SECTION 5

TRIAL PREPARATION, EVIDENCE RULES, AND STRATEGIES IN TRANSPORTATION TORT LITIGATION

A. SUGGESTED TRIAL STRATEGIES AND TECHNIQUES

A.1. Pre-Suit Notice Requirement

In many states the tort claims act may provide for a pre-suit notice to be given to the agency or department as provided by statute. As a preliminary matter, it is important to observe that there could be a factual issue on whether the plaintiff has met the requirements of the statute for the giving of a pre-suit or pre-filing notice to the state or its designated agency.[1] Because the questions can be quite technical and factual,[2] counsel must verify when any pre-suit notice must be given and to whom.[3] The relevant tort claims act must be carefully considered to determine whether the statutory prerequisites or conditions precedent for filing a claim have been met. Although the requirement of a pre-suit, written notice of claim is usually strictly construed,[4] some courts have held that some of the required information may not be absolutely essential.[5]

Under the Florida statute, sub-section 6(a),

> [a]n action may not be initiated on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also…presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing…..[6]

The Act's sub-section 6(b) provides, *inter alia*, that the requirements of notice to the agency and denial of the claim are conditions precedent to maintaining an action. In Florida, under sub-section 13, every claim is "forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues…." The statute requires the claimant to provide other information, such as date and place of birth and social security number. The courts have held that some of the required information may not be absolutely essential.[7] In general, claims must be brought against the state and not against officers, employees, or agents of the state in their personal capacity.

The provisions of the Florida statute have been upheld,[8] and the requirement of a pre-suit, written notice of claim is strictly construed.[9] Numerous cases have arisen over whether the proper entity was notified or whether the form of notice was sufficient.[10] In Florida, to state a cause of action against the state agency, the complaint must specifically allege that timely written notice has been given to the Department of Insurance in compliance with the statutory provision.[11]

Under the California Tort Claims Act,[12] a claim must conform to Section 910. Section 911.2 provides that "[a] claim relating to a cause of action for death or for injury to person or to personal property…shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than 6 months after the accrual of the cause of action…." There is a procedure for allowing a late notice of claim.[13]

A.2. The Investigative Phase

An investigation of the claim is always crucial, the earlier the better for the purpose of identifying and interviewing witnesses and preserving evidence. An inspection of the scene is important for any case; indeed, it may be important to visit the scene with an expert. One should verify, of course, that all of the videotape, photographs, damaged equipment or appurtenances, the plaintiff's vehicle and/or other vehicles, measurements and the like, respectfully, are taken,

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[1] *See* Annot., *Insufficiency of Notice of Claim Against Municipality as Regards Statement of Place Where Accident Occurred*, 69 A.L.R. 4th 484.

[2] Norris v. Department of Transp., 268 Ga. 192, 486 S.E.2d 826 (1997).

[3] *See also* Budden v. Board of Sch. Comm'rs of Indianapolis, 680 N.E.2d 543 (Ind. App. 1997); Streetman v. University of Tex. Health Sci. Ctr. at San Antonio, 952 S.W.2d 53 (Tex. App. 1997).

[4] Smart v. Monge, 667 So. 2d 957 (1996); Brown v. City of Miami Beach, 684 F. Supp. 1081 (S.D. Fla. 1988).

[5] Williams v. Henderson, 687 So. 2d 838 (1996).

[6] FLA. STAT. § 768.28 (6).

[7] *See, e.g.*, Williams v. Henderson, 687 So. 2d 838 (Fla. Dist. Ct. App. 2d Dist. 1996).

[8] Wilson v. Duval County School Bd., 436 So. 2d 261 (Fla. Dist. Ct. App. 1st Dist. 1983) (damages limitation); Ingraham v. Dade County School Bd., 450 So. 2d 847 (Fla. 1984) (attorney's fees limitation).

[9] Smart v. Monge, 667 So. 2d 957 (1996); Brown v. City of Miami Beach, 684 F. Supp. 1081 (S.D. Fla. 1988), *later proceeding*, Sanchez v. City of Miami Beach, 720 F. Supp. 974, 1989 U.S. Dist. LEXIS 10230 (S.D. Fla. 1989).

[10] *See, e.g.*, Smart v. Monge, 667 So. 2d 957 (Fla. App. 2d Dist. 1996); Lopez v. Prager, 625 So. 2d 1240 (1993), *review denied*, 634 So. 2d 625, 1994 Fla. LEXIS 380 (Fla. 1994); and Robinson v. Hillsborough Area Regional Transit Auth., 545 So. 2d 478 (Fla. Dist. Ct. App. 2d Dist. 1989).

[11] Wright v. Polk County Public Health Unit, 601 So. 2d 1318 (Fla. App. 2d Dist. 1992).

[12] CAL. GOV'T CODE § 810 *et seq*.

[13] *Id*., §§ 911.3, 911.4. Of interest is another article that has collected cases concerning whether a statute is valid that requires a plaintiff to give a notice of claim of an action against a municipality prior to suit. The article notes that such notice of claims statutes have been attacked on the basis that they violate state constitutional prohibitions against special legislation or state and federal constitutional guaranties of equal protection of the law and due process of law. The article cites to some decisions that have held notice of claim requirements invalid as violative of equal protection of the law but concludes that notice provisions are valid in almost all jurisdictions. 59 A.L.R. 3d at 98. *See also* Annot., *Insufficiency of Notice of Claim Against Municipality As Regards Statement of Place Where Accident Occurred,* 69 A.L.R. 4th 484.

inspected, and preserved for trial. The department's records should be consulted regarding the approval of the design of the location, prior accidents, and notices received from the traveling public.

If there are design issues, particularly if the structure or location in question was constructed many years prior to the accident, then additional investigation may be warranted, such as locating the standards applicable when the highway or structure was built and/or the persons involved in the design or its approval. Because online searches are now available to virtually everyone, an online search may be useful regarding the location, the claimant, and others with knowledge.

As always, it is important to consult with one's own client as part of the investigation prior to answering the complaint or beginning discovery. The investigation should be conducted with a view to developing possible defenses and anticipating potential discovery. Some transportation departments provide forensic engineering support to assist in all phases of trial preparation. The development of specific strategies and methods for gathering engineering data and support in the defense of lawsuits is an important need that arises from the routine and continuing defense of lawsuits.

A.3. Reviewing the Complaint and Agency File for Potential Defenses Including Immunity

Counsel will want to review the complaint and the applicable tort claims act for potential defenses, such as whether immunity for the specific claim asserted has been waived and whether there is immunity for the exercise of the state employee's discretion,[14] for the state's failure to provide traffic control signals or signs,[15] or for its approval of a plan or design for an improvement to public property.[16] If it appears that the legislature intended that there be immunity for the specific action alleged, then a motion to dismiss or for summary judgment may be appropriate. Every defense should be stated in the answer and consideration given to the making of counterclaims, cross-claims, and third party claims that should be asserted.

Unless it can be said that clearly the activity in question did not involve the exercise of discretion, it is prudent to review any defense the state has for discretionary action. Counsel for the transportation department will want to be aware of *United States v. Gaubert*[17] and argue that the exercise of immune discretion is not limited to the so-called policy or planning level. Counsel will need to review how broadly the state's courts define immunity for discretionary action under the state's tort claims act or at common law. Some state courts follow the broad definition of discretion in *Gaubert*; some seem to be unaware of *Gaubert*; and a few have rejected the *Gaubert* line of reasoning. If the state court has adopted the *Gaubert* analysis, then as long as the applicable regulations, standards, or guidelines permitted the state official or employee to exercise any discretion, it is possible that the state will not be liable for the allegedly negligent activity based on the immunity provision in most, if not all, state tort claims acts for the exercise of discretion. (As seen in a prior section, there is authority that the state's immunity for discretionary activity may be asserted even in the absence of a statute providing for it.) Although only a few states seem to allow the public duty defense, it may be prudent nonetheless to combine a defense for discretionary action with the public duty defense.

Even if there is a colorable claim of immunity for discretionary action, counsel must consider the possibility that the state, nevertheless, may be held liable for a dangerous condition of the highway. If so, it is prudent to consider whether there is another statutory provision that immunizes the specific activity, such as the failure to install traffic control devices, flashing lights, or crossing gate arms.[18] Similarly, there may be statutory immunity for the failure to replace a missing sign.[19]

It is important to consider the effect of possible changes in policies and practices after the construction of the highway. Does the case arise out of policies and practices that were adopted after the construction of the highway, which is now alleged to be dangerous? Alternatively, is the claim connected with a program to upgrade portions of the highway? It may be necessary to review the law in the state regarding changed conditions after the implementation of the design. Is the design one that is manifestly dangerous or that has proved to be hazardous in practice so as to constitute a defect? Does the state have immunity for errors in the plan or design where the plan has been duly approved by an appropriate legislative or quasi-legislative body? The attorney will need to determine whether the plan or design of the highway was prepared in conformity with generally recognized and prevailing standards in existence at the time of the approval of the plan or design.

There are many issues and questions already addressed by case law that may be relevant to defending against the complaint. For instance, is the state liable for delay in erecting barriers once it determines that they are needed;[20] does the claim involve what could be termed "trivial irregularities, slight depressions, or

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[14] *See, e.g.*, CAL. GOV'T CODE § 820.2; N.J. STAT. ANN. § 59:2-3.

[15] CAL. GOV'T CODE § 830.4; N.J. STAT. ANN. § 59:4-5.

[16] CAL. GOV'T CODE § 830.6; N.J. STAT. ANN. § 59:4-6.

[17] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand,* 932 F.2d 376 (5th Cir. 1991).

[18] Harrington v. Chicago and Northwestern Transp. Co., 452 N.W. 2d 614 (Iowa App. 1989).

[19] Smith v. State, Dep't of Transp., 247 N.J. Super. 62, 588 A.2d 854 (1991), *cert. denied*, 611 A.2d 651.

