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Volume 4

Tort Liability of Highway Agencies

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TORT LIABILITY OF HIGHWAY AGENCIES

Larry W. Thomas
Attorney at Law

James B. McDaniel, The Transportation Research Board's Counsel for Legal Research Projects, coordinated this research report and served as content editor.

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CONTENTS

PREFACE

Originally, there were 13 articles in *Selected Studies in Highway Law* (SSHL) on tort liability arising out of state highway activities, including design, construction, and maintenance. Although many articles were supplemented over the years, new cases and developments needed inclusion, and some of the existing material needed revising. As always, the objective is to keep the text current and meaningful for administrators, practitioners, and others concerned with transportation tort liability.

The Tort volume of *Selected Studies in Highway Law* consisted of the following articles and supplements:

• *Liability of State Highway Departments for Design, Construction, and Maintenance Defects*, by Larry Thomas. Supplemented by *Legal Research Digest* (LRD) No. 2, *Supplement to Liability of State Highway Departments for Design, Construction, and Maintenance Defects,* by John C. Vance (Dec. 1988).

• *Personal Liability of State Highway Department Officers and Employees*, by John C. Vance. Supplemented by LRD No. 4, *Supplement to Personal Liability of State Highway Department Officers and Employees,* by John C. Vance (Dec. 1988).

• *The Public Duty Defense to Tort Liability*, by Kenneth G. Nellis, LRD No. 17 (Dec. 1990).

• *Liability of State and Local Governments for Snow and Ice Control* by Larry W. Thomas. Supplemented by LRD No. 9, *Supplement to Liability of State and Local Governments for Snow and Ice Control*, by John C. Vance (Feb. 1990).

• "Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed Reducing Such Accidents on Highways," by Larry Thomas, *Selected Studies in Highway Law*, vol. 4, ch. 8, "Tort Liability," p. 1899 (Dec. 1980).

• *Liability of State and Local Governments for Negligence Arising Out of the Installation of Warning Signs, Traffic Lights, and Pavement Markings*, by Larry W. Thomas. Supplemented by LRD No. 3, *Supplement to Liability of State and Local Governments for Negligence Arising Out of the Installation of Warning Signs, Traffic Lights, and Pavement Markings*, by John C. Vance (Dec. 1988).

• *Legal Implications of Highway Departments' Failure to Comply with Design, Safety, or Maintenance Guidelines*, by Larry W. Thomas. Supplemented by LRD No. 26, *Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines*, by John C. Vance (Dec. 1992).

• *Liability of the State for Injury-Producing Defects in Highway Surface*, by John C. Vance. Supplemented by LRD No. 10, *Supplement to Liability of the State for Injury-Producing Defects in Highway Surface*, by John C. Vance (Apr. 1990).

• *Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges*, by William P. Tedesco. Supplemented by LRD No. 14, *Supplement to Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges*, by John C. Vance (June 1990).

• *Liability of the State for Injury or Damage Occurring in Motor Vehicle Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent*

Private Property, by John C. Vance. Supplemented by LRD No. 27, *Supplement to Liability of the State for Injury or Damage Occurring in Motor Vehicle Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property*, by John C. Vance (Apr. 1993).

• "Liability of the State for Injuries Caused by Obstruction or Defects in Highway Shoulder or Berm," by John C. Vance, *Selected Studies in Highway Law*, vol. 4, ch. 8, "Tort Liability," p. 1966-N123 (Jun. 1988).

• "Duty of State to Erect and Maintain Guardrails, Barriers, and Similar Protective Devices," by John C. Vance, *Selected Studies in Highway Law*, vol. 4, ch. 8, "Tort Liability," p. 1966-N157 (Jun. 1988).

• *Impact of the Discretionary Function Exceptions on Tort Liability of State Highway Departments*, by John C. Vance, LRD No. 6 (June 1989).

The following articles were also relied upon and updated as well:

• *Liability of the State for Injury-Producing Defects in Highway Surface*, by John C. Vance. Supplemented by LRD No. 10, *Supplement to Liability of the State for Injury-Producing Defects in Highway Surface*, by John C. Vance (Apr. 1990).

• *Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards*, LRD No. 38, by Richard O. Jones (Aug. 1987).

The NCHRP 20-6 committee responsible for the text decided to reorganize the articles and supplement them for this new text on transportation law. The committee authorized a new framework for topics in the field, which would permit periodic updating.

The new text covers areas that are typical of or unique to the field of transportation tort liability and basically relies upon the initial articles for some of its work. It does not address other matters for which transportation departments could be sued, such as intentional torts or employment discrimination; nor does the text discuss aspects of tort liability, such as contributory negligence or statutes of limitations, which are not unique to transportation law.

The text covers six principal subjects: (1) basic theories of tort liability of public transportation agencies; (2) transportation agencies' activities that may give rise to tort liability and defenses for discretionary activities; (3) immunities and defenses of the transportation department to such tort actions; (4) trial preparation, evidentiary rules, and strategies in public transportation tort litigation; (5) procedural considerations; and (6) shifting or sharing of tort liability by the department. The purpose of the new organization of the material is to facilitate the inclusion of new materials and provide information that is easily searchable.

SECTION 1

TORT LIABILITY OF TRANSPORTATION DEPARTMENTS, OFFICIALS, AND EMPLOYEES

A. IMMUNITY OF THE SOVEREIGN TO TORT SUITS

A.1. Introduction—Bases for Tort Liability

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

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

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

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

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

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

[2] *Id.* at 4.

[3] *Id.*

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

[5] *Id,* § 9, at 627.

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

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

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

[9] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

A.3. Sovereign Immunity in Contrast to Governmental Immunity

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

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

[14] *Supra* note 10.

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

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

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

[18] *Id*. at 435–46.

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

[20] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. JUDICIAL AND LEGISLATIVE WAIVER OF SOVEREIGN IMMUNITY

B.1. Introduction

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

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

B.2. Trend Towards Governmental Responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[46] *Id.*

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

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

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

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

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

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

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

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

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

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

B.3. Legislation Waiving Sovereign Immunity in Tort

B.3.a. Tort Claims Acts

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

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

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

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

B.3.b. State Claims Acts

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

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

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

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

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

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

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

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

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

[63] *Id.*

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

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

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

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

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

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

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

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

B.3.c. Highway Defect Statutes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[79] N.Y. JUR. 2D, *Negligence* § 14.

[80] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.2. Requirement of Notice of a Dangerous Condition

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

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

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

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

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

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

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

[107] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[118] *Id.*

D. INDIVIDUAL LIABILITY OF PUBLIC TRANSPORTATION OFFICIALS OR EMPLOYEES

D.1. Origins of Personal Liability

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

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

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

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

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

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

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

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

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

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

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

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

California provides that

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

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

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

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

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

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

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

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

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

[128] 393 A.2d at 295.

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

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

[131] CAL. GOV'T CODE § 840.

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

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

[134] NEV. REV. STAT. § 41.0337.

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

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

[137] CAL. GOV'T CODE, § 820.8.

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

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

D.3. Defenses of Public Officials and Employees

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

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

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

D.3.b. Discretionary-Ministerial Distinction

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

In a Minnesota case, the court stated that

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

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[138] CAL. GOV'T CODE, § 821.4.

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

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

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

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

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

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

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

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

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

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

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

[150] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[162] 111 S. Ct. at 1274.

[163] *Id.*

[164] *Id.*

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

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

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

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

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

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

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

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

D.3.d. The Misfeasance-Nonfeasance Distinction

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

D.4. Statutory Provisions Relating to Defense and Indemnification

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

D.4.a. Providing a Legal Defense

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

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

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

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[169] *Id.* at 549.

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

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

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

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

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

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

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

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

[178] *See* Appendix A.

[179] *Id.*

[180] ARIZ. REV. STAT. § 41-192.02.

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

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

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

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

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

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

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

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

[182] *See* ARK. STAT. § 12-3401.

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

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

[185] OR. REV. STAT. § 30.285(6).

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

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

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

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

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

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

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

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

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

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

SECTION 2

TRANSPORTATION ACTIVITIES THAT MAY GIVE RISE TO TORT LIABILITY

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

A.1. Introduction

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

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

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

A.2. Cause in Fact

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

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

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

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

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

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

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

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

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

[5] *Id.* at 85–86.

[6] *Id.*

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

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

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

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

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

[12] *Id. §* 20.2, at 93.

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

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

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

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

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

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

A.3. Proximate or Legal Cause

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

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

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

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

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

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

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

[19] *Id.*

[20] *Id.*

[21] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court went on to state that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] *Id*. at 414.

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

[64] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[74] 185 N.W.2d at 114–15.

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

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

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

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

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

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

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

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

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

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

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

B.2.a. Warning Signs

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

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

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

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

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

[81] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

B.2.b. Traffic Lights

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

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

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

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

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

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

[95] *Id.* at 784.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.2.c. Pavement Markings

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

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

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

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

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

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

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

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

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

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

C. DEFECTS IN THE PAVEMENT SURFACE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.2. Cases Allowing and Denying Recovery

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

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

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

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

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

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

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

D. SNOW AND ICE CONTROL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[149] *Id*. § 54.036, at 14–15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[181] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[185] 514 A.2d at 79–80.

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

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

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

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

[188] KAN. STAT. ANN. § 75-6104(k).

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

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

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

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

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

E. WET-WEATHER CONDITIONS AND SKIDDING ACCIDENTS

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

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

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

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

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

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

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

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

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

[194] *Id*. at 343.

[195] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[224] *Id.* at 1341.

[225] *Id*. at 1348.

[226] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F.2.c. Other Obstacles in the Shoulder

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

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

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

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

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

F.2.d. Effect of Warning Signs

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

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

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

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

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

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

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

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

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

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

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

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

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

G.1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[278] *Id.* at 144.

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

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

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

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

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

[284] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. DEFECTIVE OR DANGEROUS CONDITIONS ON BRIDGES AND OTHER STRUCTURES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H.2. The Maintenance of Bridge Railings

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

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

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

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

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

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

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

[312] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A summary judgment in favor of the county was affirmed.

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

H.3. Snow and Ice Conditions on Bridges

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

Bridge decks tend to freeze earlier than pavement and may become icy while the adjoining road surface remains unfrozen. Judicial decisions involving ice formation on bridges have reached divergent conclusions, because both courts and expert witnesses disagree on the extent to which bridge icing is a predictable phenomenon. In *Hunt v. State,*[327] for example, the plaintiff sued the State for injuries he sustained when he lost control of his car on a frost-covered bridge that had not been salted or sanded. The accident occurred in the early morning hours on a late autumn day when the surface of the highway and the bridge approach were clear and dry. The appellate court affirmed a judgment against the State upon finding that it had breached its duty to exercise ordinary care to maintain its highways in a safe condition for travel.

The central issues, according to the court, were whether the State could be charged with constructive notice of the slippery condition of the bridge and whether it had a reasonable opportunity to take remedial action. The evidence revealed that the State routinely ignored its own statement of policy and procedures regarding frost on bridges. The statement, taken from the State's highway maintenance manual, described the use of weather reports to predict frost formation and mandated the treatment of frosty bridge floors with salt or abrasives. The State admitted in testimony that it relied solely on random frost checks by maintenance employees to determine the need for salting or sanding.

On appeal, the court held:

> Substantial evidence was adduced to show the procedure was applicable and was violated. In addition, substantial evidence was received supporting the trial court's finding that violation of the procedure was a proximate cause of Hunt's accident. If the maintenance personnel had used the procedure, they would have known of the probability of frost and could have taken timely measures to eliminate the danger. Availability of the procedure coupled

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[323] *Id.* at 1301. The case of *Thorbjohnson v. Rockland-Rock Port Lime Co*., 309 A.2d 240 (Me. 1973) suggests that there is a duty to maintain guardrails sufficient to prevent a car from breaking through.

[324] 130 Ga. App. 324, 203 S.E.2d 260 (1973).

[325] Highway cases generally hold that there is no duty to upgrade highways merely because the applicable standards have been revised. As a general rule, whether the highway should be improved or upgraded appears to be a decision vested largely in the discretion of the appropriate governmental body, unless there is notice of a dangerous condition or "changed circumstances." In *McDaniel v. Southern Ry*., 130 Ga. App. 324, 203 S.E.2d 260 (1973), however, the guardrail was not constructed in accordance with then-existing standards.

[326] McDaniel, 203 S.E.2d at 262.

[327] 252 N.W.2d 715 (Iowa 1977).

> with weather conditions favorable to frost gave the commission constructive notice of the hazard in time to guard against it or eliminate it.[328]

The evidence produced in *Daugherty v. Oregon State Highway Com.*,[329] on the other hand, was held to be insufficient to establish notice on the part of the State's maintenance employees. Plaintiff's decedent was killed in a collision on a bridge during a freezing rain. The State's maintenance foreman testified that, although he kept abreast of weather conditions by monitoring local radio stations and communicating with patrolling highway department trucks and state police, he had no knowledge of icy conditions on the bridge in question until after the accident occurred.

The court concluded that the plaintiff had failed to prove breach of the State's duty of reasonable care:

> [While there] is evidence that after the freezing started [one state truck] was busy sanding other bridges [in the vicinity…t]here is no evidence tending to prove that defendant's employees should have ignored other bridges and danger spots and hurried to sand the Scoggins Creek Bridge, nor any evidence that if they had done so they would have arrived in time to prevent this accident.[330]

The court in *Estate of Klaus v. Michigan State Highway Department*[331] appeared to go a step further by suggesting that adequate notice of "preferential" bridge icing (the tendency of bridge surfaces to freeze before the adjoining roadway does) was virtually impossible.[332] The appellate court reversed the trial court's finding that the department was negligent in failing to guard against icing on the bridge. However, the judgment against the department was affirmed, because the evidence established that a Watch for Ice on Bridge sign was not visible to motorists on the day of the accident. The court emphasized that numerous prior accidents caused by ice on the bridge on clear days were known to the department. Thus, while the court was unwilling to charge highway authorities with knowledge of the bridge's icy condition on the day of the accident so as to create a duty to remedy the condition, the defendant's knowledge of the bridge's propensity for preferential icing was held to establish a duty to warn of a potential hazard.[333]

It should be noted that tort claims legislation in some states immunizes the state from liability for injuries or damage caused solely by the effect of weather conditions on streets and highways.[334] In *Flournoy v. State,*[335] for example, the court held that the plaintiff's theory that the State had created a dangerous condition by constructing an ice-prone bridge failed to state a cause of action, citing, *inter alia,* a section of the California Tort Claims Act granting immunity to the State for the effect of weather conditions.[336] As noted below, however, the state may be held liable for failure to provide advisory signing.

H.4. Failure to Post Signs Warning of Structural Defects in Bridges

Structural deficiencies that lead to the collapse of a bridge represent the most dramatic and potentially the most costly of bridge defects. Most of the reported cases involved the collapse of small bridges on secondary roads under local jurisdiction[337] rather than catastrophic failures.[338]

Transportation departments may be required by statute to maintain adequate bridges, as was the case in *Hansmann v. County of Gospel.*[339] The plaintiff was injured when a County bridge collapsed under the 23- to 24-ton weight of his truck. Under a statute rendering counties liable for damages caused by "in sufficiency or want of repair" of a county bridge, the court declared that

> a county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated.… A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe.[340]

The appellate court held that the County's failure to post a sign constituted negligence.

Thus, the state's duty extends to providing safe bridges and protecting the motorist from hazardous conditions on bridges. The state's duty includes providing safe bridge railings; keeping the bridge surface free of hazardous conditions, such as those caused by snow or ice; and informing the public with adequate signs of hazardous structural or other unsafe conditions on bridges.

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[328] Hunt, 252 N.W.2d at 719.

[329] 270 Or. 144, 526 P.2d 1005 (1974).

[330] Daugherty, 526 P.2d at 1008.

[331] 90 Mich. App. 732, 282 N.W.2d 809 (1979).

[332] Estate of Klaus, 282 N.W.2d at 807–08.

[333] *Id*. at 808; *see also* Carpenter v. Travelers Ins. Co., 402 So. 2d 282 (La. App. 3d Cir. 1981) (holding that the failure to post Ice on Bridge signs was not the cause in fact of the accident on an icy bridge).

[334] *See, e.g.*, CAL. GOV'T CODE § 831; N.J. STAT. ANN. § 59 4-7.

[335] 275 Cal. App. 2d 806, 80 Cal. Rptr. 485 (App. 1969).

[336] CAL. GOV'T CODE § 831.

[337] *See, e.g.,* Hansmann v. County of Gospel, 207 Neb. 659, 300 N.W.2d 807 (1981) and Stevens v. County of Dawson, 172 Neb. 585, 111 N.W.2d 220 (1961).

[338] In Re Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D.W. Va. 1974)*, cited among conflicting authorities in* Spring v. United States, 833 F. Supp. 575 (E.D. Va. 1993) (regarding the issue of choice of law in multi-state FTCA actions).

[339] 207 Neb. 659, 300 N.W.2d 807 (1981).

[340] Hansmann, 300 N.W.2d at 808.

SECTION 3

DEFENSES FOR DISCRETIONARY ACTIVITIES

A. IMMUNITY FROM LIABILITY BASED ON DISCRETIONARY FUNCTION OR ACTIVITY

A.1. Introduction

The primary defense to the state's tort liability for negligent design and maintenance is based on the theory that certain action taken by government is "discretionary" in nature, and, therefore, immune from suit. This chapter focuses on important United States Supreme Court cases that have construed the discretionary function exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and state supreme court cases that have construed a provision for discretionary immunity in state tort claims acts. The state court opinions frequently rely on one or more of the important U.S. Supreme Court decisions.

