface onto the shoulder (for one reason or another) may lose control of their vehicles when they strike the drop-off between the pavement and the shoulder. Severe injuries, including fatal ones, may result.

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[235] 206 N.Y.S.2d at 219, *quoting* Gilly v. State, 202 Misc. 837, 117 N.Y.S.2d 303, 304.

[236] The emergency doctrine did not bar plaintiff's recovery in Protzman v. State, 80 A.D.2d 719, 437 N.Y.S.2d 147 (1982), *aff'd* 56 N.Y.2d 821, 452 N.Y.S.2d 570, 438 N.E.2d 103 (1982); Waterman v. State, 24 Misc. 2d 783, 206 N.Y.S.2d 380 (1960), *vacated,* 13 A.D.2d 619, 214 N.Y.S.2d 671 (1961), *modified,* Webster v. State, 19 A.D.2d 851, 244 N.Y.S.2d 12 (1963); and *Miller v. State*, 6 A.D.2d 979, 176 N.Y.S.2d 817 (1958).

[237] 59 N.Y.2d 302, 464 N.Y.S.2d 707, 451 N.E.2d 454 (1983).

[238] Bottalico, 464 N.Y.S.2d at 708.

[239] *Id.; see also* Penzell v. State, 120 Misc. 2d 600, 466 N.Y.S.2d 562 (Ct. Cl. 1983); Protzman v. State, 80 A.D.2d 719, 437 N.Y.S.2d 147 (4th Dep't 1981).

[240] 52 Hawaii 490, 479 P.2d 210 (1971).

[241] 372 So. 2d 1197 (La. 1979), *on remand,* 376 So. 2d 525 (La. App. 3d Cir. 1979).

[242] 747 So. 2d 489, 494, 1999 La. LEXIS 2604 (La. 1999).

[243] Neteke, 747 So. 2d at 494; *see also* Cormier v. Comeaux, 714 So. 2d 943, 1998 La. App. LEXIS 1701 (1998); Brown v. Louisiana & Indem. Co., 707 So. 2d 1240, 1998 La. LEXIS 29 (La. 1998) (defective slope of highway shoulder).

In *Brown v. Louisiana Department of Highways*,[244] the department had completed a 2-mile resurfacing project without reworking the shoulders. There was a 2-in. drop-off between the roadway surface and the shoulder for the entire length of the project. The plaintiffs were passengers in a vehicle that had been proceeding along the highway at a speed of 45 to 50 mph when the right rear tire blew out. The vehicle veered onto the shoulder of the road and, when the driver attempted to reenter the paved surface, the vehicle's wheels struck the drop-off. The car was deflected across the highway into the path of an oncoming vehicle. The court ruled that the proximate cause of the accident was the department's negligence in failing to build up the shoulders after completing the resurfacing.[245]

In *Brandon v. State,*[246] the court rejected the transportation department's contention that its schedule of priorities justified a 5-month delay in raising the shoulders. Although the court was reluctant to "second-guess the Department on priorities in correcting defects not of its own making or in bringing old highways or bridges up to date,"[247] it stated that there was a different situation when the department initiated the construction and itself created the hazard. The department had a clear duty to complete the construction and eliminate the hazard within a reasonable time.[248]

The question may arise regarding what is a reasonable time within which the state must take action to raise the shoulder of the road after resurfacing operations to prevent the state from being held liable for negligence. Once again, each case is different and must be decided based on the facts of the case. However, the court held that a six-day delay in *Hale v. Aetna Casualty & Surety Co.*[249] was not such a lapse of time that the highway department could be held negligent. The court stated that:

> [i]t was customary to finish a section of the resurfacing and then go back and raise the shoulders of the road.... [T]he witnesses for the highway department gave good reasons for proceeding in this manner rather than raising the shoulder of the road as the resurfacing progressed. They said resurfacing and raising simultaneously would have been not only economically unsound and impractical but would have increased the hazards because of the location of additional equipment in or on the highway and the congestion of traffic.... We conclude the highway department and the contracting company, having used all reasonable precautions in the repair of the road, were not guilty of negligence.

One case held that the highway agency's failure to correct a drop-off condition caused by feathering of the edge of the pavement due to natural wear and tear did not constitute negligence.[250] The prevalence of this condition over many miles of the state's highways apparently influenced the court in ruling that the complaint, even assuming the allegations to be true, was insufficient to establish the existence of an actionable highway defect.

Thus, as seen from the foregoing cases, the courts frequently hold the state liable for injuries caused by its failure to raise the shoulder of the road within a reasonable time after completing pavement resurfacing operations. However, states have been absolved of negligence where (1) it was not shown that the elevation of the shoulder was delayed for an unreasonable length of time; (2) where the drop-off was caused by ordinary wear and tear; (3) where the condition was not directly attributable to the highway agency's activities; or (4) where the plaintiff failed to establish that the state or its subdivision had actual or constructive knowledge of the dangerous condition.[251]

F.2.b. Rut, Ditch, Hole, Depression or Other Shoulder Condition

Another situation that arises is when the motorist departs the highway pavement and strikes a rut, ditch, hole, or depression in the shoulder, causing him or her to lose control of the vehicle. The question is whether the transportation department has a duty to repair such defects in the shoulder of the roadway. Cases have held that such a duty does exist.

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[244] 373 So. 2d 605 (La. App. 3d Cir. 1979)*, cert. denied,* Wilson v. Louisiana Dep't of Highways, 376 So. 2d 1269 (La. 1979).

[245] However, in *Aetna Cas. & Sur. Co. v. State*, 712 So. 2d 216 (La. App. 1st Cir. 1998), *writ denied*, (La. 1998), there was no liability for a 2 ½ to 4-inch drop-off.

[246] 367 So. 2d 137 (La. App. 2d Cir. 1979), *cert. denied*, 369 So. 2d 141 (La. 1979).

[247] Brandon, 367 So. 2d at 144.

[248] *Id.* at 143. *See* Protzman v. State, 80 A.D.2d 719, 437 N.Y.S.2d 147 (1982), *aff'd* 56 N.Y.2d 821, 452 N.Y.S.2d 570, 438 N.E.2d 103 (1982) (The court imposed liability where there was a 3-in. to 4-in. drop-off between the paved surface and shoulder; an engineer who testified for the department of transportation stated that shortly before the accident the shoulders in the area of the accident had been inspected and were found to be in violation of the state standard, and that work orders had been issued to upgrade and fill the shoulders to remedy the hazardous condition.).