[20] KAN. STAT. ANN. § 68-419(b).

other minor inequities";[21] does the state's obligation of reasonable care encompass an efficient and continuous system of highway inspection;[22] is there a statute that precludes any duty of the state to inspect the roads and other public improvements;[23] and has there been compliance with a standard manual on traffic signs?[24]

The attorney must determine whether the state had notice of the defect or dangerous condition. Did the state have notice, either actual or constructive, of the alleged dangerous condition;[25] what is the length of time that the alleged dangerous condition has been permitted to exist;[26] or is the dangerous condition one the state itself created?[27]

In investigating the case and in preparing for trial, the attorney must consider whether the plaintiff will be able to establish that the department owed the plaintiff a duty of care, that the department breached that duty, and that the plaintiff suffered damages as a proximate result.[28] The state is only liable if there was a breach of a duty that it owed to the plaintiff. Previous sections have considered the duty issue in a number of contexts. Even so, as the attorney investigates the case and considers possible defenses, he or she may confront an issue of whether the state actually had or breached a duty of ordinary care to the plaintiff. Even if there were a duty or breach of a duty, may the state establish that a delay in correcting a dangerous condition stemmed from a legitimate ordering of priorities with other projects based on timing or the availability of funding?

The existence and application of uniform manuals or regulations may be important issues. Were there violations of mandatory provisions of the MUTCD?[29] Assuming the complaint alleges a violation of a uniform law or regulation, is the violation only evidence of negligence or does it constitute negligence *per se*? Is there *prima facie* evidence of negligence because the highway did not meet minimum state design standards and policies pertaining to minimum widths and design speeds, stopping sight distances, and "no-passing" sight distances?[30]

There may be other laws and regulations, even standard operating procedures and manuals, that may be relevant. The attorney will want to verify whether the department has a manual on maintenance procedures that must be followed in specific situations, such as, for example, in regard to snow and ice control.[31]

Frequently, warning signs, traffic lights, and pavement markings will be at issue. The question of whether the state had a duty to the motorist is one that should be considered carefully. The attorney will need to decide whether, in the absence of statute, the state has a general duty to install or provide highway signs, lights, or markings.[32] Even if there were no duty in the first instance, liability may be imposed where there is an assumption of the duty, for example, to post signs and barricades at a dangerous curve.[33] Moreover, if there is an applicable statute, then an inquiry must be made whether any failure of the department to install adequate warning signs is a violation of a duty under the statute;[34] alternatively, what is the state's duty to maintain the signs in good or serviceable condition?[35]

Even if there is a colorable breach of a duty, will the plaintiff be able to establish that the absence of a sign, for example, was the proximate cause of the accident?[36] This is an area, however, for caution; the department's own records may amount to an admission that a highway location is particularly dangerous and should have been corrected or signed.[37] If the case concerns pavement markings, would the same have alerted the motorist to a deceptive roadway,[38] or would a white line in the center of the highway have indicated the presence of a highway curve? Whenever signage is at issue, besides examining manuals and regulations that may be applicable, the attorney's expert must advise whether the highway signs at issue were misleading and dan-

[21] Christensen v. City of Tekamah, 201 Neb. 344, 268 N.W.2d 93, 97 (1978).

[22] McCullin v. State Dep't of Highways, 216 So. 2d 832, 834 (La. App. 1969); Commonwealth, Dep't of Highway v. Maiden, 411 S.W.2d 312 (Ky. 1966).

[23] NEV. REV. STAT. § 41.033.

[24] Meabon v. State, 1 Wash. App. 824, 463 P.2d 789 (1970).

[25] Kelley v. Broce Constr. Co., 205 Kan. 133, 468 P.2d 160 (1970).

[26] Commonwealth v. Young, 354 S.W.2d 23 (Ky. 1962).

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

[28] Lunar v. Ohio Dep't of Transp., 61 Ohio App. 3d 143, 572 N.E.2d 208 (1989).

[29] State v. Watson, 7 Ariz. App. 81, 436 P.2d 175 (1968).

[30] Tuttle v. Dep't of State Highways, 60 Mich. App. 642, 231 N.W.2d 482 (1975).

[31] Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

[32] Raven v. Coates, 125 So. 2d 770, 771 (Fla. App. 1961); Hewitt v. Venable, 109 So. 2d 185 (Fla. App. 1959).

[33] Andrus v. Lafayette and La. Dep't of Highways, (third party defendant), 303 So. 2d 824, 827 (La. App. 1975).

[34] Lynes v. St. Joseph County Road Comm'n, 29 Mich. App. 51, 185 N.W.2d 111 (1970); Jenson v. Hutchinson Co., 166 N.W.2d 827 (S.D. 1969); and Dohrman v. Lawrence County, 143 N.W.2d 865 (S.D. 1966).

[35] Koehler v. State, 263 N.W.2d 760 (Iowa 1978); Lansing v. County of McLean, 69 Ill. 562,372 N.E.2d 822 (1978); Spin Co. v. Maryland Casualty Co., 136 N.J. Super. 520, 347 A.2d 20 (1975); Kiel v. DeSmet Township, 242 N.W.2d 153 (S.D. 1976).

[36] Suligowski v. State, 179 N.Y.S.2d 228 (1958).

[37] Smith v. State, 12 Misc. 2d 156, 177 N.Y.S.2d 102 (1958).

[38] German v. Kansas City, 512 S.W.2d 135 (Mo. 1974); Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960); Gazoo v. Columbia, 196 S.E.2d 106 (S.C. 1973).

gerous.[39] Departmental personnel should be consulted to ascertain whether the state had a reasonable time, after notice, to correct a faulty or missing sign.[40]

As in other situations discussed above, it must be asked what the transportation department's duty is in regard to initially installing or not installing traffic control devices. Is the public agency entitled to immunity with respect to a claim that it failed initially to place signs "warning of the unpaved condition of [a] bridge and that the road was closed to vehicular traffic"?[41] Moreover, is the decision to provide traffic lights either the exercise of immune discretion or the performance of a purely governmental function?[42] This is again an area where it is important to ask what the effect is of placing the signs or devices in technical compliance with the MUTCD. After the state provides them, it most probably has a duty to maintain and repair them in a manner that will keep them reasonably safe.[43]

Previous sections have discussed in some detail the cases holding that certain activities of the department are discretionary in nature. Although up-to-date legal research will be required, in discussing the issue with departmental personnel it may be useful to address the following questions: did the work involve the marshaling of the state's resources, the "prioritizing of competing needs," planning, or the "exercise of policy-level discretion";[44] is the governmental activity so highly complex or technical that it is beyond the reasonable technical competence or expertise of the court; did the agency have to make a choice among valid alternatives and exercise independent judgment in arriving at a decision; did the public official draw on information that was not generally available and to which he or she had access by virtue of his or her office; were the decisions ones that exclusively involved "basic policy decisions" by the executive branch of the government; or did the decision involve the evaluation of social, economic, and political policy considerations?

If the claim concerns maintenance-level activity, the case law should be consulted to determine whether an argument can be made that planning at the operational level is directly related to the planning objectives chosen at the planning level and that maintenance planning is distinguishable from maintenance undertaken, for instance, in the actual repair or erection of warning devices. It should be remembered that whenever there is a question of alleged faulty maintenance, there may be present within the department certain manuals or standard operating procedures that could be relevant in showing that the standard of care was not followed.[45] Police and departmental records may be important sources of proof, and expert testimony may be very important. As noted, causation and its proof are obviously quite important. Some of the questions to consider are whether the injury would have occurred *but for* the state's alleged negligence; was the alleged defective condition of the public improvement the cause of the accident or injuries resulting therefrom;[46] and were the injuries sustained the natural result of the condition complained of such that they reasonably might have been foreseen?[47]

Although much more could be written on the subject of causation, suffice it to say that causation in fact and proximate cause are very important. Although contributory and comparative negligence are not considered herein, it is important to ascertain whether the motorist was vigilant so as to be able to avoid defects and obstructions reasonably likely to be encountered.[48]

A.4. The Discovery Phase

The sequence of discovery usually is interrogatories, document requests, depositions, and requests for admissions. Interrogatories may be best used to identify persons who have knowledge of the plaintiff's claim who should be interviewed and/or deposed prior to trial. In many jurisdictions, the number of interrogatories that may be propounded is limited to a specific number, often including sub-parts. Nevertheless, they may be useful for identification purposes. As a general matter, it is important to include in the first set of interrogatories a request for an identification of the opposing party's expert, his or her qualifications, opinions, and grounds therefor as permitted by the court's rules. Normally, sanctions should be pursued promptly if the interrogatories (or other discovery requests noted herein) are not answered or not fully answered. If nothing else, the opposing party's dilatoriness must not be allowed to disrupt the orderly sequence of one's own discovery, perhaps preventing, for example, the identification and deposition of an important witness or the discovery of an additional claim or defense.

As a general practice, a document request probably should accompany the interrogatories. Although there are standard sets of requests for use in tort litigation, it is prudent to review the requests to make certain that documents pertinent to the facts of the case are being sought. If the documents are in the possession or

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[39] German v. Kansas City, 512 S.W.2d 135 (Mo. 1974).

[40] Bryant v. Jefferson City, 701 S.W.2d 626 (Tenn. App. 1985).

[41] Boub v. Township of Wayne, 291 Ill. App. 3d 713, 684 N.E.2d 1040, 1048 (1997).

[42] Pierrotti v. La. Dep't of Highways, 146 So. 2d 455 (La. App. 1962); Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960); and Hulett v. State, 4 App. Div. 2d 806, 164 N.Y.S.2d 929 (1957).

[43] Ariz. State Highway Dep't v. Bechtold, 105 Ariz. 125, 460 P.2d 179 (1969).

[44] Defoor v. Evesque, 694 So. 2d 1302, 1306 (1997); Burgdorf v. Funder, 246 Cal. App. 2d 443, 54 Cal. Rptr. 805 (1966); Shearer v. Hall, 399 S.W.2d 701 (Ky. 1965); and Pluhowsky v. City of New Haven, 151 Conn. 337, 197 A.2d 645 (1964).

[45] Hunt v. State, 252 N.W.2d 715 (Iowa 1977).

[46] 4 *Cyclopedia of Trial Practice*, § 827, at 66.

[47] *Id.* at 62.

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

control of a third party, then a *subpoena duces tecum* will be needed to obtain them, such as for example, from a physician or a contractor not named as a defendant or third party defendant. As in the investigation of the facts, it may be prudent to consult with personnel within the transportation department regarding documents that should be requested. Of course, the documents should be produced in time for use prior to and during depositions. Unless there is a stipulation or other order or agreement pertaining to documents, a deposition may be needed merely to authenticate documents. Issues that could prevent authentication or the admissibility of documents should be confronted early rather than just before trial when the discovery period may have closed.