A.2. Federal Cases Interpreting the Discretionary Function Exemption in the FTCA

The discretionary function exemption in the FTCA provides that the United States Government may not be held liable for:

> (a) *Any claim* based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused.* (Emphasis added.)[1]

The federal courts have had considerable difficulty in construing the italicized language—the discretionary function exemption—as it appears in the federal act or in comparable state statutes.

In 1991, in *United States v. Gaubert*,[2] the Supreme Court held that if a regulation allows an employee to exercise discretion, then "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[3] Moreover, the Court held that "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."[4] Under *Gaubert*, there is no distinction between planning and operational actions:[5] it is not the status or level of the governmental actor that determines whether the discretionary exemption applies; rather it is the nature of the conduct or decision-making. The *Gaubert* Court expanded discretionary immunity beyond that exercised at the so-called planning level.

It is useful first to review briefly the reasons for the discretionary function exemption in the FTCA. In the numerous drafts of the FTCA before its final passage in 1946, Congress considered exempting from the Act's coverage certain activities that were deemed to be purely "governmental" in nature, as distinguished from the type of activities normally undertaken and carried out by private persons. Activities that are governmental in nature are probably not susceptible of precise definition. An important reason for excluding governmental functions from review by the judiciary was to preserve the separation of powers.[6] Under our tripartite form of government, the powers of the legislative, executive, and judicial branches of government are to be kept separate and distinct. However, perhaps because of the difficulty in defining governmental activities, the FTCA did not exempt governmental activities as such. Instead, Congress included an exception to preclude governmental activities that are discretionary in nature from judicial review. The pertinent language is found in 28 U.S.C. § 2680, *supra.*

Although Congress may have believed that the courts would be able to differentiate between discretionary and nondiscretionary or ministerial actions, their inability over the intervening years to distinguish them led to a maze of confusion in the cases.[7] Because judgment, choice, or discretion is present in virtually all human activity, the issue is how to draw a line between activities that are discretionary and those that are nondiscretionary. Although the courts have attempted to provide guidelines, drawing the line is the problem the courts confront when trying to define what is discretionary.[8]

The inquiry into the breadth and meaning of discretionary functions must begin with a discussion of two federal cases that are the foundation of the remaining

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[1] 28 U.S.C. § 2680.

[2] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[3] Gaubert, 111 S. Ct. at 1274.

[4] *Id.*

[5] *Id.*

[6] "The retention of sovereign and municipal immunity for discretionary functions stems from the separation of powers doctrine." Mahan v. N.H. Dep't of Admin. Servs., 141 N.H. 747, 693 A.2d 79, 82 (1997).

[7] At the core of this confusion is the fact that virtually all human activity involves some element of choice, judgment, or discretion. As the court stated in *Smith v. United States,* 375 F.2d 243 at 246 (5th Cir. 1967), *cert. denied*, 389 U.S. 841, 19 L. Ed. 2d 106, 88 S. Ct. 76 (1967) "[m]ost conscious acts of any person whether he works for the government or not, involve choice. Unless government officials…make their choices by flipping coins, their acts involve discretion in making decisions." As explained in *Sava v. Fuller*, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967), all human activity involves some element of discretion: "He who says that discretion is not involved in driving a nail has either never driven one or has a sore thumb, a split board, or a bent nail as the price of attempting to do so."

[8] Federal cases are collected in *Claims Based on Construction and Maintenance of Public Property as Within Provision of 28 U.S.C. 2680(a) Excepting from Federal Tort Claims Act Claims Involving "Discretionary Function or Duty,"* 37 A.L.R. FED. 537.

case law: *Dalehite v. United States*[9] and *Indian Towing Co. v. United States*.[10] In *Dalehite,* damages were sought for the death of Henry G. Dalehite caused by the explosion of fertilizer at Texas City, Texas, in 1947. There were 300 separate personal injury and death and property claims aggregating $200 million. The suit alleged negligence on the part of the entire body of federal officials and employees involved in a program of production of the material FGAN, which had a basic ingredient, ammonium nitrate, long used as a component in explosives. Certain deactivated ordnance plants were designated for the production of the fertilizer. Numerous federal agencies were involved in the planning and operation of the program for which there was a completely detailed set of specifications. The FGAN involved in the disaster had been consigned to the French Supply Council and, after warehousing at Texas City for 3 weeks, was loaded on two ships destined for France. Due to an uncontrollable fire in one of the ships, both ships exploded, leveling much of Texas City and killing many inhabitants.

Because no individual acts of negligence could be shown, the suit was predicated on three areas of alleged negligence of the United States Government: (1) carelessness in drafting and in adopting the fertilizer export plan as a whole, (2) negligence in various phases of the manufacturing process, and (3) official dereliction of duty in failing to police the shipboard loading. The Government contended that the acts in question were protected by the discretionary function exemption of the FTCA.

The U.S. Supreme Court held that the decisions pertinent to the fertilizer program were discretionary, and that the discretion did not end with the initial decision to implement the fertilizer program:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be held actionable.[11]

The *Dalehite* Court reviewed the numerous decisions involved in the production of FGAN and found each one to be discretionary and exempt. Specifically, the following decisions were discretionary: (a) the cabinet-level decision to institute the fertilizer export program;[12] (b) the need for any further investigation into FGAN's combustibility;[13] (c) the drafting of the basic plan of manufacture, including the bagging temperature of the mixture, type of bagging, and special coating of the mixture;[14] and (d) the failure of the U.S. Coast Guard to regulate and police the storage of the FGAN in some different fashion.[15]

The alleged negligent acts were held to have been performed under the direction of a "plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."[16] The Court found that the decisions were made with knowledge of the factors and risks involved and were based on previous experience with the materials and on judgment requiring consideration of a vast spectrum of factors. There were no acts of negligence in carrying out the plan insofar as the production and shipment of the material. Rather, the basis of the suit rested on charges that the plan itself had been defective. The Court held, in language that later evolved as a widely used test in federal and state courts, that these decisions "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicality of the Government's fertilizer program."[17]

A dissenting opinion, written by Justice Jackson, in taking issue with the majority's construction of the term discretionary, argued that the discretionary function exemption is not based on who did the thinking or at what level,[18] but on the nature of the discretionary activity. Moreover, Justice Jackson stated that the governmental decisions involved were not "policy decisions," but were more akin to those considerations given to bagging or labeling by an ordinary manufacturer, which would not be immune. Indeed, the minority opinion's position, that "a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail,"[19] would later become the basis of liability in many tort suits at both the federal and state levels. Courts would later hold

[9] 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), *reh'g denied*, 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. Ed. 362, 386, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954), *explained in* United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984) ("It follows that the acts of FAA employees in executing the 'spot check' program in accordance with agency directives are protected by the discretionary function exception as well." 104 S. Ct. at 2768.).

[10] 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (*not followed by* K.W. Thompson Tool Co. v. United States, 836 F.2d 721,726 (1st Cir. 1988); ("It is fair to conclude that Indian Towing should no longer play a role in determining the application of section 2680(a); Dalehite and Varig are now the beacon cases.").

[11] Dalehite, 346 U.S. at 35–36.

[12] *Id.* at 37.

[13] *Id*. at 36–37.

[14] *Id*. at 38–42.

[15] *Id*. at 42–43.

[16] *Id.* at 40.

[17] *Id*. at 42.

[18] The minority stated that it would not predicate liability on whether a decision is taken at "Cabinet level" or at any other "high altitude." 346 U.S. at 57.

[19] Dalehite, 346 U.S. at 58.

that, after a decision protected by the exemption has been made, negligence in implementing that decision is not protected by the discretionary function exemption.[20]

In *Dalehite,* the operational-planning test began to emerge: decisions made at the "planning level" were discretionary and those made at the "operational level" were not.

Indian Towing, supra, involved a different section of the FTCA and did not purport to modify the *Dalehite* doctrine, which came to be labeled in federal and state cases as the "operational-planning level" test. In *Indian Towing* the petitioners sought damages under the FTCA arising out of the alleged negligent operation by the U.S. Coast Guard of a lighthouse light. The specific acts of negligence relied upon were the failure of the responsible Coast Guard personnel to check the system that operated the light and to repair or give warning of the light's failure to operate.[21]

The Government and the Court assumed that the acts involved were committed at the operational level and that the discretionary exemption was not at issue; however, the language of the *Indian Towing* decision contributed significantly to the narrowing of the *Dalehite* holding:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.[22]

In explaining the operational-planning level dichotomy, one federal court wrote:[23]

> In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion. The planning level notion refers to decisions involving questions of policy; that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. For example, courts have found that a decision to reactivate an Air Force Base[24]…or to change the course of the Missouri River[25]…or to decide whether or where a post office building should be built[26]…are on the planning level because of the necessity to evaluate policy factors when making those decisions. The operational level decision, on the other hand, involves decisions relating to the normal day-by-day operations of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors. For instance, the decision to make low-level plane flights to make a survey[27]…or the operation of an air traffic control tower[28]…, or whether a handrail should be installed as a safety measure at the United States Post Office in Madison, Wisconsin,[29] involve the exercise of discretion but not the evaluation of policy factors.
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> The discretionary function exemption applies when the plaintiff claims that conduct at the planning level is the cause of his injuries. Conversely, the exception does not apply when the plaintiff complains of conduct at the operational level, even though such conduct is required for the execution of a planning level decision.

The operational-planning level test, which looked to the echelon of the official, rather than to the discretionary nature of his or her conduct, was useful as a general guide but seemed unsound as a conclusive test for application of the exception.[30] Consequently, some circuits questioned the use of the operational-planning level test, suggesting that this aid tended to obscure the meaning of the exception.

In *United States v. Varig Air Lines,*[31] the question was whether the certification by the Federal Aviation Administration of the airworthiness of private aircraft

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[20] More recent cases citing the *Indian Towing* holding include: Good v. Ohio Edison Co., 149 F.3d 413, 420 (6th Cir. 1998); Dorking Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir. 1996); and Hetzel v. United States, 43 F.3d 1500, 1504 (D.C. Cir. 1995). The Supreme Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) rejected the *Dalehite* minority's position that decisions involving uniquely or purely governmental functions, which private persons or corporations do not or are unable to perform, such as the providing and maintaining of armed forces, were discretionary and that any negligence committed in the execution of these purely governmental functions would be protected by the discretionary function exemption. Thus, it does not matter whether the alleged negligence, for purposes of the exemption, occurred during the performance of governmental or proprietary activity.

[21] Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

[22] Indian Towing Co., 350 U.S. at 69.

[23] Swanson v. United States, 229 F. Supp. 217, 219–220 (N.D. Calif. 1964).

[24] United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).

[25] Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

[26] American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958).

[27] Dahlstrom v. United States 228 F.2d 819 (8th Cir. 1956).

[28] Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *rev'd*, 350 U.S. 907, 100 L. Ed. 796, 76 S. Ct. 192 (1955), *modified, remanded*, 350 U.S. 962, 100 L. Ed. 835, 76 S. Ct. 429 (1956), *appeal after remand*, 99 U.S. App. D.C. 205, 239 F.2d 25 (1956), *cert. denied,* 353 U.S. 942, 1 L. Ed. 2d 760, 77 S. Ct. 816 (1957).

[29] American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958).

[30] 2 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS § 12.05.

[31] United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984), *reh'g denied*, United States v. United Scottish Ins. Co., 468 U.S. 1226, 82 L. Ed. 2d 919, 105 S. Ct. 26 (1984) *and on remand*, S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 744 F.2d 1387 (9th Cir. 1984).

constituted an activity immunized by the discretionary exemption of the FTCA. In holding that the certification process fell within the umbrage of 28 U.S.C. § 2680, the Court took note of the existing lack of certainty by various lower courts concerning the proper interpretation of the discretionary exemption and took pains to reaffirm its holding in *Dalehite:*

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form the basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[32]

The Court stated that "[a]s in *Dalehite,* it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."[33] It was possible, however, to isolate certain factors "useful in determining when the acts of a Government employee are protected from liability by § 2680(a)."[34] The Court identified two such factors:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.… Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals.[35]

The Court stated that the underlying basis for the discretionary function exception was that

> Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions…Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."[36] (Citations omitted.)

The Court had an opportunity in *Varig* either to disavow or to limit the operation of the planning-operational dichotomy. The fact that the Court did not suggests that the decision in *Varig* did not strike a serious blow to the use of this somewhat mechanistic device to separate discretionary from nondiscretionary activities. The lower federal court cases decided after *Varig* generally interpreted the decision as reaffirming the validity of the planning-operational test.[37]

However, importantly, the Court in *Varig* rejected the argument that planning-level activities can only take place at the highest levels of government; the Court wrote that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[38] The Court added: "Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[39]

Thus, the decision in *Varig* did much to clarify the confusion caused by *Indian Towing* concerning the status of the planning-operational test; it also served to dispel the misapprehension caused by *Dalehite* that the level of decision-making is a controlling factor in determining the applicability of the discretionary function exception. The *Varig* Court, however, also held that for decision-making to be discretionary in nature, the activity must be grounded on considerations of "social, economic, and political policy."[40]

Another significant case in the l980s is *Berkovitz v. United States.*[41] *Berkovitz* was an action against the United States to recover damages for the licensing and approval for the release of a polio vaccine that in fact caused the disease to be contracted. In holding that § 2680(a) of the FTCA was inapplicable to the facts of the case, the Court reviewed its prior opinions relating to the discretionary function exception, which it deemed to be of special significance and relevance. Because of the "summing-up" nature of the opinion in *Berkovitz,* it is worth quoting some of it:

> The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case".… In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary

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[32] 104 S. Ct. at 2763, *quoting* Dalehite v. United States, 346 U.S. at 35-36.

[33] United States v. Varig Airlines, 104 S. Ct. at 2764.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 2765 *quoting* United States v. Muniz, 374 U.S. 150, 163, 83 S. Ct. 1850, 1858, 10 L. Ed. 2d 805 (1963).

[37] In *Ala. Elec. Coop., Inc. v. United States,* 769 F.2d 1523, 11th Cir. 1985), the court stated: "In our opinion *Varig Airlines* supports the planning/operational distinction developed by the lower courts in cases subsequent to *Dalehite,*" *adding* that planning level decisions are those that involve "the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy," whereas operational level decisions are those involving "normal day-by-day operations of the government." 769 F.2d at 1527–28.

[38] Ala. Elec. Coop., Inc., 769 F.2d at 1527, quoting from Varig Airlines, 104 S. Ct. at 2765.

[39] *Id.*

[40] *Id.* at 1531, *quoting* Varig Airlines, 104 S. Ct. at 2765.

[41] 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

> unless it involves an element of judgment or choice. See *Dalehite* v. *United States*…(stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. *Cf. Westfall v. Erwin*…(recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).
>
> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*.... The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States*…("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.[42]

In *United States v. Gaubert*,[43] the Court made it clear that the exercise of immune discretion is not confined to the so-called policy or planning level. In *Gaubert,* a federal tort claims action arose as the result of the supervision by federal regulators of a federally insured savings and loan. Gaubert was the thrift's chairman and largest shareholder. Gaubert's action sought damages for the alleged negligence of federal officials in selecting the new officers and directors for and in participating in the day-to-day management of the thrift. The question was whether the regulators' actions fell within the discretionary function exception and were protected. The district court found that all of the regulators' actions fell within the discretionary function exception and dismissed.

The Court of Appeals for the Fifth Circuit held that, although the federal regulators "did not have regulations telling them, at every turn, how to accomplish their goals for the [thrift], …the officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line in *Indian Towing*."[44]

The appellate court affirmed the district court's dismissal of the claims that concerned the merger that the federal agents instituted, the agreement they arranged removing Gaubert from the thrift's management, the personal guarantee that Gaubert gave at their behest, and the replacement of the thrift's management that the agents arranged. However, the court reversed the dismissal of the claims that concerned the regulators' activities after they assumed a supervisory role in the thrift's day-to-day affairs.

The U.S. Supreme Court reviewed the prior precedents, such as *Dalehite*, *Varig Airlines,* and *Berkovitz*, and summarized the effect of the discretionary function exception where there are regulations that guide the federal employee's actions:

> [1] Under the applicable precedents…if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.…
>
> [2] If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.
>
> [3] On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.[45]

The Court observed that the employee's conduct may not always be guided by specific regulations, but stated that "it will most often be true that the general aims and policies of the controlling statute will be evident from its text."[46]

In significant language, the Court laid down a broad definition of immune discretion under the FTCA:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[47]

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[42] Berkowitz, 108 S. Ct. at 1958–59.

[43] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991), *among conflicting authorities noted in* Wright v. United States, 868 F. Supp. 930 (E.D. Tenn. 1994) (holding that Forest Service's decision not to cut tree fell within discretionary function exception of the FTCA), *aff'd* 1996 U.S. App. LEXIS 12438 (6th Cir. Apr. 11, 1996), *and criticized in* Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344, 348 (1998).

[44] Gaubert, 111 S. Ct. at 1273.

[45] *Id.* at 1274.

[46] *Id.*

[47] *Id.* at 1274–75.