[249] 273 So. 2d 860 (La. App. 2d Cir. 1973), *cert. denied,* 275 So. 2d 867 (La. 1973).

[250] Summers v. State Highway Comm., 178 Kan. 234, 284 P.2d 632 (1955) (edge of the surface was 4 to 5 in. higher than the adjoining shoulder for a distance of about 15 ft). In *Summers*, the court took judicial notice of the fact that there are hundreds of miles of highways with bituminous surface in this state and that it is a matter of common knowledge that such type of surfacing tends to feather off and crumble at the edges...and that there will be some deviations along the edge of such type of highway surfacing as contrasted to a concrete slab. 284 P.2d at 635.

[251] *See, e.g.,* Gilmore v. Rochester, 163 Misc. 2d 660, 622 N.Y.S.2d 189 (Sup. Ct. 1995) (A written notice of a dangerous condition to the mayor's office was sufficient under the prior notice statute.).

For example, in *Brummerloh v. Fireman's Insurance Co.,*[252] the plaintiff was driving his automobile at night in a misty rain. As he crossed a bridge spanning a bayou, he steered his vehicle to the right to avoid an oncoming car whose bright lights blinded him to the extent that the plaintiff could not determine the location of the center line. Immediately after crossing the bridge his right wheels dropped into a rut extending along the edge of the road, causing his vehicle to swerve into the lane of oncoming traffic and collide with another car. The appellate court affirmed a judgment for the plaintiffs and stated:

> The Highway Department had prior knowledge that such a dangerous condition had existed for a long period of time before the accident and the Highway Department took no steps to remedy same.… We…hold that the record supports the trial court's conclusion that the Highway Department was negligent in allowing such a dangerous condition to exist, which condition caused the occurrence of the accident in question.[253]

In sum, transportation departments may be held liable for failure to maintain shoulders properly or to repair dangerous ruts, ditches, holes, or depressions in the shoulder of the highway.

F.2.c. Other Obstacles in the Shoulder

If rocks or boulders in the road shoulder present a dangerous condition to motorists, then the state has a duty to remove them. The failure to do so may constitute negligence for which the transportation department may be held liable for injuries caused by those rocks or boulders.

In *Arno v. State,*[254] a motorist, confronted with a threatened collision, attempted to move to the shoulder but was prevented from doing so by a large pile of rocks in the shoulder. The court said:

> It is well established that a rock pile 6 to 7 feet long and 4 to 5 feet high obstructed 3 of the 4 feet of shoulder on the north side of the highway. It is also well established that this obstruction had been in the same position for at least three weeks and probably for five weeks. The State knew or should have known of this hazard. The State has a duty to maintain the shoulders of a highway in a reasonably safe condition for travel when necessity for their use arises. Failure to use reasonable care is negligence and in the instant case the State was negligent.[255]

Whether or not erecting a post or pole in the shoulder or allowing a tree to stand in it constitutes negligence is a factual question that the court must decide based on the circumstances of each case.[256] A crucial factor appears to be whether the post, pole, or tree is positioned in relationship to the road so as to constitute a hazard to motorists who leave the paved surface. Because posts, poles, and trees are highly visible, at least during daylight hours, the positioning has special relevance to motorists who must make sudden moves onto the shoulder when they have little or no time for reflection.

When conducting work on state roads, it is, of course, necessary from time to time to park vehicles, machinery, and equipment on the shoulders of the highway. However, if the transportation department leaves vehicles and equipment for any length of time, particularly without adequate warning signs, signals, or devices, this may constitute a lack of due care. This viewpoint is especially true at night when visibility is much less. There is little doubt that such conduct may constitute actionable negligence.[257]

F.2.d. Effect of Warning Signs

In *Maresh v. State,*[258] the court held that the State had a duty to warn the traveling public of a sharp drop-off at the edge of the highway. However, in *Baker v. Wayne County Bd. of Road Comm'rs*,[259] the court held that the duty to maintain the highway in a reasonably safe condition does not include illuminating obstacles beyond the improved portion of the roadway.

In any event, it appears to be clearly settled that the posting of a sign warning of a dangerous condition ahead does not, in and of itself, absolve the state from all liability for accidents proximately caused by the condition. Whether or not the signs bearing the legends Construction Work, Danger, etc., are sufficient to relieve the state of liability is a question of fact to be determined by the circumstances of the particular case. In some cases, the courts have held that warning signs were adequate to clear the state of liability for a hazardous condition; in other cases, the courts have

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[252] 377 So. 2d 1301 (La. App. 1979).

[253] *See also* Black v. County of Los Angeles, 55 Cal. App. 3d 920, 127 Cal. Rptr. 916 (1976) (The court affirmed a judgment for injuries sustained when the automobile collided with a car that crossed the road after being deflected off course by striking a hole in the shoulder of the road measuring 6 to 8 in. in depth and 12 1/2 to 13 in. in diameter.).

[254] 20 Misc. 2d 995, 195 N.Y.S.2d 924 (1960).

[255] 195 N.Y.S.2d at 927. *See* Mendelin v. West Boyleston, 331 Mass. 597, 121 N.E.2d 667 (1954) (A stone, which was 6 to 8 in. wide, 4 ft long, and 18 in. high, placed in the gravel shoulder by defendant many years before the date of the accident, was a useless obstruction.).

[256] Coss v. State, 11 Misc. 2d 856, 175 N.Y.S.2d 958 (1958), *aff'd* 8 A.D.2d 682, 185 N.Y.S.2d 253 (1959) (shoulder of the road obstructed by a fallen guard post); O'Connor v. State, 198 Misc. 1012, 99 N.Y.S.2d 194 (1950) (State held liable for injuries suffered by plaintiff when he drove his vehicle in the nighttime into an unlighted iron post located in the shoulder of the roadway.).

[257] Smith v. State, 146 Misc. 336, 262 N.Y.S. 153 (1933), *aff'd* 240 A.D. 752, 265 N.Y.S. 981

> ([T]he shoulder of a road is not constructed…as a parking place for the state's highway machinery or other unlighted obstacles for a traveler to collide with.… There is absolutely no excuse for parking highway machinery so close to the traveled portion of the highway as to make such an accident as we are considering here possible.)

[258] 241 Neb. 496, 489 N.W.2d 298 (1992).