Documents are important both to the preparing for and taking of depositions. It is important that witnesses be familiar with the complaint and answer and defenses, any pre-trial motions that discuss the facts and issues in the case, and any documents with which the witness may be expected to be familiar, including reports, letters, memoranda, manuals, regulations, operating procedures, or standards and guidelines. Although other texts address depositions in detail, it is important for the witness who is about to be deposed to understand fully the deposition process, what areas and materials are likely to be covered, and how the deposition could be used at trial. Parties to an action need to appreciate that portions of their depositions could be read to the court and/or the jury as part of the opposing party's case in chief, not just to impeach his or testimony on cross-examination. Obviously, counsel taking the deposition should be well prepared prior to the deposition and clearly have in mind what his or her objectives are, the areas that should be explored, and how the deposition may aid in his or her development or defense of the case.

If permitted by the court's rules or by order of the court on motion, experts should be deposed, such as medical experts, engineers, and economists who are expected to testify at trial. Counsel may need to consult with experts within or outside of the department to prepare for taking, as well as defending, the deposition of an expert. In particular, it is important to review any expert's qualifications in the light of the opinion rendered and assess whether the opinion is subject to challenge because of lack of qualifications, the data used, or the methodology employed. As noted in another section, the rules are in a state of flux on the trial court's role in the admission of expert testimony; it is important to know what the rule is that is applicable to the case that is about to be tried. Any science or methodology that is out of the mainstream may be subject to challenge. A final caveat is that anything shown to a witness, whether a fact witness or an expert, during the preparation for a deposition, particularly if the witness refers to it in his or her testimony, probably will be discoverable. Even counsel's letters to an expert discussing the case could become discoverable.

The plaintiff may demand a wide array of information from the transportation department. Some requests may be challenged on the basis of lack of relevancy for one reason or another; however, it is important to know why certain records of the department were caused to be generated in the first place. If they were created or maintained pursuant to a federal mandate, such as 23 U.S.C. § 409, as discussed in a prior section, their discoverability may be precluded.

At any time, the party may serve on another party requests for admissions. However, at the outset counsel should consider an extensive request for admissions, particularly on matters that the proponent believes must be admitted. Admissions may become part of the pre-trial stipulation of facts. In denying requests for admissions, the responding counsel incurs the risk that monetary sanctions will be imposed for failing to admit facts otherwise proven. Normally, unlike interrogatories, the court's rule does not restrict the number of requests that may be propounded. However, if the requests are unusually numerous or prolix, upon being challenged, the court may apply a reasonableness rule. Costs may be recovered if a party improperly denies a request, which the opposing party is forced to prove at trial. The requests may be useful in obtaining not only admissions but also concessions about the authenticity of documents.

A.5. Discoverability or Admissibility of Data Compiled for Highway Safety

Certain highway-related information may be obtained, compiled, and archived pursuant to federal requirements. However, 23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. (Emphasis supplied).[49]

The plain language of § 409, as the court held in *Claspill v. Missouri Pacific R. Co.*,[50] "provides that certain information shall not be admitted into evidence if it was compiled 'for the purpose of developing any highway safety construction improvement project

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[49] *See* Orrin Finch, *Freedom of Information Acts, Federal Data Collections, and Disclosure Statutes Applicable to Highway Projects and the Discovery Process,* 1995 TRANSPORTATION RESEARCH BOARD.

[50] 793 S.W.2d 139, 140 (Mo. 1990), *cert. denied*, 498 U.S. 984, 111 S. Ct. 517, 112 L. Ed. 2d 529, 1990 U.S. LEXIS 5897 (1990).

which may be implemented utilizing federal-aid highway funds.'"[51] The *Claspill* case held that surveys and lists created before the enactment of § 409 could not be admitted into evidence; § 409 applies retroactively.[52] In *Miller v. Bailey,*[53] a state trooper's letter to the department of transportation regarding the need for No Parking signs on a highway, which was part of the federal highway system, was held to be inadmissible.

Thus, the section bars the discovery or admission into evidence of documents that may be requested during the litigation, including priority investigation location lists, evaluations of the site where the accident occurred, accident studies or analyses for an accident site, and reports of screening or evaluating printouts concerning the transportation department's determinations.[54]

Although the statute may prevent the plaintiff's discovery of certain records and information, a California court stated that when the statute intrudes into an area traditionally occupied by the states, congressional intent to preempt the state must be clear and that § 409 must be construed restrictively to prohibit only what is expressly proscribed.[55] The court, however, ruled that the transportation department in that case failed to establish that the requested information was compiled or collected pursuant to 23 U.S.C. § 152 or § 409. Thus, absent a proper foundation that they are § 409 protected documents, traffic collision reports, data from an automated database, traffic investigation reports, safety reports, and traffic volume summaries were discoverable.

It has been held in a railroad-crossing accident case that information on the crossing was not discoverable, because "but for the federal railroad safety assessment program," the transportation department would possess no information on the crossing.[56] Even if the information collected and later sought in discovery fulfills both state and federal functions, it may be nondiscoverable, as held in *Mackie v. Grand Trunk Western R.R., Co.*[57]

B. ADMISSIBILITY AND USE OF UNIFORM LAWS, REGULATIONS, STANDARDS OR GUIDELINES APPLICABLE TO DESIGN AND MAINTENANCE ACTIVITIES

B.1. Sources of Applicable Highway Standards or Guidelines

In tort actions against transportation departments, the court may allow the admission of various types of evidence, including applicable statutes, regulations, standards, or guidelines. For example, in a case involving a sign, the signing history at the particular location, the effect that additional signs might have had, other circumstances at the site, and the department's decision to install a stop sign at the intersection may be admissible into evidence.[58] As discussed more fully in this section, evidence of applicable statutes, regulations, standards, or guidelines may be admitted into evidence to demonstrate whether the state met its duty of care by conforming its conduct to one or more of them.[59]

There are various sources, both governmental and nongovernmental, of standards and guidelines governing highway safety; some have been adopted by statute or regulation and made applicable to the transportation department. In addition, for federal-aid projects, federal law requires that highways be designed and maintained pursuant to accepted standards. For example, 23 U.S.C. § 109(a) provides that

> the Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility…that will be designed and constructed in accordance with standards best suited to

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[51] Claspill, 793 S.W.2d at 140.

[52] *Id*. *See also* Southern Pac. Transp. Co. v. Yarnell, 181 Ariz. 316, 890 P.2d 611, 1995 Ariz. LEXIS 14 (Ct. App. 1995), *supplemental op., recons. denied*, 182 Ariz. 134, 893 P.2d 1297, 1995 Ariz. LEXIS 42 (1995), *cert. denied*, 516 U.S. 937, 133 L. Ed. 2d 247, 1995 U.S. LEXIS 7111, 116 S. Ct. 352 (1995) (neither discoverable nor admissible); Lusby v. Union Pac. R.R., 4 F.3d 639, 1993 U.S. App. LEXIS 23100 (8th Cir. Ark. 1993) *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 27117 (8th Cir. Oct. 18, 1993) (rejecting plaintiff's expert testimony based on records and data the state highway and transportation department compiled to comply with the safety program statute); Harrison v. Burlington Northern R.R., 965 F.2d 155 (7th Cir. 1992) (letter and report inadmissible); Robertson v. Union Pac. R.R., 954 F.2d 1433 (8th Cir. 1992) (newspaper article based on data compiled by highway department not admissible); Taylor v. St. Louis Southwestern Ry. Co., 746 F. Supp. 50 (D. Kan. 1990); and Martinolich v. Southern Pacific Transp. Co., 532 So. 2d 435, 1988 La. App. LEXIS 2133 (La. App. 1st Cir. 1988), *cert. denied*, 535 So. 2d 745, 1989 La. LEXIS 85 (La. 1989) and *cert. denied*, 490 U.S. 1109, 104 L. Ed. 2d 1027, 1989 U.S. LEXIS 2873, 109 S. Ct. 3164 (1989) (10 Ct. of App., La.).

[53] 621 So. 2d 1174 (La. App. 1993), *writ denied*, 629 So. 2d 358.

[54] Coniker v. State, 181 Misc. 2d 801, 695 N.Y.S.2d 492, 494–96, 1999 N.Y. Misc. LEXIS 385 (Ct. Cl. 1999).

[55] Cal. Dep't of Transp. v. Superior Court of Solano County, 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2, 5, 1996 Cal. App. LEXIS 685 (1996).

[56] Palacios v. La. & Delta R.R., 740 So. 2d 95, 1999 La. LEXIS 1703 (1999).

[57] 215 Mich. App. 20, 544 N.W.2d 709, 1996 Mich. App. LEXIS 11 (1996).

[58] Newsom v. State Dep't of Transp. & Dev., 640 So. 2d 374, 1994 La. App. LEXIS 875 (La. Ct. App. 3d Cir. 1994), *writ denied*, 641 So. 2d 207, 1994 La. LEXIS 1639 (La. 1994).

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

accomplish the foregoing objectives and to conform to the particular needs of each locality.

Section 109(d) provides that on federally funded projects "the location, form and character of informational, regulatory, and warning signs, curbs and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary…." In addition, 23 U.S.C. § 402(a) provides, in part, that each state shall have an approved highway safety program; that the program shall be in accordance with uniform standards promulgated by the Secretary; and that the standards shall include highway design and maintenance, including lighting, marking, surface treatment, and traffic control. It may be noted, however, that 23 U.S.C. § 402(C) states that "[i]mplementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform standard, or with every element of every uniform standard, in every State."

The word "standard" does not seem to be defined in this context and its exact meaning is somewhat unclear. There are several publications incorporated by the federal regulations that may not be intended necessarily to be absolute rules but rather are meant to allow flexibility and the exercise of discretion depending on the individual situation. The federal regulations, moreover, are not confined to "standards" but refer to "standards, specifications, policies, guides, and references" that are acceptable to FHWA.[60]

The C.F.R. lists a wide variety of approved "standards, specifications, policies, guides, and references" applicable to federal-aid projects. Thus, 23 C.F.R. Part 625, "Design Standards for Highways," lists 20 that are applicable to the roadway and appurtenances; 6 for bridges; 7 for traffic control; 3 for materials; and 2 for "other aspects" of highways. Elsewhere in 23 C.F.R. § 626.1. *et seq*., there are regulations relating to pavement design policy. Also, 23 C.F.R. § 1204.4, which contains Highway Safety Program Standard No. 12, "Highway, Design, Construction and Maintenance," provides that: "[e]very State in cooperation with county and local governments shall have a program of highway design, construction, and maintenance to improve highway safety. Standards applicable to specific programs are those issued or endorsed by the Federal Highway Administrator."