In reversing the Fifth Circuit, the Supreme Court held that the discretionary function exception extends to "decisions made at the operational or management level…." Discretion involves choice or judgment, which are not limited "exclusively to policymaking or planning functions."[48] The Court stated that there was "no suggestion [in *Dalehite*] that decisions made at an operational level could not also be based on policy."[49] The Court distinguished *Indian Towing* on the basis that "making sure the [lighthouse] light was operational 'did not involve any permissible exercise of policy judgment.'"[50]

In reviewing the specific, alleged day-to-day actions of the regulators of which Gaubert complained, the Court noted that there were no "formal regulations governing the conduct in question"; thus, "[t]he relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use."[51] The regulations did not prohibit the use of supervisory mechanisms, in lieu of formal proceedings, such as the ones employed by the federal regulators.[52] Moreover, not only did the Federal Home Loan Bank Board policy appear to sanction such measures on a case by case basis, but also "the challenged actions involved the exercise of choice and judgment."[53]

Again, in important language, the Court, dismissing Gaubert's complaint as alleging "nothing more than negligence on the part of the regulators,"[54] wrote:

> If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable. This is not the rule of our cases.... [F]rom the face of the amended complaint, it is apparent that all of the challenged actions of the federal regulators involved the exercise of discretion in furtherance of public policy goals....[55]

In sum, since the *Gaubert* decision, the federal test for determining whether a decision is protected by the discretionary function exemption is not the level of the decision-maker but rather the discretionary nature of the decision itself.

A.3. State Cases Construing a Provision in State Tort Claims Acts Exempting Discretionary Activity

One of the earliest state court cases (subsequent to the enactment of the FTCA) to examine the nature of discretionary immunity was *Weiss v. Fote,*[56] decided by the New York Court of Appeals. The *Weiss* court, however, did not have a specific provision in a tort claims act providing for discretionary immunity; nevertheless, the *Weiss* court held that the government's alleged negligence was discretionary and protected from liability. In holding that the determination of the Board of Safety of the City of Buffalo regarding the length of the clearance interval in a traffic light was an immune, discretionary decision, the Court of Appeals was first faced with the fact that the New York statute waiving sovereign immunity to suit contained no provision excluding from liability discretionary decision-making by a governmental body. In reading immunity for such decision-making into the statute, the court said:

> Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question.... To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong," serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.[57]

The court's decision, which read discretionary immunity into the statute, was based on (1) constitutional requirements concerning the separation of powers, and (2) the common law rule of immunity for the discretionary acts of governmental entities. The decision of the New York Court of Appeals in this respect has had wide influence on the decisions of other courts of last resort faced with the issue of the nature of discretionary immunity.[58]

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[48] *Id.* at 1275.

[49] *Id.*

[50] *Id.*, *citing* Berkovitz, 486 U.S. at 538, n.3.

[51] *Id.* at 1277.

[52] *Id.*

[53] *Id.* at 1278.

[54] *Id.* at 1279.

[55] *Id.*

[56] 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960), *reh'g denied,* 8 N.Y.2d 934, 204 N.Y.S.2d 1025 (1960).

[57] Weiss, 200 N.Y.S.2d at 413. (Citations omitted).

[58] In the following cases, however, the New York courts denied immunity, because the evidence established that the planning for the installation of the particular guardrails in question was grounded on inadequate study and lacked a reasonable basis: Van Son v. State, 116 A.D.2d 1013, 498 N.Y.S.2d 938 (1986) (passenger drowned when car broke through a guardrail and fell into the river) and Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976) (posts were made of highly brittle cast aluminum alloy and discontinuous rails used could not absorb and distribute vehicle impact).

Another important case is *Johnson v. State,*[59] decided by the Supreme Court of California. Unlike the *Weiss* case, *Johnson* involved the construction of a statutory provision exempting discretionary activity on the part of the government from liability. The California statute[60] provided in relevant part that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The statute also immunized governmental entities "where the employee is immune from liability" and hence insulated the State (with certain exceptions) against liability to the same extent as a public employee.

In *Johnson*, the plaintiff sought damages from the State for its failure to give adequate warning of the homicidal tendencies of a 16-year-old youth the State placed in a foster home. In holding that the State was not immunized by the above provision of the statute, the court first rejected a semantic approach to the applicability of the discretionary function exception. The court pointed out that a distinction between the words "discretionary" and "ministerial" based on linguistics or lexicography will not work, because virtually all ministerial activity involves the exercise of discretion. The court stated that the purpose of the statutory provision for discretionary immunity was to assure "judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government."[61] (Emphasis supplied by the court.) The court added that "[a]ny wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government."[62] Thus, the exception was said to be based on the constitutional separation of powers, which compels the courts to abstain from review of determinations made by a coordinate branch of government that involve "basic policy decisions."[63]

The court recognized that "this interpretation of the term 'discretionary' presents some difficulties."[64] It stated that

> our interpretation will necessitate delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.[65]

The California Supreme Court held that the statutory provision for discretionary immunity related exclusively to determinations made by a coordinate branch of government that involve basic policy decisions.[66]

Another decision that had wide influence is one by the Supreme Court of Washington in *Evangelical United Brethren Church of Adna v. State.*[67] This decision, as the one in *Weiss,* involved the interpretation of a statute waiving immunity but not containing an express exception for discretionary activities. A 14-year-old boy escaped from the custody of a state-maintained correctional institution and thereafter caused the destruction of the Evangelical United Brethren Church by setting it afire. The action charged that the State was negligent in applying only minimum security measures in the detention of the youth when it knew or should have known that the youth was a pyromaniac.

The court held that the State was protected by the rule of discretionary immunity. The court noted that states waiving immunity to suit in tort litigation had provided either a judicial or statutory exception for governmental activities discretionary in nature. It stated: "The reason most frequently assigned is that in any organized society there must be room for *basic governmental policy decision* and the implementation thereof, unhampered by the threat or fear of sovereign tort liability...."[68] (Emphasis added.)

The court laid down a four-pronged test to determine the applicability of discretionary immunity:

> Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a *basic governmental policy,* program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of *basic policy evaluation,* judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged

[59] 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

[60] CAL. GOV'T CODE § 820.2.

[61] Johnson, 447 P.2d at 360.

[62] *Id*.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Cf.* The decisions of the U.S. Supreme Court in Varig and Berkovitz reaching exactly the same conclusion regarding the comparable provisions of the FTCA.

[67] 67 Wash. 2d 246, 407 P.2d 440 (1965). *Reh'g denied* 1966.

[68] Evangelical United Brethren, 407 P.2d at 444.

> act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom.[69] (Emphasis added.)

Thus, in *Evangelical United Brethren*, the court reached a conclusion similar to the decisions in *Varig, Berkovitz,* and *Johnson:* discretionary immunity relates solely to decision-making by a governmental entity that involves the evaluation of broad policy factors and considerations.

The Supreme Court of Florida adopted the foregoing line of reasoning in *Commercial Carrier Corporation v. Indian River County*.[70] Florida, as New York and Washington, passed legislation waiving immunity to suit in tort without including an exemption for discretionary activity. The case involved a collision at an unmarked intersection where there previously had been a Stop sign and the word "Stop" painted on the pavement prior to the intersection. The defendant allegedly was negligent in failing to replace the downed or missing sign and to repaint the worn pavement surface signing. The State defended on the ground, *inter alia,* that the omissions were an exercise of discretion by government officials and employees, which were exempt from the statute waiving immunity.

The court held that the State was liable to suit on the facts before it but read an exception for discretionary immunity into the act. The court, relying heavily on the decisions in *Weiss* and *Evangelical United Brethren,* adopted the four-pronged test in *Evangelical United Brethren*. The court stated that "we are persuaded by these authorities that even absent an express exception…for discretionary functions, certain *policy-making*...governmental functions cannot be the subject of traditional tort liability."[71] (Emphasis added.)

The decision in *Commercial Carrier* is also significant because it is more recent than most other state supreme court decisions in which the nature of discretionary immunity was presented *de novo*. The Florida court was able to review considerable precedent in reaching a decision. It chose to adopt the reasoning that the discretionary function exception relates solely to "policy-making" decisions of a coordinate branch of government.

The above cases, of course, were decided prior to *United States v. Gaubert*, *supra*; thus, it is important to note that since *Gaubert* some state courts, as well as the D.C. Court of Appeals, have cited and followed *Gaubert*.[72] For example, in *Aguehounde v. District of Columbia,*[73] involving a claim by a pedestrian struck at an intersection controlled by a traffic signal, the court held that the setting of signal lights was an exercise of discretion. The plaintiff argued that the light interval decision "involved purely engineering calculations," thus making it a ministerial act, and that "to establish immunity, the government must produce evidence that 'social, political or economic considerations entered into the timing of the clearance interval'" at the intersection.[74]

The Court of Appeals disagreed:

> Our case law suggests, however, that the proper inquiry is not: what concerns were actually balanced in each individual's act? Instead, we should ascertain whether the type of function at question is grounded in policy analysis. See, e.g., *United States v. Gaubert*…. Just as the length of yellow intervals is part of the overall traffic design, it is part of the overall policy of determining traffic flow in the District.[75]

The Court of Appeals, citing prior precedent in the District of Columbia, observed that where "an employee fails to follow an established policy, because the existence of a set policy means that all discretion has been removed from the employee, …the employee's actions would…be ministerial."[76] After "[f]inding that the setting of yellow intervals is a discretionary function,"[77] the court next turned to the question of whether there was a specific or mandatory directive for employees to follow in setting the timing interval.[78] The court, finding none, concluded that any mismeasurement was therefore irrelevant.[79] "The question of negligence has no relevance until it is established that an act was ministerial."[80] Thus, the Court of Appeals concluded that because the District had no mandatory policy in place for determining signal intervals, the District's employees, using a timing guide for intervals, were exercising immune discretion.

Another case makes it clear also that decisions can be based on policy and protected from liability no matter the level at which they are made. The case of *Rick v. State Department of Transp. & Dev.*,[81] a wrongful death action arising out of the collision between a car and a train at a railroad crossing, illustrates that the language of "operational" negligence, however, still

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[69] *Id.* at 445.

[70] 371 So. 2d 1010 (Fla. 1979), *on remand*, 372 So. 2d 1022 (Fla. Dist. Ct. App. 3d Dist., *appeal after remand*, 398 So. 2d 488 (Fla. Dist. Ct. App. 3d Dist. 1981), *and on remand*, Cheney v. Dade County, 372 So. 2d 1182 (Fla. Dist. Ct. App. 3d Dist. 1979).

[71] Commercial Carrier Corp., 371 So. 2d at 1020.

[72] Trujillo v. Utah Dep't of Transp., 1999 Ut. App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (1999); Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344 (1998); and Rick v. State Dep't of Transp. & Dev., 630 So. 2d 1271 (La. 1994).

[73] 666 A.2d 443 (D.C. App. 1995).

[74] Aguehounde, 666 A.2d at 449.

[75] *Id.* at 449–50.

[76] *Id.* at 450.

[77] *Id.* at 451.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 453 (Citations omitted).

[81] 630 So. 2d 1271 (La. 1994).

persists, even though the court cited the *Gaubert* case. The Supreme Court of Louisiana noted that the discretionary function exception involves a two-step analysis:

> First, a court must determine whether the action is a matter of choice. If no options are involved, the exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy. *U.S. v. Gaubert*....[82]

However, the court concluded that the crossing in question "was not selected for earlier upgrade, because the DOTD negligently assigned it a low hazard index.... Using 1974 data to formulate a 1986 hazard index was not a policy decision. It was operational negligence on the part of the DOTD."[83]

Some state courts continue to apply the planning-operational test of discretion, sometimes without even mentioning the *Gaubert* case,[84] and the Supreme Court of Utah expressly declined to embrace the *Gaubert* decision in *Trujillo v. Utah Dept. of Transp.*[85] In *Trujillo,* the court ruled that the transportation department's formulation of a traffic control plan to use barrels rather than barriers at an accident location was not a policy-level decision.[86] Moreover, the court held that the failures to reduce speed in a construction zone as called for in the construction plan, to investigate accidents, or to consider corrective action in response to notice of a dangerous condition were all operational-level activities.[87] Another court has stated that if the "work involved no marshaling of state resources, no prioritizing of competing needs, no planning, and no exercise of policy-level discretion," then the activity is likely to be held to be ministerial in nature.[88] In *Tseu ex rel. Hobbs v. Jeyte*,[89] the court stated that it had never adopted the reasoning in *Gaubert*, and it would be "directly contrary to its previous holdings on the discretionary function exception under Hawaii law to do so."[90]

In sum, the transportation department's counsel should be aware that some state courts have not embraced *Gaubert* or have rejected its holding. Possibly other state courts have not been made aware of the reasoning in *Gaubert*. In any event, counsel will want to cite *Gaubert* and argue that immune discretion may be exercised at the so-called operational level and that a planning-operational level test of discretion does not apply or should no longer be applied in construing a provision in a state tort claims act for discretionary immunity. If the state court adopts the *Gaubert* decision, it may be possible to immunize more actions that are discretionary in nature but that occur at the so-called operational level.

B. APPLICATION TO HIGHWAY DESIGN OF AN EXEMPTION FOR DISCRETIONARY ACTIVITY

B.1. Introduction

This section considers whether transportation departments may claim immunity for all decisions involving the planning and designing of projects, even if the approved plan or design contains a defective feature or omits a feature that should have been included. Although some courts recognize that design generally involves the consideration of broad policy factors protected by the discretionary function exemption, there are exceptions to immunity where, for example, the plan or design was approved without due deliberation or study, or where it was unreasonable or arbitrary.

If the plan proves to be dangerous later, such as when there are changed physical conditions that render an approved plan or design defective, then the state may have a duty to remedy the unsafe condition or to give adequate notice to the traveling public. In some states, the legislatures have enacted design immunity statutes, but the statutes may not afford the state absolute protection for its design of public property.

Consistent with the language in *Dalehite* that "it is not a tort for government to govern";[91] it has been held that generally (a) the decision to build a highway and (b) the approval of a plan or design of a highway are not actionable.[92] Since the U.S. Supreme Court's deci-

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[82] Rick, 630 So. 2d at 1276.

[83] *Id.* The trial court's verdict that the DOTD was liable was affirmed.

[84] Taylor-Rice v. State, 979 P.2d 1086, 1104, 1999 Haw. LEXIS 258 (1999) (failure to replace a guardrail was operational-level act with no mention of Gaubert); State v. San Miguel, 981 S.W.2d 342, 348-49, 1998 Tex. App. LEXIS 4668 (Tex. App., Houston, 1998) (decision to warn of a missing railing held to be discretionary; decision to use a particular type of barricade held to be not discretionary); State v. Livengood, 688 N.E.2d 189, 196, 1997 Ind. App. LEXIS 1569 (1997) (design and installation of replacement of a portion of a guardrail to comply with a safety standard was operational level task and not immune); and Schroeder v. Minnesota, 1998 Minn. App. LEXIS 1436 (1998) (decision to patch pavement where it met a bridge was operational level activity).

[85] 1999 Utah App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (Utah 1999).

[86] Trujillo, 986 P.2d at 762.

[87] *Id.*

[88] Defoor v. Evesque, 694 So. 2d 1302, 1306 (Ala. 1997).

[89] 88 Haw. 85, 962 P.2d 344, 348 (1998).

[90] *Id. See also* Trujillo v. Utah Dep't of Transp., 1999 Utah App. 227, 986 P.2d 752, 760, n.2, 1999 Utah App. LEXIS 104 (Utah 1999) (The appellate court rejected the Gaubert analysis, holding that the U.S. Supreme Court's interpretation of the discretionary function exemption in the FTCA was not binding on Utah's interpretation of its tort claims act and ruling that the court would continue to follow the planning/operational dichotomy.).

[91] *Supra* note 9.

[92] *Liability of Governmental Entity or Public Officer for Personal Injury or Damages Arising Out of Vehicular Accident Due to Negligent or Defective Design of a Highway*, 45 A.L.R. 3d 875

sion in *United States v. Gaubert*, it is possible that some state courts will be even more receptive to the view that "[w]hen established governmental policy…allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion,"[93] meaning that the agent's alleged negligence in exercising his or her discretion is immune from liability.

B.2. Immunity for Negligent Design Based on a Statutory Exemption for Discretionary Activity

If there is one area of highway activity that may be considered to be generally immune as a protected exercise of discretion, it is the one of highway design. Whether pre- or post-*Gaubert*, there are numerous examples of governmental actions held to be discretionary, including the approval of highway designs and specifications,[94] the decision to adhere to a former design during highway reconstruction,[95] or decisions regarding the inclusion of barriers.[96] The discretionary function exemption of the FTCA[97] was held to preclude liability of the United States for a bridge design in *Wright v. United States*.[98] In *Summer v. Carpenter*,[99] the Supreme Court of South Carolina held that "[a]s for negligent design, the [Tort Claims] Act provides absolute governmental immunity from liability for loss resulting from the design of highways and other public ways."[100] In that case, the court held the department would be immune even if it had been on notice that the design of the intersection was dangerous.[101] Other cases have found that the transportation department had design immunity for various reasons.[102]

If the court extends immunity only to decisions that involve "broad policy considerations," then it is possible that a design feature may not be protected. For example, in *Breed v. Shaner,*[103] the State was alleged to have been negligent in the design of the highway. The Supreme Court of Hawaii ruled that not all aspects of the design function fall within the exempt planning stage. After noting that the purpose of the discretionary exemption is "to protect the decision-making processes of state officials and employees which require the evaluation of broad public policies,"[104] the court went on to state:

> The effect of the circuit court's order is to hold the designing of a highway always involves the evaluation of broad policy factors. This places total emphasis on protecting the State to the exclusion of those who sustain injuries proximately caused by the negligent design of a highway. Although broad policy considerations may be a factor in certain aspects of highway design we do not think the circuit court's generalization is correct.… [F]urther facts must be adduced on the record to show that the decision to include the curve or other design feature involved the evaluation of broad policy factors before the court can decide that the discretionary function exception applies.[105]

(§ 13 superseded by *Governmental Tort Liability as to Highway Median Barriers*, 58 A.L.R. 4th 559).