[259] 185 Mich. App. 82, 460 N.W.2d 566 (1990).

held that signing was insufficient to protect the state from liability.[260]

G. ACCIDENTS CAUSED BY TREES OR VEGETATION IN THE RIGHT-OF-WAY OR ON ADJACENT PROPERTY

G.1. Introduction

Transportation departments may be held liable for damages caused by their failure to keep intersections and railroad crossings reasonably clear of vegetation. In some instances, a statute or ordinance may govern the government's responsibility for vegetation in the highway environment.[261] As with many issues in tort law, liability for trees and vegetation that obscure warning signs or obstruct passage depends on the circumstances.

G.2. Trees Located Within or Near the Highway Right-of-Way

Trees in the right-of-way may constitute a dangerous condition.[262] However, the mere fact that a tree was left standing within the right-of-way does not constitute negligence as a matter of law,[263] as when a car struck a stump 7 ft and 4 in. from the edge of the pavement.[264] In *Lewis v. Ohio DOT*,[265] the court stated that "the decision whether or not to remove trees from the state's right-of-way involves discretionary matters which are immune from liability where the state is not on notice that a particular tree is a hazard."

In *Hubbard v. Estate of Havlik,*[266] the court outright rejected the city's contention that the presence of a large tree in close proximity to the city street did not constitute a condition that was hazardous to the motoring public. *Norris v. State*[267] involved an automobile traveling at a high rate of speed that left the highway and crashed into a large tree more than 9 ft from the paved surface. The court affirmed the trial court's verdict that the Louisiana Highway Department was not negligent in permitting the tree to stand without a warning or barrier. The "tree was not an obstacle which was patently dangerous to an ordinarily reasonable and prudent driver."[268]

Cases have also been brought to recover for damages incurred when a falling tree or limb, hanging over the right of way, struck a moving vehicle. The courts, recognizing that dead, diseased, or decayed trees are likely to fall of their own accord, impose a duty on highway agencies to be alert to correct dangerous conditions presented by such trees. Regardless of whether the trees are located within or outside of the right-of-way limits, there is a duty of inspection and removal where necessary; formal or informal procedures must be instituted to enter on private land for the purposes of inspection, and where required, for the elimination of a public hazard. There is a duty to take all such steps as are necessary under local law to enter upon private land for the purpose of protecting highway users from conditions on the land that are hazardous to the public.[269]

Depending on the circumstances, transportation departments may be held liable for accidents caused by trees within the highway right-of-way. It has been held that the department had a duty to inspect living trees by looking for dead limbs or other indications that they were likely to fall into the right-of-way, but that the existence of trees more than 10 ft from the road was not a defective condition of the highway.[270]

Since the duty of inspection and removal where required is reasonably clear, the question in virtually all

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[260] *See* Brandon v. State, 367 So. 2d 137 (La. App., 2d Cir., 1979), *cert. den.,* 369 So. 2d 141 (La. 1979) (The erection of warning signs may lessen the road hazards but does not eliminate them.); and Stanley v. State, 197 N.W.2d 599 (Iowa 1972) (The posting of warning signs and the erection of barricades did not relieve the state of liability for negligence in permitting a 10- to 12-in. drop-off to exist while resurfacing work was in progress.) *But see* Tely v. State, 33 A.D.2d 1061, 307 N.Y.S.2d 307 (1970) (The presence of warning signs was held adequate to absolve the State from liability for negligence in the conduct of reconstruction work.).

[261] Annot., *Governmental Liability for Failure to Reduce Vegetation Obscuring View at Railroad Crossing or at Street or Highway Intersection,* 22 A.L.R. 4th 624, 627.

[262] Ford v. State, 2000 La. App. LEXIS 851 (2000); *see* Annot., *Governmental Liability for Failure to Reduce Vegetation Obscuring View at Railroad Crossing or at Street or Highway Intersection,* 22 A.L.R. 4th 624, and Jones, *Trains, Trucks, Trees, and Shrubs: Vision Blocking Natural Vegetation and a Landowner's Duty to Those Off Premises,* 45 DEF. L. J. 463 (1996).

[263] *See* Graves v. Page, 703 So. 2d 566, 574 (La. 1997) (The court noted that all witnesses conceded that the pine trees and vegetation were in the ditch and ditch bank of the highway right-of-way, not on the shoulder; it held that the transportation department's "duty to maintain the roadway and shoulders does not encompass the risk that an accident such as this one will occur.").

[264] Ledoux v. State, 719 So. 2d 43, 44, 1998 La. LEXIS 2676 (1998).

[265] 1995 Ohio App. LEXIS 4792 (1995).

[266] 213 Kan. 594, 518 P.2d 352 (1974)*, criticized on other grounds in* State ex rel. Quinn v. Johnson, 19 Kan. App. 2d, 868 P.2d 555 (1994) (State's negligence action barred by statute of limitations).

[267] 337 So. 2d 257 (La. App. 3d Cir. 1976).

[268] Norris, 337 So. 2d at 261.

[269] Annot., *Liability of Governmental Unit for Injuries or Damage Resulting from Tree or Limb Falling onto Highway from Abutting Land,* 95 A.L.R. 3d 778, 785; Ford v. S.C. Dep't of Transp., 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997), *reh'g denied*, (Nov. 20, 1997) (duty extends to trees in close proximity to a public highway).

[270] Thompson v. State, 701 So. 2d 952, 1997 La. LEXIS 3137 (La. 1997). *See* Martin v. Missouri Hwy. & Transp. Dep't, 981 S.W.2d 577, 1998 Mo. App. LEXIS 1705 (1998) (On the other hand, the State may have adopted a standard requiring it to maintain a clear area along the highway of at least 30 ft from the edge of the roadway.).

of the cases is whether the governmental entity charged with the maintenance of the roadway adequately performed its duty. The resolution of this question normally turns on whether the highway agency had actual or constructive notice of the dangerous condition of the tree prior to its fall. As stated in *Ford v. South Carolina Dept. of Transp.*,[271] although the transportation department can be held liable for a fallen tree within the limits or in close proximity to a public highway, liability depends on whether the department had notice of a hazardous condition.[272]

In *Diamond v. State*,[273] the court reasoned that, because the examination of the diseased tree had been made on foot by the State's employee, he should in the course of diligent inspection have walked around the tree. The court stated that, if he had done so, he would have observed the decayed condition of the tree and that his failure to complete the inspection constituted negligence. However, in another case the evidence failed to establish that the transportation department had actual or constructive notice of the dangerous condition of the tree before it fell.[274]

The fact that a tree stands outside the right-of-way limits on private property does not relieve the public authority of the duty of inspection and the necessity to take corrective action as required to eliminate a hazard.[275] In *Miller v. County of Oakland,*[276] the plaintiff sought to recover for injuries caused when a dead elm tree standing alongside the county road on which she was traveling toppled onto and crushed the vehicle she was driving. A state statute imposed liability on counties for failure to keep county roads in a "condition reasonably safe and fit for travel," but limited such liability "to the improved portion of the highway designed for vehicular travel."[277] The defendant asserted that the complaint was defective in that it did not "pinpoint the location of the tree prior to its fall" (i.e., within or outside the right-of-way limits).[278] The court stated that "the legal relevance of this omission is ephemeral," because the defendant had actual or constructive notice that the tree "constituted a potential hazard."[279] The court, in effect, ruled that the duty to clear the highway and remove a dangerous condition overrode the question of where the tree was located.