Although several courts, as noted herein, have discussed specific publications referenced in the aforesaid provisions of the U.S. Code or federal regulations, no decisions were found that consider the requirements of the federal statutes and regulations requiring conformance to accepted standards. Rather, the courts more often seem to have dealt with allegations that the transportation department failed to comply with the MUTCD. The MUTCD, developed in cooperation with the American Association of State Highway and Transportation Officials (AASHTO) and other groups, has been approved pursuant to 23 U.S.C. §§ 109(b), 109(d), and 402(a) and 23 C.F.R. § 1204.4, by the Federal Administrator as the "national standard"[61] for all highways open to public travel. The MUTCD, moreover, has been adopted in many states pursuant to specific statutory authority.[62] Finally, in the area of design engineering, a guideline to be consulted is the AASHTO "Policy on Geometric Design of Highways and Streets."

B.2. Admissibility of Standards or Guidelines into Evidence

It appears that in a majority of jurisdictions standards and guidelines are admissible pursuant to an exception to the hearsay rule. Rule 803 (18) of the F.R.E. is the exception pursuant to which standards and guidelines are admissible in the federal courts.[63] (The federal rule has been adopted in a number of states.) As with any evidence, for standards or guidelines to be admissible, they must be relevant to the issue being tried. "Testimony is relevant if it has a legitimate tendency to establish or disprove a material fact."[64]

There may be important standards and guidelines sponsored by governmental or nongovernmental associations that are relevant to issues of highway safety. Regardless of whether they have been adopted by statute or regulation, evidence of industry standards is generally admissible as proof of whether the defendant violated its duty of care. If the standard or guideline is relevant, it is likely to be admitted.[65] Although not all jurisdictions will admit evidence on standards and guidelines not having the force of law, the trend certainly appears to favor their admission, assuming, of course, that they are relevant.[66]

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[60] 23 C.F.R. § 625.1, *et seq*.

[61] *Id.*

[62] *See, e.g.,* Florida [FLA. STAT. ANN. § 316.0745]; Illinois 65 ILCS 5/11-301; New York [N.Y. VEH. & TRAF. LAW §1680 (Consol.)]; Ohio [Ohio REV. CODE § 4511.09]; and Texas [TEX. CIV. STAT., art. 6701d, § 29].

[63] Safety codes may also be admissible under the "residual" exception to the hearsay rule under former F.R.E., Rule 803(24), combined in 1997 with Rule 804(b)(5) and transferred to new Rule 807. *See Federal Trial Guide*, Release 6, (Nov. 1998).

[64] Grubaugh v. City of St. Johns, 82 Mich. App. 282, 266 N.W.2d 791 at 793 (1978).

[65] Martin v. Mo. Highway & Transp. Dep't, 981 S.W.2d 577, 582, 1998 Mo. App. LEXIS 1705 (1998), and Johnson v. William C. Ellis & Sons Iron Works, 609 F.2d 820 (5th Cir. 1980) (Pursuant to F.R.E. 803 (18), it was reversible error to exclude certain governmental and nongovernmental safety publications offered by the plaintiff.).

[66] *See* Annot., *Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R. 3d 148 (1974), *§ 11 citing* Grimming v. Alton & S.R. Co., 204 Ill.

Although it appears to be well settled that highway regulations, e.g., the MUTCD, are admissible in evidence,[67] counsel should consult applicable state statutes, the state's evidence code and/or rules, and local decisions.[68] Moreover, the general rule appears to be that safety regulations adopted by a defendant for its own guidance are admissible in evidence.[69] A policy, for example, may be admissible as evidence of standard, custom, or usage in this country, or as evidence that the state failed to meet the safety standards it set for itself by statute.[70] Normally, it must be shown, however, that in the particular state involved that the MUTCD or other standard or guideline has the force of law.[71] In *Comm'n., Dept. of Transp. v. Weller*,[72] although the department's winter maintenance manual was not a formal regulation having the force of law, the transportation department's own witnesses testified about the "definitive authority" of the manual. It was held that the admission of the manual into evidence was not error. Of course, a violation of an allegedly applicable standard or guideline must be shown to be the proximate cause of the accident.[73] When confronted by applicable standards or guidelines having the force of law, it may be difficult to rebut their effect or impact on the case with other evidence. It has been held proper for the trial court to exclude testimony regarding custom and practice concerning a highway project that was at variance with state-promulgated standards; evidence of custom and practice was not relevant because the applicable standards had the effect of law.[74]

If there are applicable standards and guidelines, the transportation department's interpretation of them or regulatory promulgations may be controlling, unless its interpretation is plainly erroneous or is inconsistent with the statute pursuant to which the department's interpretation was promulgated.[75] For example, where "the legislature enacts a statute requiring that an administrative agency carry out specific functions, *i.e.*, to furnish, erect and maintain signs on side highways, that agency cannot validly subvert the legislation by promulgating contradictory rules."[76]

As discussed below, the effect of failing to adhere to a standard or guideline, particularly if it has the force of law and is mandatory, is of particular concern to litigants and transportation lawyers.[77] The fact that a sign, which met fully the requirements of the MUTCD, was posted warning of possible icy conditions on the overpass did not in and of itself absolve the state for permitting ice to exist on the structure. One reason was that the value of the sign as a warning device was diminished by being posted all year.

B.3. Standards or Guidelines as Evidence of the Standard of Care

One purpose for which standards or guidelines are admitted into evidence is to demonstrate what the ap-

App. 3d 961, 562 N.E.2d 1086 (5th Dist. 1990), *app. denied* 153 Ill. Dec. 373, 567 N.E.2d 331 (Association of American Railroad's Interchange Rules); Wilson v. Key Tronic Corp., 40 Wash. App. 802, 701 P.2d 518 (1985); and Frazier v. Continental Oil Co., 568 F.2d 378 (5th Cir. 1978).

[67] Schroeder v. State of Minn., 1998 Minn. App. LEXIS 1436 (1998) (judicial notice could be taken of department's maintenance manual at any stage of the proceedings). *See also* Martin v. Mo. Highway & Transp. Dep't, 981 S.W.2d 577, 581, 1998 Mo. App. LEXIS 1705 (1998) (guidelines adopted by the department prescribing a 30-ft clear zone); and Snyder v. Curran Twp., 167 Ill. 2d 466, 657 N.E.2d 988, 212 Ill. Dec. 643, 1995 Ill. LEXIS 195 (1995) (violation of MUTCD).

[68] *See, e.g.,* CAL. EVID. CODE § 669.1

> (A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669 unless the rule, manual, policy, or guideline has been formally adopted as a statute…ordinance…or regulation.… This section affects only the presumption set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law.).

[69] State v. Watson, 7 Ariz. App. 81, 436 P.2d 175, 180 (1967). The rule that standards or guidelines should be admitted seems particularly apposite when the public agency that adopted them by statute or regulation is the one alleged to have failed to comply with the same. *See* Annot., *Admissibility in Evidence of Rules of Defendant in Action for Negligence,* 50 A.L.R. 2d 16.

[70] Commonwealth Dep't of Transp. v. Weller, 574 A.2d 728 (Pa. Commw. Ct. 1990) (trial testimony referred to departmental manual as the "Bible").

[71] Donaldson v. Dep't of Transp., 236 Ga. App. 411, 511 S.E.2d 210 (1999) (Where the MUTCD was not published by the authority of the Secretary of State, it did not have the force of law.).

[72] 574 A.2d 728 (Pa. Commw. Ct. 1990).

[73] *Id.*; *see* Lumbermens Mut. Cas. Co. v. Ohio Dep't of Transp., 49 Ohio App. 3d 129, 551 N.E.2d 215, 220 (1988).

[74] Carlson v. City Constr. Co., 179 Ill. Dec. 568, 239 Ill. App. 3d 211, 606 N.E.2d 400 (Ill. App. 1st Dist. 1992).

[75] Media v. Dep't of Transp., 641 A.2d 630, 632 (Pa. Commw. Ct. 1994).

[76] Roberts v. Transportation Dep't, 827 P.2d 1178 at 1182, 1183 (Ind. App. 1991), *aff'd* 121 Idaho 723, 827 P.2d 1174 (1992).

[77] *See, e.g.,* Beecher v. Keel, 645 So. 2d 666, 670 1994 La. App. LEXIS 2540 (La. Ct. App. 4th Cir. 1994), *writ denied,* 650 So. 2d 1185, 1995 La. LEXIS 742 (La. 1995), a case involving a collision with a utility pole. The court held that the trial court was correct in admitting into evidence the 1969 "clear zone standards," which were in effect prior to the 1972 widening of the highway in question. At the time the subject utility pole was installed in 1968, there were no specific clear zone requirements. There was no evidence that the highway location was ever reconstructed, and, therefore, the design standards in effect after the initial construction of the highway were inapplicable.

plicable standard of care was on a given issue.[78] For instance, in *Wooten v. S.C. Dept. of Transp.*,[79] the court stated that, although the transportation department agreed that it was bound by specific provisions of the MUTCD, the department did not show that it had complied with the manual's mandate to conduct a thorough investigation concerning changes at an intersection.[80]

Although standards or guidelines may be given considerable weight, they "do not conclusively determine the applicable standard of care, but are merely one kind of evidence to help the jury determine the issue of reasonable care."[81] A standard or guideline may assist the jury in deciding what the standard of care is and whether there has been a negligent deviation from it, even if the standard or guideline were not adopted until 4 months after the accident.[82]

Although more general standards or guidelines are admissible, their generality or the degree of discretion they permit may affect the evidentiary weight that will be given to them. As the court held in *Dillenbeck v. Los Angeles*,[83] discretionary guidelines are admissible, but their probative weight may be less. The *Dillenbeck* case highlights the problem of the admission of more general, discretionary guidelines. The court stated that discretionary standards (e.g., involving the operation of emergency vehicles) were but one component of the standard of care to be considered in light of all the circumstances. However, if the standard or guideline is so general and discretionary that it fails "to particularize the standard of care for the jury," thereby having no probative weight, it may be inadmissible.[84] If the more general standard or guideline is admitted, counsel may have to control its impact through testimony, carefully worded instructions, and argument to the court or jury.[85]

Another issue is the admission of a standard or guideline that, although it is silent on the matter being litigated, is said to have some bearing by implication. In *Grubaugh v. St. Johns,*[86] the defendant argued that provisions of the MUTCD were inadmissible, because the manual was a guide to types of signs and did not indicate whether signs were necessary in any given situation; thus, evidence of the MUTCD was irrelevant, because the issue in the case was whether an intersection was unsafe without signs.