[93] United States v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 1774, 113 L. Ed. 2d 335 (1991).

[94] Delgadillo v. Elledge, 337 F. Supp. 827 (E.D. Ark. 1972) (approval of designs and specifications was discretionary and, therefore, immune); Hughes v. County of Burlington, 99 N.J. Super. 405, 240 A.2d 177 (1968) (decision to omit emergency shoulders) *cert. denied*, 51 N.J. 575, 242 A.2d 379 (1968); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966) (decision by the State not to design its overpasses with wire fences).

[95] Richardson v. State, Dep't of Roads, 200 Neb. 225, 263 N.W.2d 442 (1978), *supp. op*., 200 Neb. 781, 265 N.W.2d 457 (1978).

[96] Alvarez v. State, 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719 720, 1999 Cal. App. LEXIS 1148 (1999) (design immunity not lost because of an absent barrier, although approved for eventual installation because of higher traffic volume) and Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 1997 Cal. App. LEXIS 283 (1997) (upheld immunity for barrier because it was a design decision).

[97] 28 U.S.C. § 2680(a).

[98] 568 F.2d 153, 158 (10th Cir. 1977), *cert. denied,* 439 U.S. 824 (1978) ("[T]he [government] was engaged in a 'discretionary function' when it determined to aid and assist the State of Utah in the construction of the bridge and approach roads…") *and criticized by*: Alabama Elec. Coop., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985); Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied,* 484 U.S. 1004, 98 L. Ed. 2d 647, 108 S. Ct. 694 (1988); and Ochran v. United States, 117 F.3d 495 (11th Cir. 1997), *reh'g, en banc, denied*, 136 F.3d 1333 (11th Cir. 1998).

[99] 328 S.C. 36, 492 S.E.2d 55, at 58 (1997), *reh'g denied,* (Oct. 21, 1997).

[100] S.C. CODE ANN. § 15-78-60 (15).

[101] Summer, 492 S.E.2d at 58. Certain wedging work at the intersection was relied upon to remove the claim from the protection of the statute, but the court held that the "circumstances indicate[d] the intersection was still under design and not subject to maintenance by the Highway Department." *Id.* at 60. There was, however, error in the trial judge's ruling that the department would have had discretionary immunity, because the evidence did not establish that the State considered various design options for the intersection and then selected one "after carefully weighing competing considerations." *Id.*

[102] Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 465–66 (1997) (evidence established that absence of a median barrier was a design choice made by the State; no "changed circumstances" to defeat the State's immunity); Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454 (2d Dist. 1997); Shand Mining, Inc. v. Clay County Board of Comm'rs, 671 N.E.2d 477 (Ind. Ct. App. 1996) (county entitled to immunity under a statutory provision dealing with a loss caused by the design of a highway if the loss occurs at least 20 years after the highway was designed where there was no evidence that the county had altered or redesigned the highway since then), *reh'g denied*, (Feb. 13, 1997), *transfer denied*, 683 N.E.2d 595 (Ind. 1997); and Cygler v. Presjack, 667 So. 2d 458 (Fla. App. 4th Dist. 1996) (summary judgment for the department affirmed; government not liable for failing to provide a traffic regulating or separating device or barrier).

[103] 57 Haw. 656, 562 P.2d 436 (1977).

[104] Breed, 562 P.2d at 442.

[105] *Id.* at 443.

Thus, the court held that only those aspects of design activity that involve broad policy considerations come within the ambit of the discretionary function exemption.[106] Similarly, although the court in *Japan Air Lines Co., Ltd. v. State*[107] drew a distinction between "decisions that are merely operational in nature" and those that involve planning or policy formulation, the court stated that "[a] design decision which does not require evaluation of broad policy factors does not come within the discretionary function exception."[108]

In *Stewart v. State*,[109] involving alleged defective lighting and improper design of a bridge, the Supreme Court of Washington stated that discretionary immunity is "an extremely limited exception"[110] to the general withdrawal of state tort immunity by the legislature.[111] The court identified decisions that involve broad policy considerations and that qualify for discretionary immunity, for example, the "decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, [and] the number of lanes…."[112] However, for the transportation department to be immune, it must show "that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate."[113]

Because of the absence of a clear showing that basic policy decisions were involved in the design of the bridge, the court decided that the design was indeed a proper subject of judicial review and that the issues regarding negligent design should have been submitted to the jury.[114]

Thus, courts in some cases have rejected the argument made under a state tort claims act's provision for discretionary immunity that all design activities are discretionary in nature.

[106] *Id.*

[107] 628 P.2d 934, 936 (Alaska 1981).

[108] Japan Airlines Co., 628 P.2d at 937.

[109] 92 Wash. 2d 285, 597 P.2d 101 (1979), *overruled in part on other grounds by* Crossen v. Skagit County, 100 Wash. 2d 355, 669 P.2d 1244 (1983) (decisions regarding the design and lighting of the bridge did not meet all requirements for immunity), *overruled in part on other grounds by* Crossen v. Skagit County, 100 Wash. 2d 355, 669 P.2d 1244 (1983) (jury instruction on county's duty need not refer specifically to MUTCD).

[110] Stewart, 597 P.2d at 106.

[111] WASH. REV. CODE ANN. § 4.92.090.

[112] Stewart, 597 P.2d at 106.

[113] *Id.* at 106–07.

[114] Andrus v. State, 541 P.2d 1117 (Utah 1975) (discretionary exemption of the Utah Tort Claims Act did not extend to negligence in the design of the highway), *criticized by* Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990) (inverse condemnation under the Utah Constitution not subject to sovereign immunity limitations in Governmental Immunity Act).

B.3. Arbitrary or Unreasonable Decisions or Decisions Made Without Adequate Study or Deliberation

There are decisions in which the courts have held that transportation departments could not claim immunity, because there was inadequate study of the plan or design, or the approval of the plan or design was arbitrary or unreasonable.[115] In *Weiss v. Fote*,[116] although the court held that it would be improper to permit a jury to review the local Board of Safety's judgment as to the proper clearance interval for a traffic light, the court emphasized that its decision might have been different if the evidence had revealed that the government's decision was either arbitrary or unreasonable.[117] Nevertheless, the level of proof required to challenge the state's basis for approving a design with an alleged defective feature may be quite difficult to attain. As the court stated in *Hall v. State*:[118]

> the Claimant must show that the design was evolved and approved without adequate study, or that the design lacked a reasonable basis.… *The proof must establish that the plan could not have been adopted if due consideration had been given it*.... [T]o place liability on the State for a decision by a planning body, the Court of Appeals in *Weiss* required proof, not only that a reasonable man would have acted otherwise, but that the State used no reason at all.[119] (Emphasis supplied).

In *Hall,* the court allowed the plaintiff to go forward with proof of the cause of action for negligence under the stringent *Weiss* test.[120] The extent of the State's compliance with applicable design standards may be a factor in determining the reasonableness of the design for highways[121] or bridges.[122] The *Weiss v. Fote* opinion

[115] Romeo v. New York, 1997 N.Y. Misc. LEXIS 576 (1997) (State failed to conduct an adequate study of an intersection); *but see* Redcross v. State, 241 A.D.2d 787, 660 N.Y.S.2d 211, 1997 N.Y. App. Div. LEXIS 8080 (3d Dep't 1997) (placement of pedestrian control button was not plainly inadequate or lacking a reasonable basis).

[116] 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960) *reh'g denied,* 8 N.Y.2d 934 (1960), 168 N.E.2d, 857 *mot. granted*, 10 N.Y.2d 886 (1961).

[117] 167 N.E.2d at 66.

[118] 106 Misc. 2d 860, 435 N.Y.S.2d 663 (Ct. Cl. 1981).

[119] 435 N.Y.S.2d at 665.

[120] *Id.* at 666. The court concluded that the proper standard by which to judge the rendition of engineering services by the State was the same as the standard to which engineers in the private sector were held, "a malpractice standard of reasonable care and competence owed generally by practitioners in the particular profession."

[121] Patti v. State, 217 A.D.2d 882, 630 N.Y.S.2d 137, 138 (1995) ("The State demonstrated that, despite the fact that the barricades were not part of the original highway plan for this exit area, ...their use and arrangement did not constitute a hazardous condition...[and the] array of barricades was in compliance with the only clear standards in the manual....")

[122] Harland v. State, 142 Cal. Rptr. 201 75 Cal. App. 3d 475 (1977) (court affirmed $3 million judgment against California as

intimated that government decisions made without adequate prior study would not enjoy discretionary immunity.[123]

B.4. Effect of Known Dangerous Conditions on Immunity

Several courts have recognized an exception to design immunity if the state had notice[124] of a dangerous condition of the highway because of its design.[125] In such a case, the court may hold that the state had a duty to correct the dangerous condition or to give adequate notice to the traveling public.[126] As the court stated in *City of St. Petersburg v. Collom*,[127]

> [w]e find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition.…

Similar views with respect to the exclusion of discretionary immunity in the case of known dangerous conditions have been adopted and expressed by courts in other jurisdictions.[128] In cases involving bridges, although one case stated that there is no duty "to warn of [an] open and obvious hazard,"[129] the courts generally have recognized that, notwithstanding the discretion exercised in the designing of bridges, there may be liability where the state fails to respond to a dangerous condition.[130]

B.5. Design Immunity Statutes

A few states, in addition to having a provision in the tort claims act exempting discretionary activities from liability, have sought to give further impetus to the rule that an approved highway plan or design is not actionable for injuries resulting therefrom. "The rationale behind statutory design immunity is to avoid a jury reweighing the same factors which were already considered by the governmental entity that approved the design."[131] For instance, California's governmental tort claims act embraces plan or design immunity.[132] A public entity is immune from liability for an injury

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a result of a fatal automobile accident on a bridge where expert witness testified that the bridge was dangerous because of a number of design factors); Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976) (State held liable for creating an unsafe bridge guardrail without adequate prior study).

[123] Weiss, 167 N.E.2d at 66.

[124] If a dangerous condition was not of the State's own making, it must have had actual or constructive notice and a reasonable opportunity to take remedial action with respect thereto; however, it has been held that where the dangerous condition was of the State's own making, notice was not required. Johnson v. State, 636 P.2d 47 (Alaska 1981).

[125] Thompson v. Coates, 694 So. 2d 599 (La. Ct. App. 2d Cir. 1997), *cert. denied,* 701 So. 2d 987 (La. 1997) (design of a highway causing hydroplaning may result in a dangerous condition); Bane v. California, 208 Cal. App. 3d 860, 256 Cal. Rptr. 468 (5th Dist. 1989), *review denied,* (May 23, 1989) (failure to take remedial steps within a reasonable period of time after notice that design changes resulted in an unreasonably dangerous intersection), *(criticized in* Grenier v. City of Irwindale*,* 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454 (2nd Dist. 1997)*,* and *criticized in* Sutton v. Golden Gate Bridge, Highway & Transp. Dist., 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (22nd Dist. 1997). *Compare* Compton v. City of Santee, 12 Cal. App. 4th 591, 15 Cal. Rptr. 2d 660, 665 (4th Dist. 1993) (city entitled to design immunity for a bridge also could not be held liable for failing to warn that the design was dangerous) and Alvarez v. State, 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719, 1999 Cal. App. LEXIS 1148 (1999) (The court backed away from its earlier decision in Bane.).

[126] *Id.*

[127] 419 So. 2d 1082, 1086 (Fla. 1982); *see also* Clarke v. Florida Dep't of Transp., 506 So. 2d 24 (Fla. Dist. Ct. App. 1987); Greene v. State, Dep't of Transp., 465 So. 2d 560 (Fla. 1st Dist. Ct. App. 1985); and State Dep't of Transp. v. Brown, 497 So. 2d 678 (Fla. Dist. Ct. App. 1986), *review denied*, 504 So. 2d 766 (Fla. 1987).

[128] Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983) (failure to post signing warning that a bridge was 2 ft more narrow than its roadway approaches), *appeal after remand*, 111 Idaho 897, 728 P.2d 1306 (1986), *not followed on other grounds by* Packard v. Joint Sch. Dist., 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983); Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980) (failure to erect warning signs that "motorists...were approaching a haze area...."), *overruled in part by* Chandler Supply Co. v. Boise, 104 Idaho 480, 660 P.2d 1323, 1328 (1983) ("In our view, the purpose behind the discretionary function exception is to preserve governmental immunity from tort liability for the consequences which arise from the planning and operational decision-making necessary to allow governmental units to freely perform their traditional governmental functions"); (*overruled in part* by Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755, 766 (1986) ("[W]e hold that the planning/operational test...applies to the discretionary function exception...."); *see also* McClure v. Nampa Highway Dist., 102 Idaho 197, 628 P.2d 228 (1981) (negligence of the State in failing to post a sign warning of the known dangerous condition created by an abrupt curve in the roadway), *overruled in part by* Chandler Supply Co. v. Boise, *supra, and in part by* Sterling v. Bloom, *supra;* and Carlson v. State, 598 P.2d 969 (Alaska 1979) and Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469, 475 A.2d 48 (1984).

[129] Masters v. Wright, 508 So. 2d 1299 (Fla. Dist. Ct. App. 1987) (individual killed while walking on a bridge designed to accommodate motor vehicle traffic only).

[130] Cay v. Department of Transp. & Dev., 631 So. 2d 393 (La. 1994), *reh'g denied,* Feb. 24, 1994) (duty to construct bridge railings of sufficient height); Campbell v. Louisiana Dep't of Transp. & Dev., 648 So. 2d 898 (La. 1995) (duty to install guardrails on a bridge); and Millman v. County of Butler, 244 Neb. 125, 504 N.W.2d 820 (1993) (liability where public authority knows from inspection reports that a bridge does not comply with applicable construction standards and fails to post warning signs).

[131] Wooten v. S.C. Dep't of Transp., 326 S.C. 516, 485 S.E.2d 119, 123, 1997 S.C. App. LEXIS 53 (1997).

[132] CAL. GOV'T CODE § 830.6.

caused by the plan or design of a public project that was approved in advance by a public body or employee exercising discretionary authority to give approval, if there was any substantial evidence upon which a reasonable employee or public body could have approved the plan or design.[133]

For the state to have design immunity, it must establish a causal relationship between the plan or design and the accident, discretionary approval of the plan or design prior to construction, and the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design.[134] As for approval, it has been held that a detailed plan drawn up by a competent engineering firm and approved by the city engineer in the exercise of his discretionary authority was "persuasive evidence" of the element of prior approval.[135]

The New Jersey plan or design immunity statute provides that:

> Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.[136]

Although the California statute invites the court to consider whether approval of the plan or design by the public body was reasonable, the New Jersey statute simply requires approval by one exercising discretionary authority to give such approval.

Even in states having a design immunity statute, the statute may not necessarily provide for immunity in every situation involving an allegedly defectively designed transportation project. There may be an exception to design immunity where the highway in actual use has a design feature that was not approved in the overall plan or design of the highway.[137]

B.6. Duty to Improve the Design Due to Changed Circumstances

The initiation of design studies, recommendations for highway improvements, and the commencement of improvements are themselves discretionary and do not burden the state with any further duty to complete the preliminary work.[138] A question may arise, however, as to whether the state had a duty to improve or change an existing highway where actual use or changed circumstances some time later indicated that the highway design was no longer satisfactory.

For the State to lose its design immunity in California, as held in *Alvarez v. State*,[139] there must be "changed physical conditions" that have produced a dangerous condition of the highway or other public improvement. In *Alvarez*, the plaintiff failed to produce substantial evidence of such a change in physical conditions, in part because the highway's traffic volume was less than the design capacity for the highway, and the accident rate was less than expected.[140] In another case, the mere fact that a street flooded during storms was insufficient to show a change in physical conditions.[141] It has been held also that there was no duty to upgrade a previously constructed guardrail because of changes in technology relating to the design of guardrails.[142]

If there is immunity for the planning and designing of highway projects, is such immunity perpetual? *Baldwin v. State*[143] held that the omission of a left-turn lane, which the state later knew was dangerous in actual practice, was not immunized by the state's design immunity statute.[144] The state argued that the plan or design was based on traffic conditions at the time of the preparation of the blueprint and that the installation of a special lane was not then required. However, the court held that, although initial immunity could have attached because the plan was reasonable and duly approved, the immunity continues only so long as conditions have not changed.

> Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blue-

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[133] *See* CAL. GOV'T CODE § 830.6.

[134] Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 1997 Cal. App. LEXIS 283 (1997).

[135] Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454, 459, 1997 Cal. App. LEXIS 737 (1997).

[136] N.J. STAT. ANN. tit. 59, § 4-6.

[137] In *Cameron v. State*, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777, 782 (1972), the design plans contained no specification of the uneven superelevation as the highway was actually constructed. "Therefore such superelevation as was constructed did not result from the design or plan introduced into evidence and there was no basis for concluding that any liability for injuries caused by this uneven superelevation was immunized by [Calif. Govt. Code] section 830.6." 497 P.2d at 782.

[138] Kaufman v. State, 27 A.D.2d 587, 275 N.Y.S.2d 757 (1966) (A decision not to erect barriers, after recommendations and restudy of an original design by the authorized body in the light of expert opinion then available, is not actionable negligence.)