In *Husovsky v. United States,*[280] involving an action against the United States and the District of Columbia governments, the driver of a motor vehicle was injured when a substantial portion of a large diseased tree fell on his vehicle. The fact that the tree was located on land owned by the United States did not absolve the District of Columbia of liability for failing to inspect the tree and ascertain whether it was dangerous to travelers on the adjacent roadway owned and controlled by the District.[281]

A recovery may be denied where the evidence failed to establish that the state or governmental subdivision had actual notice or constructive notice of the dangerous condition of a tree located outside right-of-way limits that fell and caused an injury.[282] Moreover, the duty to inspect trees bordering the traveled way to determine if they constitute a danger to motorists does not include the duty to discover evidence of decay that is not observable from the road,[283] and it has been held that a policy of inspecting roadways from a patrol car was not necessarily unreasonable as a matter of law.[284] Courts also have held the state or other governmental entities liable for failure to take corrective action concerning overhanging tree limbs.[285] As the court stated

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[271] 328 S.C. 481, 492 S.E.2d 811, 1997 S.C. App. LEXIS 127 (1997).

[272] *See also* Com., Dep't of Transp. v. Patton, 546 Pa. 562, 686 A.2d 1302, 1305, 1997 Pa. LEXIS 100 (Pa. 1997) (trial court erred in refusing an instruction that the Commonwealth must have had actual or constructive notice of the existence of dangerous tree limbs).

[273] 53 A.D.2d 958, 385 N.Y.S.2d 827 (1976), *appeal dismissed*, 40 N.Y.2d 969, 390 N.Y.S.2d 921 (1976).

[274] Walker v. Department of Transp. & Dev., 460 So. 2d 1132 (La. App. 2d Cir. 1984), *cert. denied,* 464 So. 2d 1377 (La. 1985) (No notice that tree, which fell across the highway, was defective.).

[275] Ford v. S.C. Dep't of Transp., 328 S.C. 481, 492 S.E.2d 811, 814, 1997 S.C. App. LEXIS 127 (1997) ("The Department…because of its responsibility to the public, had a higher duty of care than did the [landowner], to discover and remedy potential obstructions, even those obstructions originating on private property."); De LaRosa v. City of San Bernardino, 94 Cal. Rptr. 175, 16 Cal. App. 3d 739 (1971); Bakity v. County of Riverside, 90 Cal. Rptr. 541, 12 Cal. App. 3d 24 (1970) (sustaining a judgment for plaintiff); Jones v. State, 33 Misc. 2d 959, 227 N.Y.S.2d 297 (1962); and Brown v. State, 2 Misc. 2d 307, 58 N.Y.S.2d 691 (1945) ("The fact that the trunks of trees were located outside the highway right-of-way is of no consequence.").

[276] 43 Mich. App. 215, 204 N.W.2d 141 (1972).

[277] Miller, 204 N.W.2d at 143.

[278] *Id.* at 144.

[279] *Id.* The trial court's dismissal of the complaint was reversed.

[280] 590 F.2d 944 (D.C. Cir. 1978).

[281] As seen, the fact that a tree is located on private property abutting the highway also does not relieve the governmental entity having jurisdiction and control over the adjacent road of its duty; it must inspect and take whatever corrective action is required concerning trees bordering the roadway that constitute a danger to motorists. Ford v. S.C. Dep't of Transp., 328 S.C. 481, 492 S.E.2d 811, 814, 1997 S.C. App. LEXIS 127 (1997).

[282] Harris v. East Hills, 41 N.Y.2d 446, 393 N.Y.S.2d 691, 362 N.E.2d 243 (1977).

[283] *See also* Commonwealth, Dep't of Highways v. Callebs, 381 S.W.2d 623 (Ky. 1964), and Albin v. National Bank of Commerce of Seattle, 60 Wash. 2d 745, 375 P.2d 487 (1962).

[284] *Id.*

[285] Mayor and Aldermen of the City of Savannah v. AMF, Inc., 295 S.E.2d 572 (Ga. App. 1982); Bimonte v. Hamden, 6 Conn. Cir. Ct. 608, 281 A.2d 331 (1971); and Robert Neff and Sons, Inc. v. Lancaster, 21 Ohio St. 2d 31, 50 Ohio Op. 2d 80, 254 N.E.2d 693 (1970).

long ago in *Valvoline Oil Co. v. Winthrop,*[286] "there is no sound distinction between the liability of a city or town for failure to guard against defects caused by trees within the limits of a highway which are old and decayed, and those which, although sound, in course of time cause a defective condition of a highway by growth."[287]

In sum, the duty of inspection extends to and includes the detection of all patent or visible disease, but does not extend to the discovery of internal decay or the weakening of the root system, absent visible evidence of progressive disease that can be ascertained through regular and routine examination of trees bordering highways by trained observers.

G.3. Duty to Cut or Remove Vegetation Obscuring the Highway

A number of cases have held that highway agencies are not required to trim, cut, or remove vegetation impairing highway visibility in the absence of legislation that imposes such a duty.[288] The reasoning of the courts is almost invariably tied to economic considerations. That is, the courts are concerned about placing an undue burden on government agencies if the courts imposed liability for the state's failure to cut weeds, grass, and other vegetation in countless areas.