The court ruled, however, that the evidence was proper: "The availability of signs designed for 'T' intersections which would make such intersections more safe would tend to establish that the instant intersection was unsafe without such signs. The trial court did not abuse its discretion."[87]

Even if there has been compliance with mandatory standards, the plaintiff may rely on expert testimony to demonstrate that the public agency did not exercise reasonable care.[88] Moreover, the transportation department's compliance, for example, with the MUTCD does not necessarily absolve it of liability: "while such compliance is a factor in determining the reasonableness of the state's action, it does not shield the state from liability for highway defects."[89]

B.4. Violation of a Standard or Guideline as Negligence *Per Se*

In tort law, the violation of a uniform law or regulation may be evidence of negligence, or may constitute negligence *per se*.[90] Whether the violation of a uniform regulation is negligence *per se* may depend on whether the provision permits the transportation official or employee to exercise his or her discretion or whether the provision is mandatory: "[T]he cases seem to hold that if the code, manual, standard, or guideline permits the exercise of discretion, not directing conformance to a mandatory standard, the alleged deviation

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[78] Standards or guidelines also may be used for impeachment; for example, in the cross-examination of an expert.

[79] 326 S.C. 516, 485 S.E.2d 119, 125, 1997 S.C. App. LEXIS 53 (1997).

[80] *See also* Jeska v. Ohio Dep't of Transp., 1999 Ohio App. LEXIS 4246 (1999) ("[T]he State is liable in damages for accidents which are proximately caused by its failure to conform to the requirements of the [MUTCD].").

[81] 58 A.L.R. 3d at 154.

[82] State v. Watson, 7 Ariz. App. 81, 436 P.2d 175 at 180 (1967) (defendant's own expert testified that "this manual was a 'guide line' in this country").

[83] 69 Cal. 2d 472, 72 Cal. Rptr. 321, 446 P.2d 129, 134 (1968).

[84] Dillenbeck, 446 P.2d at 134, n.3.

[85] 446 P.2d 129.

[86] 82 Mich. App. 282, 266 N.W.2d 791 (1978).

[87] Grubaugh, 266 N.W.2d at 795.

[88] Boccarossa v. Dep't of Transp., 190 Mich. App. 313, 475 N.W.2d 390, 392 (1991). *See,* however, Reid v. State, 637 So. 2d 618 (La. App. 2d Cir. 1994, *writ denied,* 642 So. 2d 198 (held that compliance with MUTCD standards was *prima facie* proof of the road authority's absence of fault.)

[89] Boccarossa, 475 N.W.2d at 392.

[90] PROSSER & KEETON, THE LAW OF TORTS, at 190–92 (4th ed.); Jeska v. Ohio Dep't of Transp., 1999 Ohio App. LEXIS 42 (1999) (failure to follow MUTCD's recommendations); Golembiewski v. Ohio Dep't of Transp., 91 Ohio Misc. 2d 34, 697 N.E.2d 273, 276, 1997 Ohio Misc. LEXIS 322 (1997) (failure to use reflectorized cones in violation of a mandatory requirement in the MUTCD); Gregory v. Ohio Dep't of Transp., 107 Ohio App. 3d 30, 667 N.E.2d 1009, 1011, 1995 Ohio App. LEXIS 4780 (1995) (deviation from a mandatory standard in the MUTCD). *See also* Clemente v. State of Cal., 40 Cal. 3d 202, 219 Cal. Rptr. 445, 707 P.2d 818 (1985) (not error to instruct the jury that a California Highway Patrol officer's violation of a provision of the *California Highway Patrol Accident Investigation Manual* was negligence per se), but see Posey v. State of Cal., 180 Cal. App. 3d 836, 225 Cal. Rptr. 830, (1986) (no mandatory duty imposed because the "guideline" had not been adopted pursuant to the Administrative Procedure Act). *See also* Brelend C. Bowan, *Tort Liability and Risk Management,* TRANSPORTATION RESEARCH CIRCULAR, no. 361, July 1990, *citing* CAL. GOV'T CODE § 810.6 and CAL. EVID. CODE § 669.

may be considered to be some evidence of negligence but [is] not negligence *per se*."[91]

A discretionary, that is to say, a nonmandatory, provision of the MUTCD cannot be the basis of a negligence *per se* jury instruction.[92] Thus, regarding the state's decision not to install a flashing beacon at an intersection, the traffic manual may have served merely as an invitation to exercise discretion when certain conditions were present.[93] The alleged violation of a section of a traffic manual stating that the "effectiveness of any warning sign should be tested periodically under both day and night conditions" was held not to be negligence *per se*.[94] In another case, a traffic manual did not create a mandatory duty to place a variety of signs to warn a driver that he had exited a ramp improperly.[95] The failure to comply with a provision of a highway design manual for the removal of certain culvert markers erected many years prior to the promulgation of the manual did not amount to negligence *per se*. In *Young v. Commonwealth, Dept. of Transp.*,[96] the court stated that, absent regulatory guidance where certain warning signs should be placed, the department's failure to place them more than 3 miles in advance of a construction zone was not negligence *per se*.

There are cases involving guidelines that merely encouraged compliance and in which the agency was not held liable, either because the guidelines were not mandatory or because other policy decisions justified delay in compliance with the suggested standards.[97] In *Scheemaker v. State*,[98] the court drew a distinction between advisory and mandatory signing, stating that: "The posted advisory speed signs are not binding and were customarily ignored, which fact was known to the State.… Under such circumstances, the State's failure to post lower mandatory speed limit signs at this dangerous intersection may be deemed a proximate cause of the accident."[99]

"A defendant is *negligent per se* where a regulation imposes upon the defendant a duty to do or omit to do a definite act.…"[100] Providing signs, for example, may be discretionary, but the type of sign or signal called for may be mandatory. Thus, where the MUTCD calls for traffic signs or signals to be placed and maintained as the public authority "shall deem necessary," and further provides that all such signs or signals shall conform to the manual's specifications, the language "deems necessary" may preclude a finding that a violation is negligence *per se*.[101]

It should be noted that where the standards or guidelines prescribed a mandatory, as opposed to a discretionary course of conduct,[102] liability may be imposed for violating a mandatory requirement. For example, a violation of a provision stating that one "shall" do something may establish a duty, the breach of which is negligence *per se*.[103] Moreover, the use of the word "should"[104] or "may"[105] does not create a duty and/or may show that the transportation department was permitted to exercise its discretion concerning the decision in dispute.

If the provision is deemed to be mandatory, then a violation may be held to be negligence *per se*.[106] It is

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[91] JONES, Legal Research Digest, at 4

[92] Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330, 338 (1994), (*overruling* Curtis v. Canyon Highway Dist. No. 4, 122 Idaho 73, 831 P.2d 541); and Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (Idaho 1993).

[93] Bergeron v. City of Manchester, 140 N.H. 417, 666 A.2d 982, 985 (1995). *See also* Donaldson v. Dep't of Transp., 236 Ga. App. 411, 511 S.E.2d 210 (1999) (In a case involving alleged failure to maintain traffic control devices at an intersection during a road resurfacing project, the plaintiff failed to prove that the MUTCD established mandatory regulations for purposes of negligence *per se*.).

[94] Perkins v. Ohio Dep't of Transp., 65 Ohio App. 3d 487, 584 N.E.2d 794, 799 (10th Dist. 1989), *cause dismissed*, 57 Ohio St. 3d 612, 566 N.E.2d 673, *reh'g denied*, 58 Ohio St. 3d 711, 570 N.E.2d 281.

[95] Villarreal v. State, 810 S.W.2d 419, 420 (Tex. App. 1991), *reh'g denied*.

[96] 744 A.2d 1276, 1279, 2000 Pa. LEXIS 168 (2000).

[97] McEwen v. Burlington N. R.R., 494 N.W.2d 313 (Minn. Ct. App. 1993) (corridor review system); Hennes v. Patterson, 443 N.W.2d 198 (Minn. Ct. App. 1989) (snow removal policy); Balsach v. Ohio Dep't of Transp., 67 Ohio App. 3d 582 (1990); Bellnoa v. Austin, 894 S.W.2d 821 (Tex. App., Austin, 1995) (MUTCD); Johnson v. Tex. Dep't of Transp., 905 S.W.2d 394 (Tex. App., Austin, 1995) (MUTCD); *but see* Pullen v. Nickens, 310 S.E.2d 452 (Va. 1983) (error to admit Va. DOT manual, *Typical Traffic Control for Work Area Protection).*

[98] 125 A.D.2d 964, 510 N.Y.S.2d 359 (1986)*, aff'd* 70 N.Y.2d 985, 526 N.Y.S.2d 420, 521 N.E.2d 427 (1988).

[99] 510 N.Y.S.2d at 360.

[100] Kocur v. Ohio Dep't of Transp., 63 Ohio Misc. 2d 342, 629 N.E.2d 1110, 1112 (1993) (Noncompliance with the MUTCD may be negligence *per se*.).

[101] Chavez v. Pima County, 107 Ariz. 358, 488 P.2d 978, 982 (1971).

[102] Semadeni v. Ohio Dep't of Transp., 75 Ohio St. 3d 128 (1996) (protective fencing policy); Treese v. City of Delaware, 95 Ohio App. 3d 536, 642 N.E.2d 1147 (1994) (agency with directive regarding upgraded guardrails); Maresh v. State of Nebraska, 241 Neb. 496, 489 N.W.2d 298 (1992) (MUTCD); Lumbermens Mutual Casualty Co. v. Ohio Dep't of Transp., 49 Ohio App. 3d 129, 551 N.E.2d 215 (1988) (MUTCD); Kitt v. Yakima County, 93 Wash. 2d 670, 611 P.2d 1234 (1980) (MUTCD); and Nusbaum v. County of Blue Earth, 422 N.W.2d 713 (Minn. 1988) (MUTCD).

[103] *See* Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 274, 1996 Minn. App. LEXIS 882 (1996) (court stated that the use of the term "shall" in a provision in the state MUTCD did not necessarily create a ministerial duty).

[104] Yager v. State of Mont., 853 P.2d 1214 (Mont. 1993).

[105] Esterbrook v. State, 863 P.2d 349 (Idaho 1993).