[139] 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719, 1999 Cal. App. LEXIS 1148 (1999).

[140] *Id*.

[141] Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454, 462, 1997 Cal. App. LEXIS 737 (1997).

[142] Kniskern v. Township of Somerford, 112 Ohio App. 3d 189, 678 N.E.2d 273 (1996), *dismissed, discretionary appeal not allowed,* 77 Ohio St. 1485, 673 N.E.2d 145 (1996), *cert. denied,* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2513 (1997).

[143] 6 Cal. 3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121, (1972) (*overruling* Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967)) and Becker v. Johnston, 67 Cal. 2d 163, 60 Cal. Rptr. 485, 430 P.2d 43 (1967)).

[144] CAL. GOV'T CODE § 830.6.

> prints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.[145]

The court concluded that permitting a jury to consider the question of perpetuity of the design did not interfere with governmental discretionary decision-making, because the jury would not be reweighing the same technical data and policy criteria as would be true if the jury were allowed to pass upon the reasonableness of the original plan or design.[146] It may be noted that the mere passage of time alone will not constitute a change in conditions.[147] In 1979, after the *Baldwin* decision, Section 830.6 was amended to give the public authority a reasonable time to improve the design after having notice of a dangerous condition.[148]

In *Sutton v. Golden Gate Bridge, Highway and Trans. Dist.*,[149] the plaintiff alleged that the lack of a median barrier on the Golden Gate Bridge constituted a dangerous condition of public property for which the district did not have design immunity. The court held that California Government Code Section 830.6 provided the public entity with an affirmative defense of design immunity in actions arising out of an alleged dangerous condition of public property. The fact "'[t]hat a paid expert witness for plaintiff, in hindsight, found…the design was defective, does not mean, *ipso facto*, that the design was unreasonably approved.'"[150]

The court rejected the plaintiff's argument that the evidence failed to show that the transportation department did not make a design decision by actually considering whether to include a median barrier. The court found that there was ample evidence of studies of the bridge and whether a median was needed before and after a bridge deck replacement project in 1979. The plaintiff also contended that "technological advances in the development of a movable median barrier constitute[d] evidence of changed physical conditions defeating design immunity."[151] The court further rejected the plaintiff's argument that changed physical conditions are unnecessary to the loss of design immunity and that immunity ends when it is apparent that the design has created a dangerous condition. The court concluded: "We agree with the *Grenier and Compton* courts that changed physical conditions are necessary to the loss of design immunity.… As appellant has not shown a change in physical conditions, there is no triable issue of fact on design immunity."[152]

If the state has a duty to respond to a plan or design's changed conditions, then there may be an issue concerning the length of time within which it is reasonable for the state to respond appropriately. The issue of the length of time the state had to respond to recommended changes was before the New York Court of Appeals in *State v. Friedman*,[153] involving consolidated appeals from several court decisions. For convenience, the three cases involved will be referred to by the names *Cataldo, Muller,* and *Friedman.*

The *Cataldo* case involved a bridge that was completed in 1955. The original plan called for no median barriers. The first review of this decision, completed in 1962, concluded that median barriers were undesirable. In July 1962, the decision was reviewed again, leading to the erection of barriers at the westerly end of the bridge because of the high incidence of crossover accidents. In 1972, another report recommended against the use of barriers on the easterly and tangent sections of the bridge for the same reasons expressed in the two 1962 reports.

In 1973, following an accident, the plaintiff claimed that the state was negligent for failing to install a median barrier on another section of the bridge. The Court of Appeals held that the 1962 and 1972 reports were grounded on an adequate study and demonstrated that their recommendations had a reasonable basis. The court stated: "The authority fulfilled its duty under *Weiss* by studying the dangerous condition, determining that design changes were not advisable, and later reaching the same conclusions upon reevaluation of its decision."[154]

However, in the *Muller* case, the authorities decided that median barriers should be installed on the entire length of a bridge. Approximately 3 years later, in December 1977, the plaintiff was injured in a crossover accident. In reinstating a verdict for the plaintiff, the Court of Appeals held that the change in the original plan or design must be implemented within a *reasonable* time or the State may be held liable for the delay. The 3-year delay in carrying out the State's decision to erect a median barrier was unreasonable and, hence, the State was liable.

In the *Friedman* case*,* 5 years earlier in February 1973, the transportation department had recognized, based on the proliferation of crossover accidents, the need for a median barrier on a viaduct. Although inclusion of a barrier on the viaduct was proposed in August 1974, the State had not commenced work by

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[145] Baldwin, 491 P.2d at 1127. (Footnote omitted).

[146] *Id*. at 1128.

[147] Cameron v. State, 102 Cal. Rptr. 305, 497 P.2d 777, n.10 (1972). *See also* Anderson v. City of Thousand Oaks, 65 Cal. App. 3d 82, 135 Cal. Rptr. 127 (1977) (Absence of approved features from the design was itself part of the approved design; however, there was a triable issue on whether the City had notice of a dangerous condition and failed to take action).

[148] Sutton v. Golden Gate Bridge, Highway and Trans. Dist., 68 Cal. App. 4th 1149, 1163, 81 Cal. Rptr. 2d 155, at 164 (Calif. App. 1st Dist. 1998).

[149] 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (Calif App. 1st Dist. 1998).

[150] Sutton, 81 Cal. Rptr. 2d at 160, *quoting* Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 525, 237 Cal. Rptr. 505 (1987).

[151] *Id*. at 163.

[152] *Id*. at 164

[153] 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986).

[154] State v. Friedman, 502 N.Y.S.2d at 676.

the time of the Friedman accident in March 1978. The State attributed its delay to necessary work on other projects and to the need for the setting of funding priorities.

The Court of Appeals held that the 5-year delay in carrying out the decision to install a median barrier was unreasonable. The State "failed to demonstrate at trial either that the 5-year delay between DOT's recognition of the hazardous condition on the viaduct and its project proposal and the Friedman accident was necessary…or that the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding."[155]

Thus, decisions from New York establish that a decision made because of a *Weiss*-type review of a plan or design of the highway in operation must be executed within a *reasonable* time after the review; otherwise, the state may be held liable for the delay. What constitutes an acceptable period of delay in implementing the decision depends on circumstances of each case.

In sum, there may be limited immunity for negligent design under the exemption for discretionary activity. However, such immunity may not be available if it can be demonstrated to the court that the design decisions were made arbitrarily or without an adequate or reasoned basis. Although design immunity statutes may be important to the transportation department in protecting design decisions from liability, once again immunity may not be available in those cases where it is established that a design has become dangerous in actual use or that there is a hazardous condition because of changed physical circumstances.

C. APPLICATION OF DISCRETIONARY EXEMPTION TO MAINTENANCE OF HIGHWAYS

C.1. Introduction

It is not possible simply to categorize decisions involving construction or maintenance activities as purely operational in character and, therefore, not worthy of protection under the discretionary function exemption. Similarly, the mere labeling of an activity as being either a "design" or a "maintenance" function has been rejected as an unsatisfactory test to determine whether a particular activity should be immune under the discretionary function exception.[156]

As seen under the *Gaubert* decision, where state courts follow the U.S. Supreme Court's interpretation of the FTCA's discretionary function exception, the transportation department's employees may make decisions on a day-to-day basis at the so-called "operational" level, which still may come within the protection of the discretionary function exception. But where state courts have not accepted *Gaubert,* the courts may be following the planning-operational distinction under which only discretion exercised at the planning level is likely to be immune from liability.[157]

C.2. The Element of Choice as the First Step in the Analysis

Under the *Gaubert* decision, there is a presumption that an employee is exercising discretion if the statute, regulation, agency policy, or other guideline allows the employee to exercise some discretion in his or her decision-making. The first inquiry is whether the government's employee's action involves an element of judgment or choice.[158] If the course of conduct is prescribed in some fashion by the government, then there is no discretion to violate the mandate and, thus, no immunity. However, even if the public employee is allowed by the agency's regulation, policy, or manual to exercise some discretion, then there may be immunity for the employee's alleged negligence in performing highway construction or maintenance activities.[159]

The two-step analysis was described in *Rick v. Department of Transp. & Dev.*,[160] a railroad crossing accident case, in which the discretionary function exception was at issue:

> First, a court must determine whether the action is a matter of choice. If no options are involved, the [discretionary function] exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy.[161]

The phrase "based on policy" is important as the transportation employee who exercises discretion in implementing a policy directive may be entitled to immunity for his or her actions even though he or she was not required to consider broad policy objectives in making the decision at issue. Prior to the *Gaubert* case, there was authority holding that immune discretion involved in formulating a policy could flow downward and immunize subordinates who had to exercise

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[155] *Id.*

[156] Stevenson v. State Dep't of Transp., 290 Or. 3, 619 P.2d 247 (1980) (A verdict for the plaintiff was reinstated without regard to whether the dangerous condition was the result of faulty design or negligent maintenance, because there was nothing "in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion.") 619 P. 2d at 254.

[157] *See, e.g.,* Trujillo v. Utah Dep't of Transp., 1999 Utah App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (1999); Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344 (1998); and Rick v. State Dep't of Transp. & Dev., 630 So. 2d 1271 (La. 1994).

[158] United States v. Gaubert, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[159] Robinson v. Washington Metro. Area Transit Auth., 676 A.2d 471 at 474 (D.C. App. 1996) (There was discretionary action involved, because the applicable manual allowed station manager "to weigh on the spot the same considerations as to an appropriate response to observed crime that underline[d] the directives.").

[160] 630 So. 2d 1271 (La. 1994).

[161] Rick, 630 So. 2d at 1276, *citing* United States v. Gaubert.

discretion to implement the policy.[162] Immunity was exhausted only if the policy was sufficiently detailed that the employee has no discretion in implementing it.

Prior to the *Gaubert* decision, the courts had a tendency to decide construction and maintenance cases under one of two basic approaches. One approach was to follow the *Dalehite* case. Thus, a state court in a case involving maintenance of a highway could decide that even though the details of the project were not spelled out fully, the alleged negligence occurred at the "operational level." Decisions made at the operational level did not involve policy-making and did not come within the exception.[163]

The second approach, based on the *Indian Towing* decision, was that if the negligent construction or maintenance was performed in such a way that it deviated from the specifications of the approved plan or design, then the alleged negligence would not be protected under the exception. The reason was that once the policy-level decision was made to undertake a project, there was no discretion to perform it negligently.[164]

In *State v. Abbott,*[165] the court stated that day-to-day "housekeeping" functions (ministerial duties) are generally not discretionary.[166] However, since the *Gaubert* case, so-called housekeeping functions, presumably meaning those performed at the operational level, may nevertheless may be protected by the discretionary function exception. As seen, the first question is whether the applicable statute, regulation, policy, or guideline permitted the transportation employee to exercise discretion in performing his or her duties relating, for example, to highway maintenance. If the employee is not required to comply with any specific guidelines, the argument may be even stronger that the employee is exercising discretion in the performance of his or her duties. As one court has stated, the state's argument that the "absence of formal standards renders all maintenance discretionary has some appeal…."[167] The court agreed that the decision *whether* to enact regulations requiring particular maintenance or inspection procedures regarding hoists was an act characterized by official discretion; however, "[t]he absence of formal standards…is not dispositive of the issue of immunity."[168]

Thus, it may be important whether there is *any* standard or policy concerning how a lower ranking employee is to perform his or her tasks. On the other hand, if a statute requires the transportation agency to promulgate rules or regulations, then it may be important that the agency has done so. In one case, there was immunity, because the agency "did promulgate at least some rules pursuant to its statutory mandate…."[169] Another example is the case of *Aguehounde v. District of Columbia,*[170] in which the court held that the setting of traffic light signal intervals was discretionary. The court specifically noted that the government had not adopted a directive that mandated the setting of traffic intervals that "would transfer the setting of the interval timing from a discretionary to a ministerial task."[171] "Moreover, the testimony at trial established that there were several different charts which the engineers used to determine the length of signal intervals."[172] The court held that there was no claim even for simple mismeasurement by the engineers, because "the evidence considered as a whole did

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[162] Spillway Marina, Inc. v. United States, 445 F.2d 876, 878 (10th Cir. 1971). A marina was damaged by the draw-down of the water level of a reservoir in Kansas, an Army Corps of Engineers project. The government contended that the decision to draw down the reservoir was discretionary, and the court agreed:

> The discretionary function did not stop in the decision to construct Turtle Creek Reservoir. It continued because the storage and release of water was directly related to the attainment of objectives sought by the reservoir construction. Decisions of when to release and when to store required the use of discretion.

Id. at 878. The draw down decision depended on a great number of variable factors, such as navigation conditions and needs, irrigation requirements, and rainfall.

[163] United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962) (A directive authorizing construction on an air base did not specifically authorize the acts and omissions that caused the damage to the plaintiffs' land; thus, the negligence in implementing the overall general plan was committed at the operational level and, therefore, was not immunized by the discretionary function exemption.).

[164] State v. Abbott, 498 P.2d 712, 722 (Alaska 1972) (Once the State made the decision to provide winter maintenance,

> the individual district engineer's decisions as to *how* that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision. Once the basic decision to maintain the highway in a safe condition throughout the winter is reached, the state should not be given discretion to do so negligently. The decisions at issue in this case simply do not rise to the level of government policy decisions calling for judicial restraint. Under these circumstances the discretionary function exemption has no proper application.) (Footnote omitted).

[165] 498 P.2d 712 (Alaska 1972).

[166] *Id*. at 720.

[167] Mahan v. New Hampshire Dep't of Admin. Servs., 141 N.H. 747, 693 A.2d 79, 83 (1997). Factual issues precluded summary judgment on the issue of the applicability of the discretionary function exception.

[168] *Id.*

[169] Evenstad v. State, 178 Ariz. 578, 875 P.2d 811, 819 (Ct. App. 1993) (In a case involving whether the motor vehicle division had promulgated rules that might prevent it from issuing a license to an habitually intoxicated person, the agency was held to have immunity.).

[170] 666 A.2d 443 (D.C. 1995).

[171] Aguehounde, 666 A.2d at 451.

[172] *Id.* at 452.

not establish the existence of a mandatory policy for setting traffic intervals which would transfer the function into a ministerial one. We also conclude that any mismeasurement, if there was one, was therefore irrelevant in this analysis."[173]

C.3. The Element of Policy Consideration as the Second Step in the Analysis

Even though the policy or manual may permit the transportation employee engaged in maintenance activity some discretion, it is still necessary to consider and evaluate the *nature* of the particular maintenance activity to determine whether the decisions involved policy-type considerations.

As seen, cases prior to *Gaubert*[174] seemed to assume that maintenance decisions of whatever kind were low-level, operational decisions. Thus, the courts may have failed to consider the nature of the decision-making that was actually involved. A pre-*Gaubert* case and a post-*Gaubert* decision involving pavement resistance illustrate how some activity at the maintenance level that heretofore was ruled nondiscretionary now could be considered discretionary in nature, because the employee was performing activity that involved both choices and policy considerations.

In *Costa v. Josey,*[175] a pre-*Gaubert* case, the question was whether alleged negligence regarding the resurfacing of a highway was protected from liability because of the State's discretionary function exception. The Supreme Court of New Jersey, after noting that virtually "all official conduct, no matter how ministerial, involves the exercise of some judgmental decision-making," held that such maintenance activity was not protected by the exception:

> We recognize that the resurfacing plans in this case were approved by high-level officials, the State Highway Engineer and the Commissioner of Transportation. Although the identity of the decision-maker may indicate that the decision involves basic policy making, that conclusion does not follow. A high-level official may make operational decisions as well. Here, the record is devoid of any evidence that the Engineer's and Commissioner's approval was other than an operational determination.... Moreover, subsumed within the principle that the public entity is immune when it exercises its discretion with respect to basic policy is the necessity for demonstrating that there has in fact been an exercise of that discretion. Here, for example, assuming that a basic policy matter was involved, there is nothing to indicate that any competing policy choices were actually considered when the resurfacing plan was made and approval given.[176]

Although the court conceded that almost all activities involve some element of discretion, it rested its decision on the finding that the particulars of the resurfacing operation in question were *operational* rather than *planning* in nature.[177]

In a case decided after *Gaubert*, the D.C. Circuit ruled in *Cope v. Scott*[178] that the Federal Government's decisions regarding road maintenance, including matters regarding the road's skid resistance and whether to resurface the highway, were decisions that were discretionary in nature and protected by the exception. Since the *Gaubert* decision, the following decisions have been held to be discretionary:

- The choice of materials used in the construction of guardrails;[179]
- Decisions regarding skid resistance and surface types where the applicable manual stated that the standards should be followed "to the extent practicable";[180]
- A city's operation of its water main system;[181] and
- The setting of priorities for road repair work and the deployment of maintenance crews.[182]

Similarly, in a mass transit case involving a garage accident, the court ruled that the agency could not be held liable "for determinations made in establishing 'plans, specifications or schedules of operations for the Metrorail.'"[183]

C.4. Applicability of the Discretionary Activity Exemption in Maintenance Cases Involving Known Dangerous Conditions

It appears that when the transportation department has knowledge of a dangerous or hazardous condition, under both pre-*Gaubert* and post-*Gaubert* decisions, the department has a duty to correct the defective condition or to give adequate warning. The discretionary function exception has been held not to apply to protect the department from liability for negligence where there was a failure to respond to dangerous or hazardous conditions.[184]

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[173] *Id.* at 451.

[174] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[175] 83 N.J. 49, 415 A.2d 337 (1980).