In *Paddock v. Tuscola & S.B.R. Co.,*[289] the court held that the road commission did not have a duty to clear vegetation.[290] An earlier case from Arizona similarly held that there was no duty.[291] In *Scheurman v. DOT*,[292] the court held that "liability may not be imposed upon the defendant for a hedge, located on private property, which obstructed the view of travelers." In *Sipes v. DOT,*[293] the court held that there was no ground for a recovery against the department for having permitted high vegetation in a highway median that obstructed the view of crosstraffic, because, *inter alia,* the condition was not a "special defect" within the meaning of the state code: "Tall vegetation growing on the side of a state highway is not in itself an inherently dangerous condition."[294]

Thus, a significant number of cases hold that there is no duty to cut vegetation impairing highway visibility.[295] As discussed below, the duty to clear vegetation may arise if it causes a dangerous or defective condition of the highway.[296]

Other cases have held that the public agency does have a duty to cut or trim vegetation growing either within the right-of-way limits or on adjacent private property. Road junctions, Stop or Yield signs, and other traffic warning signals installed for the protection of the motoring public must be visible. However, of course, it must be shown that foliage, for instance at an intersection, was a substantial factor causing the accident.[297]

Sanchez v. Lippincott[298] held that whether a township had violated its duty to maintain town roads in a condition reasonably safe for public travel by allowing the visibility of a Stop sign to become obscured by vegetative growth was a jury question. The court stated the applicable rule to be that:

> [a] governmental body is under a non-delegable duty to maintain its roads and highways in a reasonably safe condition and liability will flow for injuries resulting from a breach of that duty.… The duty to maintain highways in a reasonably safe condition extends not only to the road surface and shoulders but also applies to other conditions which could reasonably be expected to result in injury and damages to the public.… This encompasses an obligation to prevent a dangerous condition from developing at intersections, by trimming growth within its right-of-way to assure visibility of stop signs and other traffic.… The Town's duty…stems from the common law and its statutory obligation to maintain its highways for the safety of the vehicular public.[299]

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[286] 235 Mass. 515, 126 N.E. 895 (1920).

[287] Valvoline Oil Co., 126 N.E. at 897.

[288] Graves v. Page, 703 So. 2d 566, 573-574, 1997 La. LEXIS 3341 (1997) (department of transportation did not have a duty to keep right-of-way free of vegetation).

[289] 225 Mich. App. 526, 571 N.W.2d 564, 568 (1997).

[290] In *Paddock*, the court cited Prokop v. Wayne Co. Bd. of Rd. Commr's, 434 Mich. 619, 633, 456 N.W.2d 66 (1990).

[291] Hidalgo v. Cochise County, 13 Ariz. App. 27, 474 P.2d 34 (1970) (It was held that the county was not under a common law duty to cut weeds obscuring the view of an intersection; to "rule otherwise would be to hold, literally, that hundreds of county road intersections are inherently dangerous and to impose an imponderable responsibility upon the counties.").

[292] 434 Mich. 619, 456 N.W.2d 66, 73 (1990), *criticized in* Burkholder v. Lenawee County Rd. Com., 905 F. Supp. 421, 429 (E.D. Mich. 1995) ("This court's view admittedly cannot be completely reconciled with the narrow construction of the highway exception advocated…in Scheurman."); and Boyle v. Phoenix, 115 Ariz. 106, 563 P.2d 905 (1977) (No duty to a bicyclist injured when his view of an intersection was impaired by weeds 6-ft-high in the right-of-way of a city street).

[293] 949 S.W.2d 516 (Tex. App. 1997)*, writ denied,* (Nov. 20, 1997).

[294] Sipes, 949 S.W.2d at 522.

[295] *See* Stanley v. South Carolina State Highway Dep't, 249 S.C. 230, 153 S.E.2d 687 (1967) (The complaint failed to state a cause of action, because the State's waiver of immunity to suit was by statute limited to injury caused by "a defect in any State highway"; the failure to cut vegetation did not constitute or produce a "defect" in a State highway, within the meaning of the statutory language.) The *Stanley* case was overruled in part by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), where the court abolished to some extent the doctrine of sovereign immunity. *See also* Walker v. Bignell, 100 Wisc. 2d 256, 301 N.W.2d 447 (1981) (The court remanded for a hearing on whether the state highway beautification legislation imposed a duty to remove obstructive roadside vegetation.).

[296] Paddock v. Tuscola and S.B.R. Co., 225 Mich. App. 526, 571 N.W.2d 564, 568, 1997 Mich. App. LEXIS 330 (1997) (no duty to clear vegetation that had not become a "point of hazard").

[297] 731 So. 2d 216, 220, 1999 La. LEXIS 336 (1999).

[298] 89 A.D.2d 372, 455 N.Y.S.2d 457 (1982).

[299] Sanchez, 455 N.Y.S.2d at 459.

Although the courts may disagree on whether the state has a duty to cut obstructive vegetation,[300] it should be noted that the duty to do so may be created by statute.[301] However, in *Hurst v. Board of Comm'rs of Pulaski County,*[302] the court held that the statutory duty to cut weeds along the highway right-of-way "does not require the cutting of weeds at an intersection to provide visibility."

In other cases, the courts interpreted words of general import to embrace the duty to trim or remove vegetation impairing visibility of the highway. The Supreme Court of Tennessee ruled in *Fretwell v. Chaffin*[303] that the Tennessee Tort Liability Act imposed liability on governmental entities for any injury caused by a defective, unsafe, or dangerous condition of any street. The duty included a situation where visibility of a Stop sign at an intersection was obscured by uncut vegetation, which caused a collision between two motor vehicles at an intersection.

The Texas Tort Claims Act[304] permits claims against a municipality arising from the absence, condition, or malfunction of a traffic or road sign. In *Lorig v. Mission,*[305] the Supreme Court of Texas ruled that the obstruction of a Stop sign by trees or branches was a "condition" of the sign within the meaning of the Act. Thus, a complaint alleging that the city failed to remove trees and branches obstructing the view of a Stop sign, which was the proximate cause of a motor vehicle collision at an intersection, stated a cause of action against the city under the Act.[306]

In sum, state transportation departments may be held liable for injury resulting from accidents caused by trees or vegetation in the right-of-way or on adjacent property if there is sufficient evidence that the trees or vegetation created a known dangerous condition, and the state failed to take corrective action. As before, liability may not be avoided because the vegetation is on private property adjacent to the highway, rather than within the limits and confines of the right-of-way itself.