[106] Weston v. Washington Metro. Area Transit Auth., 316 U.S. App. D.C. 32, 78 F.3d 682 (1996); Baughman v. State, Dep't of Transp. & Dev., 674 So. 2d 1063 (La. App. 2d Cir.

proper, therefore, for the court to give a negligence *per se* instruction based on a statutory mandate that was violated. There may be a duty to erect warning signs in compliance with traffic regulations, the violation of which is negligence *per se*;[107] also, the defendant's failure to meet the requirements of the MUTCD by posting construction approach signs may constitute negligence *per se*, not merely some evidence of negligence.[108]

In sum, there are a wide variety of laws, regulations, standards, and guidelines applicable to the design and maintenance of highways. In addition, transportation departments often establish their own standard operating policies or procedures that are applicable to the issue at hand. Even standards and guidelines not having the force of law, which are sponsored by governmental or nongovernmental associations, may be admissible. The trend certainly favors their admission into evidence, assuming they are relevant and the proper foundation is established. If admitted, the standard or guideline is at least some evidence of the standard of care to which the transportation agency should have adhered. In some instances, as explained, the violation of a mandatory standard or guideline having the force of law may constitute negligence *per se*. Testimony may be required or be desirable to establish whether, under the circumstances, the provision in question is discretionary or mandatory.

C. ADMISSIBILITY OF EVIDENCE OF PRIOR ACCIDENTS, POST-ACCIDENT REMEDIAL MEASURES, EXPERT OPINION, AND ACCIDENT RECONSTRUCTION

C.1. Introduction

Questions arise regarding the admissibility of evidence of prior accidents or evidence of remedial measures undertaken after an accident to prove what the highway conditions were at the time of the accident. Furthermore, although expert testimony may be offered on a variety of issues, there may be an attempt to use an accident reconstructionist. The admissibility of such types of evidence is considered in this section.

C.2. Admissibility of Evidence of Prior Accidents or of Post-Accident Remedial Measures

C.2.a. Evidence of Prior Accidents

If the plaintiff proves that the conditions were substantially the same at the time of any prior accidents and when his or her accident occurred, then evidence of the prior accidents at the same site may be admissible, usually for two purposes:[109] that the highway was defective at the time of the plaintiff's injury and/or that the defendant had actual or constructive notice of the defect.[110]

As stated in one treatise, for prior accident evidence to be admissible,

> [t]he evidence must reasonably tend to show that the circumstances were substantially the same as at the time of the accident complained of, and the condition or thing shown to be the common cause of danger in such accidents must be the condition or thing contributing to the danger of the accident complained of.

The question of the similarity of conditions is within the discretion of the trial court, and its determination is conclusive, if there is evidence to support it.[111]

Thus, the evidence of prior accidents to prove a dangerous condition may be presented to the jury only when the trial court is satisfied that the accident occurred under substantially the same circumstances.[112] However, in some jurisdictions the courts have ruled that proof of similar occurrences in the same vicinity and at other times is inadmissible.[113]

On the issue of "notice," the rule is different. In *Taylor-Rice v. State*,[114] the court held that, as for prior accidents and notice to the State, the requirement of "similar circumstances" was not intended to mean that a prior occurrence needed to be identical or exactly similar, only that it be generally the same. Thus, the

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1996), *reh'g. denied*, 681 So. 2d 1260 (1996); and Gregory v. Ohio Dep't of Transp., 107 Ohio App. 3d 30, 667 N.E.2d 1009, 1011 (10th Dist. 1995).

[107] Snyder v. Curran Township, 212 Ill. Dec. 643, 167 Ill. 2d 466, 657 N.E.2d 988 (1995), *on remand*, 666 N.E.2d 818, *appeal denied*, 671 N.E.2d 743.

[108] Patton v. Cleveland, 95 Ohio App. 3d 21, 641 N.E.2d 1126, 1131 (8th Dist. 1994).

[109] 40 C.J.S., *Highways,* § 272, at 135–36.

[110] Rodriguez v. Loxahatchee Groves Water Control Management Dist., 636 So. 2d 1348, 1349 (Fla. Dist. Ct. App. 1994), ("[S]ufficiently similar other accident evidence, not too remote in time, is relevant and admissible to show the existence of a dangerous condition and knowledge or notice thereof."), *review denied*, 649 So. 2d 233, 1994 Fla. LEXIS 1689 (Fla. 1994); Hampton v. State Highway Com., 209 Kan. 565, 498 P.2d 236, 1972 Kan. LEXIS 609 (1972) (accumulation of water on highway was highway defect under the statute, evidence of prior accidents and general traffic conditions in the area was relevant both to the existence of the defect and fact of notice), (*superseded by statute as stated in* Force v. City of Lawrence, 17 Kan. App. 2d 90, 838 P.2d 896, 1992 Kan. App. LEXIS 336 (1992), *review denied*, 251 Kan. 937 (1992).

[111] PATRICIA D. KELLY, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 425.1, at 451–52 (3d ed.) (footnotes omitted).

[112] Halum v. Palm Beach County, 571 So. 2d 515, 517 (Fla. Dist. Ct. App. 4th Dist. 1990) (Where a driver lost control of an automobile that plunged into a canal, it was proper to admit evidence of a prior accident occurring nearby under similar conditions.) *See*, however, Hall v. Burns, 213 Conn. 446, 569 A.2d 10 (1990) (evidence of a prior accident inadmissible where plaintiff failed to prove that alleged cause of accident (overgrown brush) was same as a prior accident.).

[113] *See* KELLY, *supra* note 111 at 445.

[114] 91 Haw. 60, 979 P.2d 1086, 1105, 1999 Haw. LEXIS 258 (1999), *quoting* SEN. SPEC. COMM. REP. NO. S5-86 in 1986 SPECIAL SESSION SENATE JOURNAL at 28–29.

State had reasonable notice of a defective highway where the accident at issue occurred in the same vicinity 7 years earlier when the same guardrail was present.[115]

Indeed, the plaintiff may be allowed to offer evidence of prior accidents extending over a number of years. In *Kerns v. State,*[116] the court held that prior accidents in the previous 10 years had put the State on notice of a dangerous condition and that the State had failed to study it or devise a plan to remedy the condition. It has been held that evidence of 19 prior accidents at and near an intersection was admissible even though some of the accidents were dissimilar to the decedent's accident.[117] In *Capo v. State Dept. of Transp.,*[118] the court held that the plaintiffs should have been allowed to offer evidence regarding prior accidents in a 5-year period, as well as the testimony of eyewitnesses who had regularly seen accidents at the accident location. The evidence was relevant on the issue of whether the transportation department negligently maintained the exit ramp in question by allowing potholes to exist and foliage to obscure a driver's view. Some courts have diverged on whether evidence of the absence of prior accidents may be used to show that the site of the accident was not a dangerous condition. In one case, it was permissible to show "[t]he statistical facts...that in the course of four and one-half years there was only one accident per 685,000 cases."[119] On the other hand, another court has held the reverse, that the absence of prior accidents or complaints is not admissible to prove lack of notice of a dangerous condition.[120]

If the transportation department has or receives notice of a potential defective highway location, it has a duty to investigate.[121] Evidence of prior accidents at the accident location and of the department's method of determining whether accidents were caused by a highway defect may be admissible on whether the defendant fulfilled its duty to investigate.[122]

C.2.b. Admissibility of Remedial Measures Taken After the Accident

There is a split of authority also on the admissibility of repairs made by the department after an accident.[123] According to an extensive article, "[a]lmost all American jurisdictions adhere to the rule that evidence of repairs, precautions, or like remedial measures taken after an accident may not be admitted as proof of antecedent negligence...."[124] However, the evidence may be admitted for other purposes,

> such as to rebut or impeach a witness; to explain measurements, maps, photographs, and the like; to show the conditions existing at the time of the accident; to prove the cause of the injury; to establish the defendant's control of the premises or instrumentality involved; and to demonstrate the feasibility of taking certain precautions. This is the approach taken by Rule 407 of the Federal Rules of Evidence.[125]

Evidence of measures taken after an accident to remediate a hazardous location, although not admissible as proof of "antecedent negligence," may be admissible to prove ownership or control, to establish feasibility of precautionary measures when the same are in dispute, or for impeachment of witnesses or as rebuttal evidence.[126]

Similarly, in *Macon County Comm'n. v. Sanders*,[127] it was ruled that evidence of subsequent repairs should have been allowed. The Supreme Court of Alabama stated that

> [t]here was evidence that the defendants had received complaints about the condition of the road at the site of the accident and that they had failed to act on the complaints.[128]
>
> Evidence of subsequent remedial measures is not admissible to show a defendant's prior negligence.... In this case,

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[115] Taylor-Rice, 979 P.2d at 1105–06.

[116] 226 A.D.2d 1046, 641 N.Y.S.2d 775, 1996 N.Y. App. Div. LEXIS 5498 (1996).

[117] Pike v. S.C. Dep't of Transp., 332 S.C. 605, 506 S.E.2d 516, 1998 S.C. App. LEXIS 122 (1998).

[118] 642 So. 2d 37 (Fla. App. 1994), *review denied*, 651 So. 2d 1193, 1995 Fla. LEXIS 240 (Fla. 1995).

[119] Callahan v. City and County of San Francisco, 15 Cal. App. 3d 374, 93 Cal. Rptr. 122 (Cal. App., 1st Dist., 1971).

[120] Commonwealth, Dep't of Transp. v. Weller, 133 Pa. Commw. 18, 574 A.2d 728, 1990 Pa. Commw. LEXIS 243 (1990), *reh'g denied*, 1990 Pa. Commw. LEXIS 334 (Pa. Commw. Ct. June 6, 1990). Thus, where the DOT sought a new trial because the trial court excluded testimony "as to the absence of complaints and previous accidents at the site of the decedent's accident, such evidence was inadmissible where the DOT did not 'show that similar conditions existed at the time to which the offered testimony related....'"

[121] Hall v. Burns, 213 Conn. 446, 569 A.2d 10, 29 (1990). The court agreed that the proffered evidence of a prior accident was irrelevant and that the jury was properly charged on the defendant's duty to investigate.

[122] Laitenberger v. State, 57 N.Y.S.2d 418, 421–22 (Ct. Cl. 1945) (The claimants' request was proper for any accident reports preceding the accident by 5 years and after the time of the accident when they sought, *inter alia*, to discover any steps that were taken to avoid accidents or to give notice or warning of the condition of that highway location.).

[123] 40 C.J.S., *Highways*, § 272.