[176] 415 A.2d at 342–43.

[177] The court remanded the case for trial for determinations of whether the initial design contemplated that the divider would be lowered by subsequent resurfacing and whether the decision to resurface was a policy-level decision that came within the meaning of the discretionary function exemption.

[178] 310 U.S. App. D.C. 144, 45 F.3d 445 (D.C. Cir. 1995) (*criticized in* Aguehounde v. D.C., 666 A.2d 443 (D.C. 1995)).

[179] Baum v. United States, 986 F. 2d 716 (4th Cir. 1993).

[180] Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445 (1995).

[181] Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995). In Olson, there were no statutes, regulations, or policies prescribing a course of action for maintenance.

[182] Woods v. Ladehoff, 1993 Minn. App. LEXIS 113 (Minn. Ct. App. Feb. 2, 1993).

[183] Maxwell v. Washington Metro. Area Transit Auth., 98 Md. App. 502, 633 A.2d 924 at 929 (1993), *quoting* Beatty v. Washington Metro. Area Transit Auth., 860 F.2d 1117, 1127 (D.C. Cir. 1988).

[184] *See* Symmonds v. Chicago, M., S.P. & P.R. Co., 242 N.W.2d 262 (Iowa 1976) (existence of hazardous highway condition alone sufficient to give rise to the public agency's duty to

In some instances, where it can be demonstrated that a policy decision was made not to provide warning signs, there may be immunity for the decision not to provide them.[185] However, where the department decides to install a sign at an intersection, it has a duty to maintain it until it exercises its discretion to remove it or replace it with a more appropriate sign.[186] The discretionary function exception may not protect the state from alleged negligence for failing to provide an adequate warning sign when the highway presents a hazardous condition.

D. APPLICATION OF THE DISCRETIONARY ACTIVITY EXEMPTION TO HIGHWAY GUARDRAILS AND BARRIERS

D.1. Decisions to Provide or Not Provide Guardrails and Barriers as Protected by the Discretionary Exemption

The discretionary function exemption has been on occasion successfully asserted as a defense when the state has been sued because of a decision not to install guardrails or barriers.[187] As stated in *State, Dept. of Transportation v. Vega,*[188] the decision whether to erect a guardrail or a barrier is a planning level decision. On the other hand, a public entity may be held liable for injury caused by a dangerous condition of its property, and the state's failure to erect median barriers to prevent cross-median accidents may result in liability.[189]

If a plaintiff alleges that the state was negligent in *constructing* a guardrail on the road, the transportation department's evidence may be that, when the guardrail was installed, there were no prevailing engineering standards in existence for the designing and installing of guardrails along the highway. If so, the plaintiff must present evidence controverting the department's contention.[190] However, there may be a jury question concerning the state's liability if there is evidence "presented…that [the department of transportation] failed to utilize accepted professional engineering standards…."[191] On the other hand, it has been held also that when a defectively designed guardrail is a substantial factor in the cause of an accident, even negligent drivers and passengers can recover damages

provide adequate warning). Two cases holding that the State's failure to provide warning signs at a given location did not involve the exercise of discretion are *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972) and *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976); *but see* Seiber v. State, 211 N.W.2d 698 (Iowa 1973) (held that a policy determination not to erect signs along the state highways warning of deer involved the exercise of protected discretion).

[185] Jennings v. State, 566 P.2d 1304 (Alaska 1977) (The State's decisions not to provide an overpass, to lower the speed limit, to post warning signs, or to provide additional controlled crossings on a highway near a school all came within the "ambit" of the discretionary function exemption of the Alaska statute.).

[186] Board of Comm'rs v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975), *reh'g denied,* 167 Ind. App. 137, 340 N.E.2d 373 (1976); *see also* Kiel v. DeSmet Township, 90 S.D. 492, 242 N.W.2d 153 (S.D. 1976).

[187] Dean v. Commonwealth, Dep't of Transp., 561 Pa. 503, 751 A.2d 1130, 2000 Pa. LEXIS 1241 (Pa. 2000) (failure to erect a guardrail did not constitute a "dangerous condition" of commonwealth realty); Lockwood v. Pittsburgh, 561 Pa. 515, 751 A.2d 1136, 2000 Pa. LEXIS 1213 (Pa. 2000) (failure to erect a guardrail is not a "dangerous condition of the streets" for purposes of the "streets exception" to governmental immunity under tort claims act); Sutton v. Golden Gate Bridge, 68 Cal. App. 4th 1149, 81 Cal. Rptr. 155 (1998), *review denied,* 1999 LEXIS 1346 (Cal., Mar. 9, 1999) (no liability for failing to provide a median barrier, particularly where there was no showing of "changed conditions" between the time of the reconstruction and the accident).

[188] 414 So. 2d 559 (Fla. Dist. Ct. App. 3d Dist. 1982), *petition denied*, 424 So. 2d 763 (Fla. 1983); State v. San Miguel, 2 S.W.3d 249, 251, 1999 Tex. LEXIS 101 (1999); Helton v. Knox County, 922 S.W.2d 877 (Tenn. 1996) ("[T]he decision not to install guardrails despite the recommendations of state inspectors falls within the discretionary function exception."); Cygler v. Presjack, 667 So. 2d 458 (Fla. App. 4th Dist. 1996); Newsome v. Thompson, 202 Ill. App. 3d 1074, 148 Ill. Dec. 377, 560 N.E.2d 974 (1st Dep't 1990).

[189] Ducy v. Argo Sales Co., 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755, 760, 1979 Cal. LEXIS 332 (1979) (The Supreme Court of California held that the language of § 835, CAL. GOV'T CODE, "refute[d] the state's argument that it [was] under no 'duty' to protect the public against dangers that are not created by physical defects in public property" and that under the circumstances in that case the State was liable for failure to provide an adequate median barrier. *Compare* Carney v. McAfee, 577 N.E.2d 1374, 1986 Ohio App. LEXIS 9509 (Ct. App., 6th Dist., 1986), where the court appears to have required that there be a defect in the highway before there could be a duty on the city's part to provide a guardrail: "there was no actionable defect such as a hole, obstruction or excavation present in the street so as to render it not reasonably safe," and there was insufficient evidence for the jury to find that the absence of a median guardrail was a nuisance under the applicable statute or common law.

[190] Bird v. Kan. Dep't of Transp., 23 Kan. App. 2d 164, 928 P.2d 915 (1996). However, the reviewing court concluded that excerpts of expert deposition testimony were sufficient to controvert the Secretary's contention that no standards existed in 1972.

[191] Pike v. S.C. Dep't of Transp., 332 S.C. 605, 506 S.E.2d 516, 519–20 (S.C. App. 1998), *reh'g denied*, (Nov. 19, 1998). On the other hand, the trial court did not err in admitting evidence of 19 prior accidents at and near the intersection, when only one of the accidents was similar to the decedent's. *See* McIntosh v. Dep't of Transp., 234 Mich. App. 379, 594 N.W.2d 103, 1999 Mich. App. LEXIS 50 (1999) (genuine issue of material fact requiring trial on whether site where automobile crossed highway median was a "point of hazard"); and Temple v. Chenango County, 228 A.D.2d 938, 644 N.Y.S.2d 587, 589, 1996 N.Y. App. Div. LEXIS 7276 (3d Dep't 1996) (factual issue requiring trial on whether road and guardrails were built in accordance with good engineering practices).

from the state under the principles of comparative negligence.[192]

Of course, if there are applicable standards at the time of design and construction, it is important that the roadway and any guardrails or barriers meet them.[193] However, it has been held also that the transportation department need not show that there were applicable standards and that it complied with them to be able to claim immunity: "The discretionary function exception may come into play when there are no standards applicable to the governmental action."[194]

It should be noted that decisions regarding the removal of such devices are also important. A decision, for example, to remove a guardrail should be supported by an adequate study.[195] Moreover, if there are no guardrails, it may be important that the state's comprehensive reconstruction plan for the highway in question show that there was a decision not to provide a guardrail or barrier.[196]

Some jurisdictions will require evidence of the state's deliberation when the discretionary defense is raised. Thus, the discretionary defense may be unavailable if the transportation department made the decision not to spend funds on guardrails without engaging in active or affirmative decision-making; that is, rather than mere inaction or indecision, there must be an affirmative decision not to act.[197] "To establish discretionary immunity, the governmental entity must prove that, when faced with alternatives, it actually weighed competing considerations and made a conscious choice."[198]

In claims arising out of the failure to provide guardrails or barriers, it has been held that the fact that the same improvements are provided elsewhere is not evidence of negligence or a basis for the state's liability.[199] Furthermore, a delay in installing or erecting a guardrail or barrier may not be unreasonable in view of the scope of the particular reconstruction project at issue.[200] There may be changes in the standards applicable to guardrails or barriers between the time of the original design and the construction of the highway. The transportation department has no duty as technology develops to upgrade a previously constructed guardrail. Moreover, the department's "decision not to redraft its plans to incorporate a new guardrail design [is] the type of discretionary decision which is entitled to the protection of sovereign immunity…"[t]he fact that ODOT chose to incorporate some changes set forth in the new standards, but not others, proves that ODOT engineers were exercising their independent judgment in modifying the project plans in the months prior to construction."[201]

In the foregoing cases, the agency's decision-making concerning whether to provide or upgrade guardrails and barriers was held to be within the discretionary exemption and, therefore, immune to review by the courts. Out of the triumvirate of social, economic, and political policy considerations—the generally agreed basis of discretionary immunity—the courts relied primarily on economic considerations in holding the agency's decision to be nonreviewable.

D.2. Decisions to Provide or Not Provide Guardrails and Barriers That Are Not Discretionary

As seen in a previous section, there is some question as to whether the operational-planning level test is or should remain viable at the state level since the Supreme Court's decision in *United States v. Gaubert*.[202] There appear to be only a few decisions that hold that the state's decision-making regarding the installation or upgrading of guardrails and barriers is not an exercise of discretion. At the state court level, there are cases before and after the U.S. Supreme Court's *Gaubert* decision in which the courts declined to rule that administrative decisions concerning the installation of

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[192] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086, 1999 Haw. LEXIS 258 (1999) (affirmed judgment below that the State was 20 percent negligent).

[193] Utley v. State, 570 So. 2d 501, *cert. denied*, 573 So. 2d 1121 and 573 So. 2d 1122 (La. 1991) (no showing that the lack of a barrier on a median presented an unreasonable risk of injury).

[194] Bird v. Kan. Dep't of Transp., 928 P.2d at 920 (1996).

[195] Maricondo v. State, 151 A.D.2d 651, 542 N.Y.S.2d 712 (2d Dep't 1989), *appeal denied*, 75 N.Y.2d 702, 551 N.Y.S.2d 905, 551 N.E.2d 106 (1989).

[196] Light v. State, 672 N.Y.S.2d 543 (App. Div. 3d Dep't 1998), *leave to appeal denied*, 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229 (1998).

[197] Goss v. City of Globe, 180 Ariz. 229, 883 P.2d 466 (Ariz. App. Div. 2 1994).

[198] Pike v. S.C. Dep't of Transp., 332 S.C. 605, 506 S.E.2d 516 at 518 (S.C. App. 1998), *reh'g denied*, (Nov. 19, 1998).

[199] Ross v. Chicago, 168 Ill. App. 3d 83, 118 Ill. Dec. 760, 522 N.E.2d 215 (1st Dist. 1988), *appeal denied*, 122 Ill. Dec. 446, 526 N.E.2d 839 (1988).

[200] Edouard v. Bonner, 224 A.D.2d 575, 638 N.Y.S.2d 688, *appeal denied*, 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604 (2d Dep't 1996).

[201] Kniskeen v. Somerford Twp., 112 Ohio App. 3d 189, 678 N.E.2d 273, 278–79 (Ohio App. 10th Dist. 1996), *dismissed, appeal not allowed*, 77 Ohio St. 3d 1485, 673 N.E.2d 145 (1966), *recons. denied*, 77 Ohio St. 3d 1549, 674 N.E.2d 1187 (1997), *cert. denied*, 117 S. Ct. 2513.

[202] 111 S. Ct. 1267, 499 U.S. 315, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991). *See* Bruce Peterson and Mark Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997); Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703 (1999); Amy M. Hackman, *Note and Comment*: *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411 (1997).

tion of guardrails and barriers were protected by the state's discretionary function exception to liability.[203]

Nevertheless, it has been held that the state may be liable for a determination whether to install a raised median in the following instances: because such a decision is not a discretionary function;[204] for not providing one where the state had recognized that it was necessary;[205] or for failing to provide a temporary one.[206] The *alteration* of a median barrier has been held to be maintenance activity that did not come within the discretionary exception.[207]

In a guardrail case, it was held that the state had a duty to the motorists and passengers in an accident where the car struck the buried end of a guardrail. The court held that it was reasonably foreseeable that a motorist would leave the road at excessive speeds and vault over the guardrail.[208] In affirming a judgment against the state, the court noted that the state had reasonable notice of a prior accident in the same vicinity in which the design of the guardrail was at issue.[209]

Although decisions based on budgetary or other economic constraints, as seen, generally are discretionary in nature,[210] in *Gregorio v. City of New York*, the City contended that its failure to replace a barrier was due to funding priorities. However, the City presented no evidence on planning, ordering of priorities, or limitations on available funding. The court held that the City was not immune from liability for injuries caused by a defective barrier.[211]

The state may be liable for the failure to correct a defect in a guardrail or to upgrade it during resurfacing of the highway. Indeed, one court held that the state was negligent in spite of the discretionary function exception and even though the driver was intoxicated and speeding.[212] The discretionary exception did not apply to the transportation department's decision to reconstruct a bridge below standards that were applicable at the time of reconstruction.[213] In a case involving the reduced height of a bridge railing, the court held that the decision was an operational one to which the discretionary exception did not apply.[214]

In *State v. Livengood,*[215] an Indiana court held that "the State [was] not immune from suit under [a] twenty year design immunity" statute where the State "substantially redesigned the guardrail in 1980 when it removed over 100 feet of the existing guardrail and installed the BCT end-treatment."[216] However, the State was immune to the extent that the plaintiffs' case rested on the State's allegedly negligent construction of the original guardrail. Although the State was immune for any alleged negligence that arose from the adoption of the applicable standard, it was "not immune from liability for negligence that relate[d] to the specific application of that standard.…"[217]

In a more recent case, also not citing the Supreme Court's *Gaubert* decision, the highest court in Nevada held that the State may be held liable for failing to install safety barriers near support posts for a freeway overpass, because the State's decision was an opera-

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[203] Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 122, 1998 N.Y. App. Div. LEXIS 8975 (1998) (City not immune where it had notice that a barrier was defective). In Helton v. Knox County, 922 S.W.2d 877, 885 (Tenn. 1996), the court cited United States v. Gaubert, 499 U.S. 315, 323, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335 (1991) for the proposition that "[w]hen deciding whether a particular decision is 'planning' or 'operational,' the courts should keep in mind the purpose of the discretionary function exception; that is, 'to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy....'" [sic], but the court did not suggest that the law in Tennessee had changed because of the Gaubert decision.

[204] Lawton v. City of Pocatello, 886 P.2d 330 (Idaho 1994).

[205] Ames v. New York, 177 A.D.2d 528, 575 N.Y.S.2d 917 (2d Dep't 1991).

[206] Pino v. Gauthier, 633 So. 2d 638 (La. App. 1st Cir. 1993), *cert. denied*, 634 So. 2d 858 (La. 1994) and 634 So. 2d 859 (La. 1994).

[207] Daniel v. State, 239 N.J. Super. 563, 571 A.2d 1329 (1990).

[208] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086, 1096–97, 1999 Haw. LEXIS 258 (1999).

[209] Taylor-Rice, 979 P.2d at 1105–06.

[210] Emmons v. Olmsted County, 1997 Minn. App. LEXIS 579 (1997) (cost and other factors led county not to install guardrail on existing bridges).

[211] Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 122–23, 1998 N.Y. App. Div. LEXIS 8975 (1st Dep't 1998).

[212] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086 (1999), *overruling* Ikene v. Mauro, 54 Haw. 548, 511 P.2d 1087.

[213] Williams v. City of Monroe, 658 So. 2d 820 (La. App. 2d Cir. 1995), *cert. denied,* 664 So. 2d 451–52 (La. 1995) (bridge railing not part of the "improved portion" of a highway designed for vehicular traffic); and Chaney v. Mich. Dep't of Transp., 447 Mich. 145, 523 N.W.2d 762 (1994), *reh'g denied*, 526 N.W.2d 881 (Mich. 1994) (guardrail adjacent to but beyond the shoulder of a state highway).

[214] *Id.* The Chaney case involved interpretation of a statutory "highway exception" to governmental immunity.

[215] 688 N.E.2d 189, 194 (Ind. App. 1997).

[216] Adopted in 1979, GR 10A governs the installation of BCT end-treatments and allows Indiana DOT to use a parabolic curve ranging from 1 to 4 ft with a 4-ft curve preferable.