H. DEFECTIVE OR DANGEROUS CONDITIONS ON BRIDGES AND OTHER STRUCTURES

H.1. The State's Duty to the Traveling Public Includes Bridges

The general principles of liability applicable to highways are applicable to bridges as well, because bridges are components of highways.[307] States have been held liable for breach of their obligation to construct and maintain bridges so that they will be reasonably safe for public use.[308] The duty to correct a dangerous condition generally arises when the state has actual or constructive notice of the condition, and the state has had a reasonable opportunity to remedy it.[309]

The state may be held liable for failure to provide warning signs where a dangerous condition exists that is not reasonably apparent to the reasonably prudent driver.[310] One court has ruled that a transportation

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[300] *See* Belleair v. Taylor, 425 So. 2d 669 (Fla. Dist. Ct. App. 1983) (The court stated that the "town constructed and maintained the median and the foliage upon it, and that being so the town knew or should have known that failure to maintain it would create conditions dangerous to the public."). *See also* Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. Dist. Ct. App. 1983); Bentley v. Saunemin Township, 83 Ill. 2d 10, 413 N.E.2d 1242 (1980); Coppedge v. Columbus, 134 Ga. App. 5, 213 S.E.2d 144 (1975); First National Bank in DeKalb v. City of Aurora, 71 Ill. 2d, 373 N.E.2d 1326 (1978); and Stewart v. Lewis, 292 So. 2d 303 (La. App. 1st Cir. 1974).

[301] *See* O'Gara v. Ferrante, 690 A.2d 1354 (R.I. 1997) (The statutes at issue "contemplate that the highway is wider than the roadway and includes the 'entire width' between the boundary lines of the public way, including the 'sidewalk, berm, or shoulder'"; whether the vegetation was within the "boundary lines of the highway" was an issue of fact, which precluded the grant of a summary judgment.).

[302] 476 N.E.2d 832, 834 (Ind. 1985).

[303] 652 S.W.2d 755 (Tenn. 1983).

[304] TEX. CODE ANN., Civ. St., art. 6252-19, § 1 *et seq.* (Now repealed by Act, 1985, 69th Leg., ch. 959).

[305] 629 S.W.2d 699 (Tex. 1982).

[306] An intermediate court of appeals applied the ruling in *Lorig v. City of Mission*, *supra*, in *Kenneally v. Thurn*, 633 S.W.2d 69 (Tex. App. 1983), to render the City of San Antonio accountable under the Tort Claims Act to a motorist injured in a collision at an intersection by reason of the City's failure to correct the "condition" of a Stop sign obscured from view by bushes growing on private property adjacent to the intersection.

[307] Under the National Bridge Inspection Standards promulgated by FHWA, states are required to inventory and inspect all bridges over 20 ft in length on public roads at least every 2 years. 23 C.F.R. §§ 650.301, 650.305. The inspections are to be conducted according to AASHTO's *Manual for Maintenance Inspection of Bridges 1978*, and the data are to be recorded and retained by the state for collection by FHWA. *Id.,* §§ 650.309, 650.311. Upon receipt and evaluation of the bridge data, FHWA assigns each bridge a "sufficiency rating" according to a mathematical formula designed by AASHTO and FHWA. *Id.,* § 650.409. The sufficiency rating is used as a basis for establishing eligibility and priority for replacement and rehabilitation of bridges under the Highway Bridge Replacement and Rehabilitation Program. *Id.,* § 650.409.

[308] There is authority that, in order for a public entity to owe a duty under the tort liability act, the injured party "must be both a permitted and intended user of the property." Mostafa v. City of Hickory Hills, 287 Ill. App. 3d 160, 222 Ill. Dec. 513, 677 N.E.2d 1312 (1997); Boub v. Township of Wayne, 291 Ill. App. 3d 713, 226 Ill. Dec. 44, 684 N.E.2d 1040 (1997), *appeal granted*, 176 Ill. 2d 570, 690 N.E.2d 1379 (1998).

[309] Daugherty v. Oregon State Highway Comm'n, 270 Or. 144, 526 P.2d 1005, 1008 (1974).

[310] Shively v. Pickens, 346 So. 2d 1314 (La. App. 3d Cir. 1977) (Where the transportation authority had actual and constructive notice that a bridge was excessively slippery when wet, the transportation department was held to be negligent for its failure to correct the condition or to warn the public thereof.).

department is not required to remove all potentially hazardous conditions provided that adequate signs were posted. Similarly it has been held that although a transportation agency had no duty to replace an otherwise adequate bridge that was narrower than the approach roadway,[311] the agency may be held liable for failing to warn approaching drivers of a narrow bridge.[312] The adequacy of the warning, given the circumstances of a particular case, is a question for the finder of fact, i.e., the court or the jury.[313]

The single most common, and most successful, claim by plaintiffs who are injured on highway bridges is that the state failed to provide adequate warning of a hazardous condition on the bridge.[314] Not every case involving the failure to post a sign results, however, in liability.[315] The duty to warn has been frequently asserted in cases involving narrow bridges.[316] For example, in *Bellard v. South Central Bell Telephone Co.*,[317] the court held that the Parish jury was at fault for the dangerous condition of a bridge in part because of vegetation obstructing the driver's vision, the bridge's inadequate width, and the lack of warning signs on the road. Twenty percent of the fault for the accident was apportioned to the Parish.

H.2. The Maintenance of Bridge Railings

Railing systems that are reasonably safe when installed can, of course, become weakened and dangerous with age or lack of proper maintenance. Even structurally sound and well-maintained railings, moreover, may not be capable of withstanding direct impact by a vehicle that is out of control. The question then becomes whether the public entity breached its duty to maintain the railings in a reasonably safe condition or to remedy a dangerous condition. If the transportation department acquires notice that a bridge railing design is dangerously defective, the state may be negligent if it fails to replace the railings.[318]

In Prybysz v. Spokane,[319] the plaintiff's decedents were killed when their car spun out of control on a bridge and crashed through a railing to the riverbank below. There was evidence that the driver was intoxicated. Plaintiff contended that the defendant city had been negligent in maintaining the railing. Although the evidence regarding the condition of the railing was conflicting, experts for the city testified that city officials had inspected the railing on several occasions prior to the accident and found no deficiencies and that many cars had struck the rail previously without it giving way.