[124] Annot., *Admissibility of Evidence of Repairs, Change of Conditions, Or Precautions Taken After Accident—Modern State Cases*, 15 A.L.R. 5th 119. By comparison, it may be noted that in Dec. 1997, Federal Rule of Evidence 407 was amended to prohibit evidence of subsequent remedial measures to prove liability in products liability cases. *See Federal Trial Guide* § 23.30[2].

[125] 15 A.L.R. 5th at 158.

[126] Ielough v. Mo. Highway & Transp. Comm'n, 972 S.W.2d 563, 566, 1998 Mo. App. LEXIS 961 (1998).

[127] 555 So. 2d 1054 (Ala. 1990).

[128] Macon County Comm'n, 555 So. 2d at 1056.

> however, the plaintiff was...offering the evidence to show.. that the defendants did not intend to improve the safety of the road and thus that their conduct was wanton.[129] (Citation omitted).

C.3. Admissibility of Expert Testimony and Accident Reconstruction Evidence

C.3.a. Use of Expert Testimony in General

Expert testimony may be received on issues of safety or the dangerous character of a highway location. Expert testimony is not permitted when the subject matter is within the practical experience of the jurors.[130] On occasion, nonexpert testimony may be received regarding the "safety or danger of a particular place or appliance, where, from familiarity with it or by reason of having seen it, [the witness has] gained a personal knowledge of the matter...."[131] However, it has been held that the testimony of a deputy sheriff, who was not qualified as an expert witness, was inadmissible concerning the cause of an accident.[132]

Aside from the use of an expert witness in accident reconstruction, discussed next, experts may be called to express an opinion as to the cause of an accident,[133] and, of course, on damages. Even where there is admitted compliance with an applicable standard on highway safety, the plaintiff may be able to use expert testimony to establish whether the highway agency has adhered to a minimum standard of care under the circumstances. For instance, in *Salas v. Palm Beach Board of County Comm'rs.*,[134] the court reversed a directed verdict for the defendant County in connection with an issue arising under the Manual on Traffic Control and Safe Practices adopted by the County.[135] Apparently it was agreed that the County only had to conform to the minimum standard of care established by the manual, but there was disagreement over how the minimum standards were to be proved. The court ruled that the plaintiffs had a right to introduce testimony of an expert to the effect that the governmental agency did not adhere to a reasonable standard of care in supervising traffic at the intersection, notwithstanding the County's compliance with mandatory provisions of the applicable manual.

A state highway employee may not testify as an expert in a case without having the proper qualifications and without being identified as an expert prior to trial. Testimony from an employee of the agency that a road is a "major arterial highway," a "limited access highway," or that the right-hand lane of the road is an "acceleration, deceleration lane for ingress" are technical matters that may require the testimony of an expert. The testimony is not factual in nature but concerns "technical terms about which the average layman cannot testify based on his or her own perceptions and experiences."[136]

The F.R.E., Rule 702, provides that expert or opinion evidence is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Under the federal rule, and presumably under many or most state rules of evidence, "an expert may be employed if the expert has specialized knowledge that would be helpful in deciding the case correctly, and if the expert's testimony is sufficiently reliable to assist the fact-finder."[137]

Recent cases decided by the U.S. Supreme Court, such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[138] give the trial judge in federal cases considerable discretion to reject expert testimony that, based on the application of several factors, the court determines to be unreliable. The *Federal Rules of Evidence Manual* discusses the U.S. Supreme Court's decision in *Daubert*, which requires that "a Trial Judge must evaluate the proffered testimony to assure that it is at least minimally reliable...."[139] Under the test described in *Frye v. United States*,[140] scientific evidence could be admitted if it had gained general acceptance in the

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[129] *Id*. at 1058 (citations omitted). *See also* Annot., *Admissibility of Habit or Routine Practice Under Uniform Evidence Rule 406*, 64 A.L.R. 4th 567.

[130] *See* 31A AM. JUR. 2D *Expert and Opinion Evidence* §§ 350, at 351.

[131] *See id*. § 353.

[132] State Dep't of Transp. v. Hoffman, 721 N.E.2d 356, 1999 Ind. App. LEXIS 2221 (1999).

[133] Under Federal Rules of Evidence, Rule 704(a), with one exception stated in subpart (b), "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See* Miksis v. Howard, 106 F.3d 754 (7th Cir. 1997) (held, no abuse of discretion in permitting a sleep deprivation expert to testify that defendant driver was fatigued and that sleep deprivation was primary cause of the accident). *See also* Childers v. Phelps County, 252 Neb. 945, 568 N.W.2d 463 (1997) ("[O]pinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," *citing* NEB. EVID. R. 704; NEB. REV. STAT 27-704).

[134] 484 So. 2d 1302 (Fla. Ct. App. 4th Dist. 1986) (alleged that accident was caused by county blocking the left turn lane and failing to prevent (or give warning to) eastbound motorists from turning left onto oncoming traffic), *(approved* 511 So. 2d 544, 1987 Fla. LEXIS 2059 (Fla. 1987)).

[135] The issue concerned what evidence would be admissible to prove the minimum standards set by the manual. The trial court precluded the plaintiffs' expert from testifying on the minimum standard of care set by the manual.

[136] Mitchell v. Montgomery County, 88 Md. App. 542, 552, 596 A.2d 93 (1991).

[137] STEPHEN A. SALTZBURG ET AL., 2 FEDERAL RULES OF EVIDENCE MANUAL, at 1218.

[138] 509 U.S. 579 (1993).

[139] SALTZBURG ET AL, *supra* note 137, at 1224.

[140] 293 F. 1013 (D.C. Cir. 1923).

particular field to which it belonged.[141] As the evidence text discusses, the *Daubert* decision rejected the Frye "general acceptance" test:

> The majority in *Daubert* set forth a five-factor, non-dispositive, nonexclusive, "flexible" test to be employed by the Trial Court under Rule 702 in determining the "validity" of scientific evidence. These factors are:
>
> (1) whether the technique or theory can be or has been tested;
>
> (2) whether the theory or technique has been subject to peer review and publication;
>
> (3) the known or potential rate of error;
>
> (4) the existence and maintenance of standards and controls; and
>
> (5) the degree to which the theory or technique has been generally accepted in the scientific community.[142]

The manual discusses *post-Daubert* cases and certain "red flags," ("factors other than those listed in the *Daubert* opinion that might indicate that an expert's opinion is unreliable"[143]), and observes that "[m]any of the reported cases on scientific experts after *Daubert* have resulted in exclusion of the proffered expert testimony."[144] The manual noted also, however, that "[o]ne of the questions left open by *Daubert* is whether its standards apply to expert testimony that does not purport to be scientifically based."[145]

In *General Electric Co. v. Joiner*,[146] the Court held that a federal district court may reject expert scientific evidence when the court's independent review of the underlying data reveals significant discrepancies between the data relied on by the expert and the conclusions the expert supposedly has drawn from that data.[147]

In 1999, in *Kumho Tire Co., Ltd. v. Carmichael*,[148] the Court enlarged the trial judge's gatekeeping function under F.R.E. Rule 702 from scientific experts to all types of experts. Even prior to the Supreme Court's *Kumho Tire* decision, there was authority that *Daubert* applied to "most areas of non-scientific expert testimony, such as accountancy or evaluation of customary industry practices"; moreover, some courts were applying the *Daubert* standards to soft science and non-scientific expert testimony.[149] Transportation attorneys will need to consult their own states' rules of evidence and case law on the permissible use of experts in their jurisdiction in light of the *Daubert* and *Kumho Tire* decisions.[150] In *State Dept. of Transp. v. Hoffman*,[151] an appellate court in Indiana, following *Daubert*, recognized that the trial judge functions as a "gatekeeper" in the admission of proferred expert testimony.

C.3.b. Admissibility of Accident Reconstruction Evidence

There appears to be a split of authority also on the admissibility of expert testimony to reconstruct how an accident occurred. As noted in one treatise, "[m]any courts look with disfavor on attempts to reconstruct how a traffic accident occurred. In some cases, it has been held that such expert opinions should be excluded in the instances where direct proof on the subject exists; and, in other cases, that such fact is not controlling."[152]

The *Federal Rules of Evidence Manual* includes a discussion of several accident reconstruction cases: *Habecker v. Clark Equip. Co.,*[153] *Guillory v. Domtar Indus. Inc.*,[154] *Barnes v. General Motors Corp.*,[155]

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[141] SALZTBURG ET AL, *supra* note 137, at 1224.

[142] *Id*. at 1224–25.

[143] *Id.* at 1226–37.

[144] *Id*. at 1237.

[145] *Id*. at 1241.

[146] 118 S. Ct. 512, 522 U.S. 136 (1997).

[147] The standard of review of the district court's decision on the admission of the expert testimony is the "abuse of discretion" standard. General Electric Co., 118 S. Ct. at 517.

[148] 119 S. Ct. 1167, 1999 LEXIS 2189 (1999). The case arose out of an accident caused when a tire blew out causing a minivan to overturn. The plaintiffs based their case primarily on the testimony of an expert in tire failure analysis. The district court excluded the expert's testimony because his methodology failed to satisfy Rule 702, FED. R. EVID; there were insufficient indications of its reliability based on the four factors addressed in Daubert. The Eleventh Circuit reversed, holding that Daubert was limited to the "scientific" context, but the Supreme Court reversed. In its decision, the Court ruled that Daubert applied to all expert testimony.

[149] SALZTBURG ET AL, *supra* note 137, at 1242. *See* R. Piller, *Coping With Kumho, LITIG. NEWS*, (vol. 24, no. 6 (1999).

[150] After the *Daubert* case, it was promptly noted that "[a]lthough the facts in *Daubert* involved novel scientific evidence, lawyers [were] now using *Daubert* to challenge the bases of scientific testimony in all sorts of cases, including…personal injury. Lawyers [were] also invoking *Daubert* in state courts, in an effort to extend the influence of this federal evidence decision." *Where Does the Supreme Court's Opinion in Daubert v. Merrell Dow Go From Here?*, LITIG. NEWS, vol. 24, no. 3, at 12 (1999). *See also* R.W. Littleton, *Supreme Court Dramatically Changes the Rules on Experts,* N.Y. ST. BAR J. vol. 71, no. 6 at 8 (1999) (article suggests a checklist for qualifying experts under Kumho Tire) and E.E. Cavanagh, *Decision Extends Daubert Approach to All Expert Testimony,* N.Y. ST. BAR J., vol. 71, no. 6, at 8 (1999).