[217] State v. Livengood, 688 N.E.2d at 197. *See also:* Johnson v. County of Nicollet, 387 N.W.2d 209 (Minn. App. 1986) (court limited discretionary activity to the "policy decision to permit public use of the road;" decisions beyond that point, including even the decision not to erect a guardrail at a particular location, not discretionary); Butler v. State, 336 N.W.2d 416 (Iowa 1983) (court, applying the planning/operational dichotomy, held that design and placement of guardrail not immune); State v. Magnuson, 635 S.W.2d 581 (Tex. App. 1982) *writ ref'd n.r.e.*, (Oct. 6, 1982), *reh'g of writ of error overruled*, (Nov. 10, 1982) (decision not to erect a guardrail was operational); and State v. Webster, 88 Nev. 690, 504 P.2d 1316, 1319 (1972) (failure to provide cattle guard at entrance to controlled access highway was "the type of operational function of government not exempt from liability…state's position would effectively restore sovereign immunity.").

tional one.[218] Furthermore, the state may be held liable where it unacceptably fails to comply with safety standards, has actual knowledge of other accidents at the same site, and fails to maintain an adequate clear space between the edge of the pavement and a highway hazard, such as a culvert headwall.[219]

D.3. Railroad Crossings

The rules stated in the foregoing section apply also in cases involving traffic control at railroad crossings. Cases have involved the issues of whether there is a duty to take certain action because of the recommendations of a report or study; whether the failure to act is protected by the discretionary function exemption; whether there is a duty to upgrade existing devices at crossings; and whether certain evidence, such as accident data and "near misses," is admissible into evidence to establish that the state had a duty to respond to a dangerous situation.

First, highway department engineers may have immunity in determining whether to remove railway rails surrounding a crossing signal.[220] Second, it has been held that a particular regulation did not impose a mandatory duty on the state to install active warning devices at a railroad crossing.[221] Third, it has been held that there was immunity for crossing signals installed in 1957 when a state statute provided that approved crossing safety devices or improvements were "adequate and appropriate protection."[222]

Although the effect of standards and guidelines is considered elsewhere, in *McEwen, supra,* a corridor study had stated that gates should be installed at all crossings where trains exceeded 40 mph; however, the court agreed that the state's decision not to upgrade the crossing in question was in accordance with a priority rating system that balanced financial constraints, limited funding, and safety considerations. The state's actions were protected by the exemption for discretionary action.[223] Nevertheless, in *Archon v. Union Pac. R.R.*,[224] the court rejected the discretionary function defense in a situation where the transportation department failed to install active warning devices at a railroad crossing, forcing the plaintiff-driver to "creep" up to the tracks to see beyond boxcars on the rails. The passive warning devices did not warn of an approaching train.

Although 23 U.S.C. § 409 is discussed elsewhere, *Sawyer v. Illinois C.G.R. Co.*[225] held that § 409 is binding in an action against the State; thus, data developed by the State pursuant to that section on railroad crossing accidents was inadmissible in a State court action. The court precluded testimony regarding a letter from the highway department that recommended that flashing lights be installed at a railroad crossing. The court also precluded evidence of the presence of the accident location on an inventory of hazardous sites, testimony concerning notice to the railroad of an unusually dangerous situation 2 years before the accident, and testimony that the site "was in the top 1 percent most dangerous in Mississippi."[226]

Although the court affirmed a jury verdict in favor of the railroad, it noted that "[t]here can be no serious suggestion that these passive warning devices [an 'X' cross buck sign and reflectorized railroad markings on the pavement] fell below minimum standards mandated by law."[227] The court precluded evidence of "near misses," but the court did observe that it "had no doubt there are cases where evidence of near accidents may be admissible for the purpose of showing the dangerous character of a place and to show notice there to the person in control."[228]

In sum, the decision not to install a barrier or guardrail may be considered a discretionary function and held to be immune from liability.[229] However, as seen, before and after the U.S. Supreme Court's decision in *Gaubert*, there are some cases in which the transportation department was held liable for failure to install a barrier or guardrail or for failure to correct a dangerous condition.

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[218] Arnesano v. State, Dep't of Transp., 113 Nev. 815, 942 P.2d 139 (1997).

[219] Woollen v. State, 256 Neb. 865, 593 N.W.2d 729, 741 (1999). There are pre-*Gaubert* cases holding that discretion is exhausted when either the decision is made to build a new highway or to open a new highway for public use and that all decisions thereafter, including decisions regarding the installation of guardrails and barriers, are operational-level decisions that are not immunized by the discretionary exemption. There are post-*Gaubert* decisions where the courts continue to refer to the operational nature of the decision in holding that the state was negligent with respect to the guardrail or barrier in question. As seen in *State v. Livengood*, 688 N.E.2d 189, 196, 1997 Ind. App. LEXIS 1569 (1997), the court relied on the planning/operational level dichotomy but held that the installation of a portion of a guardrail to comply with a safety standard was an operational task and not immune.

[220] Taylor v. Shoemaker, 605 So. 2d 828 (Ala. 1992).

[221] Ball v. Burns & McDonnell, 256 Kan. 152, 883 P.2d 756 (1994).

[222] McEwen v. Burlington N. R.R. Co., 494 N.W.2d 313, 316 (Minn. Ct. App. 1993), *review denied,* 1993 Minn. LEXIS 135 (Minn. Feb. 25, 1993).

[223] McEwen, 494 N.W.2d at 317.

[224] 657 So. 2d 987 (La. 1995)*, on reh'g,* 675 So .2d 1055 (La. 1996).

[225] 606 So. 2d 1069 (Miss. 1992)*, reh'g denied,* 1992 Miss. LEXIS 615 (Miss. Aug. 26, 1992).

[226] Sawyer, 606 So. 2d at 1073–74.

[227] *Id.* at 1071, n.2.

[228] *Id*. at 1075.

[229] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 443, at 928.

E. THE DISCRETIONARY ACTIVITY EXEMPTION AS APPLIED TO TRAFFIC CONTROL DEVICES

E.1. Immunity for Decisions Regarding Whether to Provide Them

Section II.A discusses whether transportation departments have a duty[230] to provide traffic control devices, such as traffic lights, and, if so, when that duty arises.[231] This section discusses when the department's decision to provide or not to provide them is immune from liability because of the exemption for discretionary activities. Usually, transportation departments have immunity for the initial decision as to whether to install traffic control devices.[232] However, after the department decides to provide them, it has a duty to maintain them in good working order.[233]

According to one authority, liability for failure to provide or maintain traffic lights or signals at intersections depends on the circumstances. "The strongest cases for recovery have been those in which the highway authority failed within a reasonable time to replace a traffic sign which had been removed by unauthorized persons, to re-erect or repair a sign which had fallen down or had been knocked down or bent over, or to replace a burned out bulb in an electric traffic signal."[234] However, a transportation department has escaped liability where the motorist fails to establish that a traffic control device would have been "an appropriate remedial measure" at an intersection between a local road and a state highway lacking a traffic control device.[235] Finally, it should be noted that in some municipalities there may be no liability solely for failure to maintain traffic lights.[236]

E.2. Immunity for Selection, Placement or Sequencing

E.2.a. Traffic Lights and Signals

Cases involving transportation departments' duty for traffic control devices frequently involve issues of their design, placement, or sequencing. There may be statutory immunity for decisions concerning traffic sign selection, their placement, or adequacy.[237] Cases have held that decisions concerning traffic control devices and whether extra ones are needed at a given intersection rest within the sound discretion of the transportation department.[238] Thus, the general rule is that the state's decision-making concerning the providing or placing of signs, signals, or warning devices is protected by the discretionary function exception.[239] As

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[230] *See* Hart v. Salt Lake County Comm'n, 324 Utah Adv. Rep. 30, 945 P.2d 125 (1997), *cert. denied*, 953 P.2d 449 (Utah 1997) (In a case involving allegedly inadequate warning devices, the County failed to preserve the legal issue that it did not owe a duty to the plaintiff.) *See also* Harkness v. Hall, 684 N.E.2d 1156, 1159 (Ind. Ct. App. 1997) (appellate court reversed lower court's decision granting defendant's motion for summary judgment; county's immunity from "any design defect claim" did not immunize county from claim alleging defective maintenance and signage).

[231] Traffic control devices encompass a variety of traffic signs, lights, signals, and markings. *See, e.g.*, 21 DEL. CODE ANN. §§ 4107-4112.

[232] A public agency may be 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." Boub v. Township of Wayne, 291 Ill. App. 3d 713, 684 N.E.2d 1040, 1048 (1997), *appeal granted*, 176 Ill. 2d 570, 690 N.E.2d 1379 (1998). (However, the case may be distinguishable in that the bicyclist injured on the bridge was not a permitted user to whom the township owed any duty.) *See also* Weiss v. N.J. Transit, 128 N.J. 376, 608 A.2d 254, 257 (1992) ("[T]he explicit grant of immunity for failure to provide traffic signals under N.J.S.A. 59:4-5 'will prevail over the liability provisions'" of the tort claims act in a case in which the plaintiff alleged that the public activities were independently negligent in delaying the implementation of a plan to install a traffic signal at a railroad crossing.) In *Wainscott v. State*, 642 P.2d 1355 (Alaska 1982), the decision to provide flashing red and yellow lights instead of a sequentially changing traffic signal at the intersection in question was immune; however, in *Department of Transp. v. Brown*, 267 Ga. 6, 471 S.E.2d 849 (1996), *recons. denied*, (July 12, 1996), the decision to open a highway prior to completion with two-way stop signs rather than four-way traffic light signals was not a "public policy" decision that entitled the State to immunity. *See also* Rapp v. State, 648 P.2d 110 (Alaska 1982); Pierrotti v. La. Dep't of Highways, 146 So. 2d 455 (La. App. 3d Cir. 1962) and Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960), *aff'd* 14 A.D.2d 825, 218 N.Y.S.2d 534 (4th Dep't 1961).

[233] *See* Iovino v. Mich., 228 Mich. App. 125, 577 N.W.2d 193 (1998), *review pending,* 1999 Mich. LEXIS 241 (1999) (where positioning of roads created a hazard, duty arose to erect adequate signs or traffic signals); and Forest v. State, 493 So. 2d 563 (La. 1986), *reh'g denied,* (Oct. 9, 1986) (absence of amber flashing lights contributed to a finding of liability).

[234] *See* Annot., *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection*, 34 A.L.R. 3d 1008, 1015.

[235] Starr v. Veneziano, 747 A.2d 867, 873–74, 2000 Pa. LEXIS 714 (Pa. 2000).

[236] Capshaw v. Tex. Dep't of Transp., 988 S.W.2d 943, 946, 1999 Tex. App. LEXIS 2050 (Ct. App., El Paso, 1999) (Unless there is a dangerous condition that the government failed to remedy, generally the transportation department is not liable for claims arising from defective traffic signals.) *See also* Radosevich v. County Comm'rs of Whatcom Co., 3 Wash. App. 602, 476 P.2d 705 (1970).

[237] McLain v. State, 563 N.W.2d 600, 603, 1997 Iowa Sup. LEXIS 167 (1997), *citing* I.C.A. § 668.10, subd. 1.

[238] State Farm Auto Ins. Co. v. Ohio Dep't of Transp., 1999 Ohio App. LEXIS 2601 (1999).

[239] McDuffie v. Roscoe, 679 So. 2d 641, 645 (Ala. 1996) (court stated "we cannot agree that posting warning signs was a ministerial function"); French v. Johnson County, 929 S.W.2d 614 (Tex. App. 1996) (decision not to post warning signs held to be a discretionary function); Jacobs v. Board of Comm'rs, 652 N.E.2d 94 (Ind. Ct. App. 1995), *transfer denied*, (Nov. 20, 1995) (county

seen elsewhere, however, the state may not be immune from liability if it has failed to respond to a dangerous condition.[240]

In *Department of Transportation v. Neilson,*[241] the complaint alleged that the State and others were negligent in that an intersection was defectively designed as a roadway and was not adequately controlled with traffic control signs and devices. The court stated that:

> the issue to be decided in this case is whether decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability. We answer the question in the negative, holding such activities are basic capital improvements and are judgmental planning-level functions.[242]

In *Davis v. Cleveland,*[243] the defendants allegedly set the sequential change of traffic lights at an intersection in a manner such that the interval of the yellow caution light was too brief to allow for clearance of traffic before the signal changed. The tort liability act waived governmental immunity "for injury proximately caused by a negligent act or omission of any employee within the scope of his employment," except and unless the act or omission arose out of "the exercise or the failure to exercise or perform a discretionary function, whether or not the discretion is abused."[244]

Based on the statutory language, the court ruled that the setting of the timing sequence of the traffic light by defendants' employees was a "judgment call" falling within the ambit of the discretionary exemption.

> In this case, it is the acts or omissions of the employees in setting the yellow caution interval that are really claimed to be the proximate cause of plaintiff's injuries. The traffic signal itself operates properly according to the timing sequence previously set, and is itself not defective. Thus, this case must be considered under T.C.A., Section 29-20-205. Since the acts or omissions for which the plaintiffs claim the City of Cleveland and Bradley County are liable are acts or omissions for which immunity has not been removed under T.C.A., Sec. 29-20-205, this action is barred.[245]

In *Bjorkquist v. City of Robbinsdale,*[246] a bicyclist claimed that the timing of the clearance interval between the change of traffic lights from red to green was unduly brief and that the improper timing of the light change was the proximate cause of an accident in which he was struck by an automobile at the intersection.[247] The plaintiff asserted that the timing of the change of lights was based on a decision made at the operational level, and, therefore, was not immune from judicial review. The court ruled, however, that the decision on the length of the clearance interval was a part of the planning process; thus, it was a discretionary decision that was protected by the Act.

Other cases have ruled that decision-making regarding the installation and placement of warning signs and signals is not discretionary; for instance, the decision to open a highway prior to completion with two-way stop signs rather than four-way traffic light signals was not a "public policy" decision that would entitle the state to immunity under the discretionary function exception.[248] Moreover, where the positioning of roads creates a hazard, there is a duty to erect adequate signs or traffic signals. In *King v. State,*[249] the placement of the devices was in technical compliance with the MUTCD. However, the State was held liable for the design of a traffic light at an intersection, because the traffic control devices at that location were improperly aimed, equipped, and located, with the result that they confused and misled motorists.

E.2.b. Warning Signs or Markings

It should be noted that there may be a distinction between "regulating" signs and "warning" signs. There are cases decided under California Government Code Section 830.4 holding that the failure to install a "regulating" or "regulatory" sign is immune.[250] For example, in *Frazer v. County of Sonoma*,[251] the court held that painted lines on a highway consisting of double yellow lines with white striping inside, which an expert maintained would have prevented an accident, were "regulatory" type markings, rather than "warning" type markings, and thus their absence was not a

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failed to establish that it had engaged in systematic process to determine when and where to place warning signs).

[240] Helmus v. Transp. Dep't, 238 Mich. App. 250, 604 N.W.2d 793, 1999 Mich. App. LEXIS 321 (1999) (government agencies have duty to provide adequate warning signs or traffic control devices at the location of a known "point of hazard"); Harkness v. Hall, 684 N.E.2d 1156 (Ind. Ct. App. 1997) (duty to maintain signs or signals in good working order); and Bendas v. Township of White Deer, 531 Pa. 180, 611 A.2d 1184, 1187, 1992 Pa. LEXIS 395 (1992) (commonwealth's duty to make highways reasonably safe included erecting traffic control devices or otherwise correcting dangerous conditions).

[241] 419 So. 2d 1071 (Fla. 1982).

[242] *Id.* at 1077

[243] 709 S.W.2d 613 (Tenn. Ct. App. 1986).

[244] Tennessee Governmental Tort Liability Act, TENN. CODE ANN. § 29-20-201, 205.

[245] 709 S.W.2d at 616.

[246] 352 N.W.2d 817 (Minn. Ct. App. 1984); *see also* Zank v. Larson, 552 N.W.2d 719 (Minn. 1996).

[247] The plaintiff conceded that the decision whether to install a traffic control device at the intersection was discretionary in nature and exempt from liability under the discretionary function exception of the Minnesota Tort Claims Act.

[248] Department of Transp. v. Brown, 267 Ga. 6, 471 S.E.2d 849 (1996), *recons. denied,* (July 12, 1996).

[249] 83 Misc. 2d 748, 370 N.Y.S.2d 1000 (Ct. Cl. 1975).

[250] Section 830.4 refers to "regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in section 21460 of the Vehicle Code."

[251] 267 Cal. Rptr. 39, 218 Cal. App. 3d 454 (1st Dist. 1990).

dangerous condition for which the county could be held liable. The section does not always shield the public entity, however, from liability.[252] Rather, the provision provides for immunity for a dangerous condition caused by the "mere" failure to provide certain signs. Where there are additional factors that give rise to a dangerous condition, the absence of a regulatory sign or signal may be considered.[253] As for warning signs, there may be immunity for failing to provide one under California Government Code Section 830.8, as long as the signal, sign, marking, or device was not necessary to warn of a dangerous condition that would not have been reasonably apparent to and would not have been anticipated by a person exercising due care.

The courts have considered whether the posting of a curve warning sign is a discretionary activity protected by the discretionary exemption of state tort claims acts or is instead an unprotected operational or ministerial level activity. In *Peavler v. Board of Comm'rs of Monroe County*,[254] the appellate court specifically declined to rule on whether the county's decision not to erect signing warning of a dangerous curve was discretionary, stating that whether the decision was discretionary (and hence protected) or ministerial (and hence unprotected) was an issue for the jury to decide. The court remanded the case for a jury determination on the issue.