The trial court's instructions to the jury with respect to the city's duty included the following language: "A city has a duty to exercise ordinary care in the inspection, maintenance, and repair of its public streets and bridges [including bridge railings] to keep them in a condition that is reasonably safe for *usual and ordinary travel,* with reasonable regard for dangers that may be anticipated."[320] (Emphasis supplied.) The jury returned a verdict for the city and, in answering an interrogatory, stated that the city had not maintained the bridge in a negligent manner.[321]

On appeal, the plaintiff argued that the jury may have been misled by the instruction into believing that the city owed no duty to persons not engaged in "usual and ordinary travel," such as the situation where a vehicle was out of control. The plaintiff objected to the trial court's omission of plaintiff's proposed instruction, which deleted all reference to "usual and ordinary travel" and required the city to keep bridges reasonably safe under conditions that could be "reasonably anticipated."[322]

After reviewing Washington case law, the appellate court upheld the jury's verdict. The court did not decide whether the instruction should have been limited to travelers exercising reasonable care, because the plaintiff's request to instruct the jury on "reasonably anticipated conditions" had been granted by the trial court. The court reasoned:

> [T]he language in the cases seems to suggest the duty of the City is limited to travelers using ordinary care. This is consistent with the rule that the City is not an insurer or guarantor of the safety of the streets or bridges. It is also

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[311] Barr v. State, 355 So. 2d 52, 57 (La. App. 2d Cir. 1978), *cert. denied*, 355 So. 2d 1324 (La. 1978).

[312] *Id.*

[313] *See, e.g.*, Rugg. v. State, 284 App. Div. 179, 131 N.Y.S.2d 24 (1954) (A Narrow Bridge sign was not adequate to warn of sharp curve preceding bridge.).

[314] Millman v. County of Butler, 244 Neb. 125, 504 N.W.2d 820, 825 (1993) (railing inadequate to contain a truck traveling at about 10 mph; liability imposed where the transportation authority knew from inspection reports that the bridge did not comply with applicable standards and failed to post warning signs); Hall v. State, 106 Misc. 2d 860, 435 N.Y.S.2d 663 (Ct. Cl. 1981); Hansmann v. County of Gosper, 207 Neb. 659, 300 N.W.2d 807 (1981); and Prybysz v. Spokane, 24 Wash. App. 452, 601 P.2d 1297 (1979) and Barr v. State, 355 So. 2d 52 (La. App. 2d Cir. 1978), *cert. denied,* 355 So. 2d 1324 (La. 1978).

[315] A township was held not liable for failing to place signs warning of unimproved conditions on a bridge during repair work and warning that the road was closed to vehicular traffic during the repair work. Boub v. Township of Wayne, 291 Ill. App. 3d 713, 226 Ill. Dec. 44, 684 N.E.2d 1040, 1048 (1997), *appeal granted,* 176 Ill. 2d 570, 690 N.E.2d 1379 (1998).

[316] Annot., *Liability, In Motor Vehicle-related Cases, of Governmental Entity for Injury or Death Resulting from Design, Construction, or Failure to Warn of Narrow Bridge,* 2 A.L.R. 4th 635.

[317] 702 So. 2d 695 (La. App. 3d Cir. 1997), *review denied*, 704 So. 2d 1202 (La. 1997).

[318] Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976).

[319] 24 Wash. App. 452, 601 P.2d 1297 (1979).

[320] 601 P.2d at 1299, n.1.

[321] Evidence that the bridge had been inspected and found sufficient was relevant to the issues of notice to the city and the city's exercise of reasonable care.

[322] Prybysz, 601 P.2d at 1300.

consistent with the common law duty to exercise reasonable care.[323]

In *McDaniel v. Southern Railway Co.,*[324] the court reached a similar conclusion and relied upon a rationale phrased in terms of proximate cause and foreseeability. The plaintiff, who had fallen asleep and collided with a guardrail, sued the county in which the accident occurred on the theory that the county had negligently designed and maintained the guardrail.

There was expert testimony that the guardrail should have been but was not designed in accordance with modern standards; the latter required that the end of the rail be flared outward and anchored to the ground so as not to penetrate a vehicle on impact, as did the rail in this case. The guardrail was designed in compliance with then existing federal standards and terminated above ground 4 ft from the edge of the concrete pavement. Before the contract to build the guardrail was awarded, new standards calling for a "flared and anchored" guardrail were issued. The plaintiff's expert witness testified that a guard rail built in August 1966 should have met the new standard or should have been later modified.[325]

The court held that the county was not liable under a statute that imposed upon the county a duty to exercise ordinary care in constructing and maintaining bridges in a safe condition.

> The county in which the bridge was built and maintained was not liable for the death of the passenger under Code § 95-1001 for the reason the sole proximate cause of the collision, which resulted in the injuries to the passenger, was the act of the driver of the automobile.... It is not a duty of the county to anticipate and provide against a driver of an automobile falling asleep, but this falls within the "domain of the unusual and the extraordinary, and therefore, in contemplation of law, of the unforeseeable," there being no defect in the bridge which was a contributory cause toward rendering the automobile uncontrollable.[326]

A summary judgment in favor of the county was affirmed.

In sum, proving proximate cause may be difficult for plaintiffs, first, from a factual standpoint (e.g., proving the speed of the vehicle, and its angle of impact), and, second, from an engineering standpoint (e.g., the capacity of standard railings and curbs to stop or deflect a particular vehicle under certain conditions). Furthermore, there may be a question of law in such cases regarding whether the transportation department had a duty to upgrade aging equipment to meet modern standards.

H.3. Snow and Ice Conditions on Bridges

The liability of state and local governments for snow and ice control has been discussed in subsection 2.C.1. Most often the pivotal issue in cases involving liability for snow and ice control on bridges is whether the transportation department had actual or constructive notice of a dangerous condition, and a reasonable time within which to remedy it. Notice is a prerequisite to proving a breach by the agency of its duty to use ordinary care to keep bridges and other highway components reasonably safe for public travel.

Bridge decks tend to freeze earlier than pavement and may become icy while the adjoining road surface remains unfrozen. Judicial decisions involving ice formation on bridges have reached divergent conclusions, because both courts and expert witnesses disagree on the extent to which bridge icing is a predictable phenomenon. In *Hunt v. State,*[327] for example, the plaintiff sued the State for injuries he sustained when he lost control of his car on a frost-covered bridge that had not been salted or sanded. The accident occurred in the early morning hours on a late autumn day when the surface of the highway and the bridge approach were clear and dry. The appellate court affirmed a judgment against the State upon finding that it had breached its duty to exercise ordinary care to maintain its highways in a safe condition for travel.