[151] 721 N.E.2d 356, 359, 1999 Ind. App. LEXIS 2221 (1999).

[152] KELLY, *supra* note 111 at § 431.3, citing cases on both sides of the issue from many jurisdictions.

[153] 36 F.3d 278 (3d Cir. 1994) (decedent crushed by forklift; although defense verdict remanded for a new trial, court agreed with trial court's exclusion of testimony of plaintiff's expert), (*cert. denied*, 514 U.S. 1003, 131 L. Ed. 2d 195, 1995 U.S. LEXIS 1843, 115 S. Ct. 1313 (1995)).

[154] 95 F.3d 1320 (5th Cir. 1996) (excluding testimony by defendant's expert under *Daubert*).

[155] 547 F.2d 275 (5th Cir. 1977) (A pre-*Daubert* case holding that it was error to allow plaintiff's expert to testify.).

Bauman v. Volkswagenwerk, A.G.,[156] *Robinson v. Missouri Pac. R.R.*,[157] and *Jackson v. Fletcher*.[158]

In *Hollingsworth v. Bovaird Supply Co.*,[159] overruling prior decisions, the Supreme Court of Mississippi held:

> [W]e disagree that allowing an expert accident reconstructionist to testify as to the post impact reaction of vehicles is an usurpation [of the jury's function]. An expert's qualifications and the basis of his conclusions are open to cross-examination. The jury, as is their province, may reject the expert's testimony just as they might any other witness.... *[A] majority of American jurisdictions now permit the use of expert accident reconstruction opinion.* (Emphasis supplied.)

In a products liability action, evidence was allowed for the purpose of contradicting a motorist's version of how an accident had occurred: "[t]he standard for admissibility of demonstration evidence does not require precise replication."[160]

In *Childers v. Phelps County*,[161] the court noted that there was no dispute regarding the expert's qualifications to testify as an accident reconstructionist. The expert was, among other things, a civil engineer with a background in traffic safety and engineering and a consultant on projects dealing with traffic safety, signaling, and safety programs. The expert had testified that the County failed to act reasonably and prudently with regard to warning motorists of the hazardous corner in question, because it failed to provide at the location an advance warning turn sign, a speed plate under the sign indicating the safe speed for the curve, and chevrons on the back side of the curve to show the location of the curve.

The appeals court, reversing the trial court's dismissal of the plaintiff's case, ruled that the opinion testimony was not objectionable because it embraced an ultimate issue: "[The expert's] opinion is not inadmissible because it embraces the ultimate issue as to the proximate cause of the accident."[162] Moreover, the expert's opinion had probative value, because he "was in possession of such facts as to enable him to express a reasonably accurate conclusion as to the proximate cause of the accident."[163] The court did observe that the expert's opinion should have been expressed "in terms of 'a' proximate cause rather than 'the' proximate cause of the accident...."[164]

If the court permits the expert to testify, for example regarding the re-creation of an accident, there are a variety of ways to use the expert effectively. Besides rendering an opinion on the cause or causes of the accident, the expert may be used in other, more limited ways, such as to explain the conditions at the time of the accident or to illustrate graphically some aspect of the proof or defense.

In addition, one may even employ both the expert witness and a view of the scene of the accident. An illustrative case is one from Michigan. In *Gorelick v. Michigan Dep't of State Highways & Transp.,*[165] the state highway agency argued on appeal that the trial court erred in viewing the scene with the expert and counsel and in admitting into evidence a motion picture simulating the accident. As to the first issue, the court noted that the plaintiff's expert accompanied the trial court to the scene and used various distance markers to demonstrate that objects in the passing lane were not visible at certain distances important to the scenario of the accident. The court held that the view, which was not prejudicial, was necessary to resolve conflicting testimony concerning sight distances open to each motorist.[166]

As for the movie, if it portrayed conditions almost identical to those prevailing at the time of the accident, it was admissible for the purpose of re-creating the scene of the accident. Although conditions were different in the *Gorelick* case, the film was admissible on the ground that it was not a re-creation of the accident "but instead merely [used] to illustrate certain general principles.... The film was offered and received for the limited purpose of 'showing the amount of time (oncoming) cars disappear from view' at the intersection...."[167]

A question frequently arises regarding the admissibility of testimony by a police officer who investigated an accident. In *Goren v. United States Fire Ins. Co.*,[168] the court held that a nonexpert witness may not render opinions on the cause of a traffic accident that he did not witness, even if elicited on cross-examination. Although the state trooper who testified in the case was not an accident reconstruction expert and was never received as one, he was permitted on cross-examination to testify concerning a diagram that he had drawn of the accident scene. The court stated that the trooper's opinions were the type that "required an expertise in accident reconstruction."[169]

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[156] 621 F.2d 230 (6th Cir. 1980) (expert testimony allowed based on simulated reproductions of an accident).

[157] 16 F.3d 1083 (10th Cir. 1994) (A close case in which the court approved the use of a video animation.).

[158] 647 F.2d 1020 (10th Cir. 1981) (error to admit testimony when the circumstances of the experiments were different from those of the accident).

[159] 465 So. 2d 311, 314-15 (Miss. 1985).

[160] Ducharme v. Hyundai Motor America, 45 Mass. App. Ct. 401, 698 N.E.2d 412, 417, 1998 Mass. App. Lexis 967 (1998).

[161] 252 Neb. 945, 568 N.W.2d 463 (1997). In *Childers* a passenger sued the county alleging that inadequate signage had contributed to the driver's failure to negotiate a highway curve successfully.

[162] Childers, 568 N.W.2d at 468.

[163] *Id*. at 469.

[164] *Id*.

[165] 127 Mich. App. 324, 339 N.W.2d 635 (1983).

[166] Gorelick, 339 N.W.2d at 641.

[167] *Id*.

[168] 113 Md. App. 674, 688 A.2d 941, 1997 Md. App. LEXIS 26 (1997), *cert. denied*, Genstar Stone v. Goren, 346 Md. 27, 694 A.2d 949, 1997 Md. LEXIS 163 (1997).

[169] 688 A.2d at 947.

A police officer or a state highway agency employee may give opinion testimony if properly qualified. "[I]t is clear that a police officer's testimony as to the cause of the accident, based on training, experience in investigation, etc., would be considered accident reconstruction testimony, allowable as expert testimony under Rule 702...*if the officer is properly qualified*."[170] It is reversible error if the police officer is not offered as an expert but then is questioned as to the primary contributing factor to the accident, which he did not witness but investigated afterward. In sum, "[a] police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert."[171]

Lastly, experts must testify on matters within the realm of their expertise. An accident reconstruction expert, for example, may not be qualified to interpret photographs of the accident scene taken by the police.

> [The expert] conceded that he could not differentiate between lights on the back of the Kirkland truck and glare caused by the flashbulbs of the camera.... We agree with the trial judge that [the expert's] training and work experience did not qualify him to testify as an expert in the field of photography.[172]

Expert testimony may be received at trial for numerous purposes if the issue is beyond the practical experience or knowledge of the jurors. However, at least for the federal courts, the rules on the admission of expert testimony are in a state of flux since the U.S. Supreme Court's decisions in the *Daubert* and *Kumho Tire* cases. The rules may change in state courts as well. Depending on the jurisdiction, testimony by an accident reconstructionist may be admissible. Police officers and highway employees are not necessarily qualified to give opinion testimony simply by virtue of their positions. Depending on the issue, it may be necessary to qualify them as experts to permit them to give testimony that is normally within the province of experts.

D. THE TRIAL

There are numerous sources on trial strategy as it relates to opening statements, direct and cross-examination, and closing arguments or summations. In the writer's opinion, two important considerations are preparation in general and demonstrative evidence in particular. Usually, counsel may use demonstrative evidence even in the opening statement. If there is some doubt, counsel may want to request a pre-trial ruling, for instance, at a pre-trial conference. Nothing conveys one's theory more clearly than a well-drawn diagram, a large photograph, a graph, or an enlargement of a document. It may be wise, however, not to overdo it, nor should one attempt to use demonstrative evidence that either is too complex or that will be subject to attack later because of the manner in which the facts eventually developed at trial. One would not want to rely on demonstrative evidence that later conflicts with one's own case. Counsel should have confidence in the accuracy of the demonstrative evidence to be used at trial lest its credibility and his or her own credibility be undermined by the opposing counsel at trial.

The preceding section discussed a variety of issues relevant to the state's potential tort liability. Also discussed were statutes in some jurisdictions regarding statutory caps or limits on damages and the non-availability of punitive damages or pre-judgment interest. The applicable statutes should be consulted not only from the viewpoint of defenses to assert both prior to and during the trial, but also for any post-trial motions.

Because the state transportation department is the defendant, there are unique aspects in a tort action against it. Some of the uniqueness is derived from legislation or from judicial precedent allowing suit to be brought against the state, from the array of federal and state statutes and regulations or standards and guidelines that may apply, and/or from the issues arising out of the state's duty or discretion whether or not to take certain action in regard to a matter of highway safety. As always, a full appreciation of the facts is extremely important; however, in a case involving tort actions against a state transportation department, legal research on the issues identified in this text, as well as on other issues in the experience of attorneys handling such litigation, is vitally important. The state transportation department is not just any alleged tortfeasor.

The foregoing section addresses several aspects of preparing successfully for trial, including the need to investigate the claim carefully; to view the scene, possibly with an expert; to review the tort claims act for compliance with procedural provisions; and to consider whether there are defenses based upon the transportation department's exercise of discretion or based upon other, specific provisions of the tort claims act. As always, it is important to assess whether under the circumstances the department had a duty to the plaintiff. The section has noted the importance of other factors, such as whether there are standards applicable to the highway where the accident occurred, and the planning and use of demonstrative evidence at trial.

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[170] Roberts v. Grafe Auto Co., 701 So. 2d 1093, 1099 (Miss. 1997), (emphasis in original), *reh'g denied*, 702 So. 2d 133, 1997 Miss. LEXIS 587 (Miss. 1997).

[171] Gulledge v. McLaughlin, 328 S.C. 504, 492 S.E.2d 816, 818 (Ct. App. 1997), *reh'g denied*, (Nov. 20, 1997), *quoting* State v. Kelly, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985).

[172] Montgomery Cablevision Pshp. v. Beynon, 116 Md. App. 363, 696 A.2d 491, 509 (1997), *cert. granted*, 347 Md. 683, 702 A.2d 291, 1997 Md. LEXIS 614 (1997).