The central issues, according to the court, were whether the State could be charged with constructive notice of the slippery condition of the bridge and whether it had a reasonable opportunity to take remedial action. The evidence revealed that the State routinely ignored its own statement of policy and procedures regarding frost on bridges. The statement, taken from the State's highway maintenance manual, described the use of weather reports to predict frost formation and mandated the treatment of frosty bridge floors with salt or abrasives. The State admitted in testimony that it relied solely on random frost checks by maintenance employees to determine the need for salting or sanding.

On appeal, the court held:

> Substantial evidence was adduced to show the procedure was applicable and was violated. In addition, substantial evidence was received supporting the trial court's finding that violation of the procedure was a proximate cause of Hunt's accident. If the maintenance personnel had used the procedure, they would have known of the probability of frost and could have taken timely measures to eliminate the danger. Availability of the procedure coupled

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[323] *Id.* at 1301. The case of *Thorbjohnson v. Rockland-Rock Port Lime Co*., 309 A.2d 240 (Me. 1973) suggests that there is a duty to maintain guardrails sufficient to prevent a car from breaking through.

[324] 130 Ga. App. 324, 203 S.E.2d 260 (1973).

[325] Highway cases generally hold that there is no duty to upgrade highways merely because the applicable standards have been revised. As a general rule, whether the highway should be improved or upgraded appears to be a decision vested largely in the discretion of the appropriate governmental body, unless there is notice of a dangerous condition or "changed circumstances." In *McDaniel v. Southern Ry*., 130 Ga. App. 324, 203 S.E.2d 260 (1973), however, the guardrail was not constructed in accordance with then-existing standards.

[326] McDaniel, 203 S.E.2d at 262.

[327] 252 N.W.2d 715 (Iowa 1977).

> with weather conditions favorable to frost gave the commission constructive notice of the hazard in time to guard against it or eliminate it.[328]

The evidence produced in *Daugherty v. Oregon State Highway Com.*,[329] on the other hand, was held to be insufficient to establish notice on the part of the State's maintenance employees. Plaintiff's decedent was killed in a collision on a bridge during a freezing rain. The State's maintenance foreman testified that, although he kept abreast of weather conditions by monitoring local radio stations and communicating with patrolling highway department trucks and state police, he had no knowledge of icy conditions on the bridge in question until after the accident occurred.

The court concluded that the plaintiff had failed to prove breach of the State's duty of reasonable care:

> [While there] is evidence that after the freezing started [one state truck] was busy sanding other bridges [in the vicinity…t]here is no evidence tending to prove that defendant's employees should have ignored other bridges and danger spots and hurried to sand the Scoggins Creek Bridge, nor any evidence that if they had done so they would have arrived in time to prevent this accident.[330]

The court in *Estate of Klaus v. Michigan State Highway Department*[331] appeared to go a step further by suggesting that adequate notice of "preferential" bridge icing (the tendency of bridge surfaces to freeze before the adjoining roadway does) was virtually impossible.[332] The appellate court reversed the trial court's finding that the department was negligent in failing to guard against icing on the bridge. However, the judgment against the department was affirmed, because the evidence established that a Watch for Ice on Bridge sign was not visible to motorists on the day of the accident. The court emphasized that numerous prior accidents caused by ice on the bridge on clear days were known to the department. Thus, while the court was unwilling to charge highway authorities with knowledge of the bridge's icy condition on the day of the accident so as to create a duty to remedy the condition, the defendant's knowledge of the bridge's propensity for preferential icing was held to establish a duty to warn of a potential hazard.[333]

It should be noted that tort claims legislation in some states immunizes the state from liability for injuries or damage caused solely by the effect of weather conditions on streets and highways.[334] In *Flournoy v. State,*[335] for example, the court held that the plaintiff's theory that the State had created a dangerous condition by constructing an ice-prone bridge failed to state a cause of action, citing, *inter alia,* a section of the California Tort Claims Act granting immunity to the State for the effect of weather conditions.[336] As noted below, however, the state may be held liable for failure to provide advisory signing.

H.4. Failure to Post Signs Warning of Structural Defects in Bridges

Structural deficiencies that lead to the collapse of a bridge represent the most dramatic and potentially the most costly of bridge defects. Most of the reported cases involved the collapse of small bridges on secondary roads under local jurisdiction[337] rather than catastrophic failures.[338]

Transportation departments may be required by statute to maintain adequate bridges, as was the case in *Hansmann v. County of Gospel.*[339] The plaintiff was injured when a County bridge collapsed under the 23- to 24-ton weight of his truck. Under a statute rendering counties liable for damages caused by "in sufficiency or want of repair" of a county bridge, the court declared that

> a county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated.… A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe.[340]

The appellate court held that the County's failure to post a sign constituted negligence.

Thus, the state's duty extends to providing safe bridges and protecting the motorist from hazardous conditions on bridges. The state's duty includes providing safe bridge railings; keeping the bridge surface free of hazardous conditions, such as those caused by snow or ice; and informing the public with adequate signs of hazardous structural or other unsafe conditions on bridges.

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[328] Hunt, 252 N.W.2d at 719.

[329] 270 Or. 144, 526 P.2d 1005 (1974).

[330] Daugherty, 526 P.2d at 1008.

[331] 90 Mich. App. 732, 282 N.W.2d 809 (1979).

[332] Estate of Klaus, 282 N.W.2d at 807–08.

[333] *Id*. at 808; *see also* Carpenter v. Travelers Ins. Co., 402 So. 2d 282 (La. App. 3d Cir. 1981) (holding that the failure to post Ice on Bridge signs was not the cause in fact of the accident on an icy bridge).

[334] *See, e.g.*, CAL. GOV'T CODE § 831; N.J. STAT. ANN. § 59 4-7.

[335] 275 Cal. App. 2d 806, 80 Cal. Rptr. 485 (App. 1969).

[336] CAL. GOV'T CODE § 831.

[337] *See, e.g.,* Hansmann v. County of Gospel, 207 Neb. 659, 300 N.W.2d 807 (1981) and Stevens v. County of Dawson, 172 Neb. 585, 111 N.W.2d 220 (1961).

[338] In Re Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D.W. Va. 1974)*, cited among conflicting authorities in* Spring v. United States, 833 F. Supp. 575 (E.D. Va. 1993) (regarding the issue of choice of law in multi-state FTCA actions).

[339] 207 Neb. 659, 300 N.W.2d 807 (1981).

[340] Hansmann, 300 N.W.2d at 808.