The *Peavler* case was consolidated with *Board of Comm'rs of County of Steuben v. Hout,*[255] and the state supreme court reversed and remanded:

> The defendants here seek to establish the defense of immunity. Each bears the burden to show that a policy decision, consciously balancing risks and benefits, took place. Neither defendant county presented evidence to show that its decision regarding the warning signs was the result of such a process.... Failure to engage in this decision-making process does not automatically result in liability. The county simply is not shielded by immunity if the failure to erect a warning sign did not result from a policy decision consciously balancing risks and advantages.... On remand, the counties bear the burden to demonstrate the discretionary nature of the decision in order to prevail on a claim of immunity.[256]

In *Lee v. State*,[257] the court held that the transportation department's improvement of the highway curves at issue was in the planning phase at the time of the accident such that the State and the department were entitled to immunity. In *Ring v. State*,[258] the court held that the State did not breach its maintenance duties by failing to erect signs warning of curves prior to an accident only 8 days after the State officially took control of the road.

As noted in *Carpenter v. Johnson,*[259] there is a distinction between the exercise of governmental discretion and the exercise of professional judgment by highway engineers in deciding the need for signing. The question is whether the State's employees are exercising discretion within the meaning of the tort claims act or merely exercising professional judgment within established guidelines. The court remanded the case for the jury to resolve whether the decision not to post warning signs was protected "governmental discretion" or the unprotected exercise of "professional judgment."

There may be immunity even when there was no sign or signal, but there was an acknowledged risk to the motorist. In *Lee v. State ex rel. Depart. of Transp. & Dev.,*[260] it was disputed whether a "Stop Ahead" sign was in place on the date of the accident. The trial judge determined that the sign was necessary to properly warn motorists of the need to stop at the intersection. In reversing the trial judge's decision against the State, the appellate court held that "[i]t is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public," but it is not "responsible for all injuries resulting from any risk posed by the roadway or its appurtenances, only those caused by an unreasonable risk of harm to others."[261] Although the absence of a sign may have created an unreasonable risk of harm to motorists,[262] the intersection was guarded by two flashing red beacons, was free of obstructions, and was visible at a distance of more than 800 ft.[263] The court also stated that "[i]n all situations, the decision to erect a warning sign is discretionary on the part of DOTD."[264]

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[252] Bunker v. City of Glendale, 168 Cal. Rptr. 565, 111 Cal. App. 3d 325 (2d Dist. 1980) (liability arising out of misleading speed limit sign).

[253] City of South Lake Tahoe v. Superior Court, 73 Cal. Rptr. 2d 146, 62 Cal. App. 4th 971 (3d Dist. 1998).

[254] 492 N.E.2d 1086 (Ind. Ct. App., 1st Dist., 1986); *see also* Farrell v. State, 612 N.E.2d 124 (Ind. Ct. App. 1993), *vacated,* 622 N.E.2d 488 (Ind. 1993).

[255] 497 N.E.2d 597 (Ind. App. 3d Dist. 1986).

[256] 528 N.E.2d at 47–48.

[257] 682 N.E.2d 576, 1997 Ind. App. LEXIS 895 (1997).

[258] 705 N.Y.S.2d 427, 428, 2000 N.Y. App. Div. LEXIS 3345 (3d Dep't 2000).

[259] 231 Kan. 783, 649 P.2d 400 (1982).

[260] 701 So. 2d 676 (La. 1997). The issue in the case was not immunity based on the exercise of discretion but liability for a dangerous condition.

[261] Lee, 701 So. 2d at 678. "It is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public." *Id.*

[262] *Id.* at 679.

[263] The court disregarded the claim that there was glare from the sun: "Temporary sun blindness, like visual impairment caused by fog or heavy rain, is a physical condition with which drivers must learn to contend in a safe and responsible manner." *Id.*

[264] *Id.*

E.2.c. Stop Signs and Speed Limit Signs

As in the case of traffic lights, it has been held that the decision whether or not to erect a Stop sign at an intersection is a protected discretionary decision and immune from judicial review under the discretionary exemption in state tort claims acts.[265]

In *Gonzales v. Hollins,*[266] the question was whether the city's action in changing the traffic control device to a static Stop sign was a discretionary activity and immune under the Minnesota Tort Claims Act. In holding that the city's decision to replace the traffic control devices was discretionary, the court relied upon the planning-operational dichotomy, stating that the decision concerning the change in the traffic control devices was "planning" in nature.

However, the New York Court of Appeals reached a different result in *Alexander v. Eldred.*[267] The court applied its previously announced rule that the exemption for discretionary activity does not apply to decision-making that was grounded on an inadequate study or that lacked a reasonable basis. In a case involving the absence of a Stop or other sign at the junction of the highway with a private road, the city's traffic engineer testified that he did not consider installing a sign on the private road. Although he believed that he lacked authority to do so, the state's vehicle and traffic law authorized the installation of signs on private roads open to public motor vehicle traffic. The court ruled that the engineer's ignorance of the law reflected both inadequate study and the lack of a reasonable basis for the decision not to install signing warning of the intersection.[268]

Although there are a few cases, as noted, holding differently, once the state makes a decision and erects a sign, the transportation authority has the duty to maintain it in good working order, and its failure to do so is not protected by the discretionary function exemption.[269]

The decision to post a speed limit sign is a protected planning level activity rather than an unprotected operational activity.[270] As stated in *Kolitch v. Lindedahl*,[271] based on the planning and operational dichotomy, the posting of a speed limit is a planning level decision protected by the discretionary exemption. However, it has been held that the state's posting of advisory rather than mandatory speed limit signs at a dangerous intersection constituted negligence.[272]

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[265] Tell City v. Noble, 489 N.E.2d 958 (Ind. App. 1st Dist. 1986) (held that the decision of the city not to install a Stop sign or other form of traffic control at an intersection was discretionary and immune from judicial review under the Indiana Tort Claims Act).

[266] 386 N.W.2d 842 (Minn. App. 1986). *See* Nguyen v. Nguyen, 565 N.W.2d 721, 723 (Minn. Ct. App. 1997) ("Discretionary immunity applies in this case because the challenged conduct, the County's decision to delay the intersection improvements, occurred at the planning level.").

[267] 63 N.Y.2d 460, 483 N.Y.S.2d 168, 472 N.E.2d 996 (1984).

[268] In the leading case of *Weiss v. Fote, supra* note 116, the court denoted inadequate study and lack of reasonable basis as grounds for avoiding the application and protection of the discretionary exemption.

[269] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), *on remand*, 372 So. 2d 1022 (Fla. Dist. Ct. App. 3d Dist. 1979), *appeal after remand*, 398 So. 2d 488 (Fla. Dist. Ct. App. 3d Dist. 1981), and *on remand*, Cheney v. Dade County, 372 So. 2d 1182 (Fla. Dist. Ct. App. 3d Dist. 1979); *See* Bussard v. Ohio Dep't of Transp., 31 Ohio Misc. 2d 1, 507 N.E.2d 1179 (Ct. Cl. 1986); Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469, 475 A.2d 48 (1984) (jury question presented whether the county was guilty of "palpably unreasonable" conduct in allowing a sign to become obscured by vegetation after installation); Bryant v. Jefferson City, 701 S.W.2d 626 (Tenn. App. 1985); Dep't of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982) (failure to maintain traffic control devices in proper working order once installed constituted negligence at the unprotected, operational level); and Crucil v. Carson City, 95 Nev. 583, 600 P.2d 216 (1979) (discretionary exemption provision of the tort claims act was inapplicable).

[270] Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 273–74, 1996 Minn. App. LEXIS 882 (1996) (engineer's decision not to install a "distance plaque" on the approach to a curve was discretionary).

[271] 100 N.J. 485, 497 A.2d 183 (1985).

[272] Scheemaker v. State, 125 A.D.2d 964, 510 N.Y.S.2d 359 (1986), *appeal granted*, 69 N.Y.2d 610, 516 N.Y.S.2d 1025 (1987), *and aff'd,* 70 N.Y.2d 985, 526 N.Y.S.2d 420, 521 N.E.2d 427 (1988).

SECTION 4

SELECTED TRANSPORTATION DEPARTMENT DEFENSES IN TORT ACTIONS

A. DEFENSES BASED ON ALLOCATION OF RESOURCES OR PRIORITY OF PROJECTS

A.1. The Allocation of Funds as a Defense

A.1.a. Decisions Recognizing the Defense

This section discusses whether economic and time sensitive issues are defenses to a transportation department's tort liability. The issue is whether the department may defend against such suits on the basis that it did not correct a particular hazardous location because of its need to allocate scarce resources, be they funds, personnel, or equipment; because of insufficient funds or the cost of a given project; or because of the need to give other areas higher priority for repair or improvement than the one that allegedly caused an accident. The transportation department generally is not liable in cases where it has had to spend "its limited funds [on] those highway projects it believes are most urgently needed."[1] The "absence of the necessary funds and the legal means to procure them" may preclude a finding of liability for the transportation department's failure to keep streets in good repair.[2] It appears that the lack of funds may be used by the defendant to escape liability but not by the plaintiff to establish liability.[3]

In addition to the statutory exception from liability in tort claims acts for the transportation department's exercise of discretionary functions, at least one act contains an exemption from liability for the State's failure to allocate resources or for its negligence in allocating them. In New Jersey,

> c. A public entity is not liable for *the exercise of discretion in determining whether to seek or whether to provide the resources* necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
>
> d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.[4] (Emphasis supplied.)[5]

In *Lopez v. City of Elizabeth*,[6] an appellate court addressed the public policy behind Section 59:2-3(c) and (d), as well as the proof required for the public entity to make the resource allocation defense successfully. The opinion is germane to the allocation defense regardless of whether a specific statutory exemption is involved. According to the court, the allocation defense derives from the fact that

> [a] private person or firm that cannot afford the people and equipment to do a good job can withdraw rather than perform in a dangerous way. Government rarely has that option. It cannot withdraw from law enforcement if its police force is too small, from fire protection if its trucks are in poor repair, or from maintaining streets if it cannot afford to keep them in perfect condition. That is why high level discretionary policy decisions whether to burden the taxpayers to furnish equipment, material, facilities, personnel or services are absolutely immune. That is also why operational governmental decisions to devote existing resources to one activity at the expense of another are immune unless palpably unreasonable.[7]

Under the New Jersey statute, the plaintiff has the burden of proving that the defendant's allocation of resources was palpably unreasonable.[8]

A California statute, Section 835.4 of the California Government Code, applies a reasonableness standard to the public entity and states how reasonableness is to be determined. As explained in the comments to the section, "a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else."[9]

Even without a provision such as the New Jersey one protecting the department's decisions when seeking or allocating resources, other courts recognize the defense, usually on the basis that the allocation of resources involves the exercise of discretion. In *Bodin v. City of Stanwood,*[10] the Supreme Court of Washington agreed that the trial court properly allowed evidence of the defendant's efforts to procure funding for improvements. The court referred to judicial precedents holding that governmental entities may present evi-

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[1] 65 N.Y. JUR. 2D *Highways, Streets, and Bridges* § 407, at 217–18.

[2] *Id.*

[3] *See, e.g.,* Estate of Arrowwood v. State, 894 P.2d 642, 1995 Alaska LEXIS 43 (Alaska 1995).

[4] N.J. STAT. ANN. § 59:2-3.

[5] It should be noted that under the statute "discretionary operational or less than high level planning decisions made by a public employee charged with a duty to exercise more than a ministerial function may be granted immunity" for allocation decisions. Longo v. Santoro, 195 N.J. Super. 507, 480 A.2d 934, 940 (App. Div. 1984). The decision is consistent with the U.S. Supreme Court's decision in *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991), regarding the exercise of discretion within the meaning of the FTCA.

[6] 245 N.J. Super. 153, 584 A.2d 825 (App. Div. 1991).

[7] Lopez, 584 A.2d at 830 (citations omitted).

[8] *Id.* at 829. *See* Brown v. N.J. Dep't of Transp., 86 N.J. 565, 432 A.2d 493, 500, 1981 N.J. LEXIS 1669 (1981) (State's delay in correcting a swale intended to keep water off the highway was "palpably unreasonable.").

[9] CAL. GOV'T CODE § 835.4.

[10] 130 Wash. 2d 726, 927 P.2d 240 (1996).

dence of the practicality, cost, or otherwise of guardrails and barriers on roads and bridges and stated that "funding considerations may be relevant in defending the state against a negligence claim that it failed to make highway improvements."[11] In a case where the city claimed immunity for a defective barrier causing an accident, arguing that the failure to replace the barrier was due to funding priorities, the court in overturning a directed verdict for the city held that the city had failed to present evidence of its planning or ordering of priorities or of the limitations on available funding.[12]

In Minnesota, in *Gutbrod v. County of Hennepin*,[13] the court affirmed a summary judgment for the County regarding its decision not to repair a rut in a county road. After considering the risks and costs of changing the schedule, the county engineer adhered to the County's established road repair schedule. The County's decision to adhere to the schedule and not immediately repair a crack or rut in the center of the roadway was entitled to discretionary immunity, because the County had demonstrated that its decision was based upon cost and safety considerations. Moreover, and perhaps very importantly, there was no evidence that the alleged crack constituted an immediate danger.

In *Cruz v. New York*,[14] the court recognized the allocation defense when the City asserted that its decision to defer repair of the surface of a walkway and to make other repairs to a bridge's structure arose from a legitimate ordering of priorities in light of budgetary constraints. The court agreed that the "deferment of remedial action may…be justified by proof that 'the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding.'"[15] As discussed below, the city failed to prove its defense.

In *Estate of Arrowwood v. State*,[16] the plaintiffs argued that the trial court abused its discretion by excluding evidence relating to the effect of reductions in the transportation department's budget upon the level of road maintenance in the region where the accident occurred. However, the appellate court agreed, first, that the State's refusal to close the highway due to icy conditions was a planning level decision, such that it was proper for the lower court to dismiss the action against the State. Second, the court held that the proper focus of the case was not the budgetary decisions of the legislature or the transportation department, but rather what the maintenance district did with the resources that it received.[17] The court agreed that the plaintiff's proffered evidence was inadmissible, because it was not relevant: "budget decisions are discretionary functions immune from judicial inquiry."[18] In a case from Indiana, while affirming summary judgment for the County, the court held that the County's decision concerning the feasibility of installing additional warning devices at railroad crossings was based properly on "the availability of County resources."[19]

In sum, either a statute or judicial precedent may make it quite proper for the state to defend a tort claim based on its allocation of funds. In making the defense, the government may not have to demonstrate that it considered and rejected the specific improvements alleged to have been neglected.[20] It is sufficient for the government "to demonstrate that [it] consciously engaged in decision making regarding the general type of improvements alleged in plaintiff's complaint."[21]

A.1.b. Decisions Not Recognizing the Defense

The allocation defense does not always succeed. The court may believe that there were other, less expensive alternatives that the public authority failed to consider that could have prevented the accident in question.

In *Guilbeau v. St. Landry Parish Police Jury*,[22] in which there was actual notice of the hazard, the defendant argued, unsuccessfully, that it had "no reasonable opportunity" to remedy the defect, because it had insufficient funds to do so. Although the court did not address the insufficient funds defense directly, it held that there were less costly alternatives that were not considered.

A case holding that the lack of funding is not a defense is *Georgia Depart. of Transp. v. Cannady*.[23] The trial court had entered a judgment against the transportation department in the amount of $2,650,000. In reversing and remanding the case, the appeals court noted that in 1989 the highway was resurfaced and that the resurfacing should have had an equal or better slope; "however, due to a lack of funding for the repaving project, the super-elevation and proper cross-slope were not included."[24] The court held that "[i]n

[11] Bodin, 927 P.2d at 247, *citing* Bailey v. Town of Forks, 108 Wash. 2d 262, 271, 737 P.2d 1257, 753 P.2d 523 (1987).

[12] Gregorio v. New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 123, 1998 N.Y. App. Div. LEXIS 8975 (1st Dep't 1998).

[13] 529 N.W.2d 720 (Minn. App. 1995).

[14] 201 A.D.2d 606, 607 N.Y.S.2d 969 (App. Div. 2d Dep't 1994).

[15] Cruz, 607 N.Y.S.2d at 971. *Citing* Friedman v. State of New York, 502 N.Y.S.2d 669, 493, N.E.2d 893.

[16] 894 P.2d 642, 1995 Alaska LEXIS 43 (Alaska 1995).

[17] Estate of Arrowwood, 894 P.2d at 646.

[18] *Id.*

[19] Streiler v. Norfolk & Western Ry., 642 N.E.2d 1019, 1022 (Ind. App. 5th Dist. 1994).

[20] Wade v. Norfolk & Western Ry., 694 N.E.2d 298, 303 (Ind. App. 1998). (Affirming summary judgment for the county.)

[21] *Id.*

[22] 600 So. 2d 859, *writ denied,* 606 So. 2d 544 (1992).

[23] 230 Ga. App. 585, 497 S.E.2d 72, 1998 Ga. App. LEXIS 234, 98 Fulton County D. Rep. 927 (1998), *cert. granted*, 1998 Ga. LEXIS 754 (Ga. June 25, 1998).

[24] 497 S.E.2d at 74.

this case, there was a substantial passage of time between the elimination and restoration of the superelevation and proper cross-slope, but it had been knowingly and consciously done for lack of funding...."[25] The court ruled that lack of funds cannot be a defense to improper maintenance, because such a defense would deter the making of proper repairs to eliminate the risk of danger just as surely as the admissibility of subsequent remedial repairs would.[26]

A.2. Evidence Required to Prove the Allocation Defense

As suggested in *Cruz v. New York*,[27] *supra*, it is crucial for the State to offer evidence and request an instruction regarding its available resources and/or its resource-allocation policy. In fact, at any time the defendant seeks immunity for a discretionary function, the State should offer proof that the "challenged conduct or omission was a policy decision made by consciously balancing risks and benefits. This proof may come in the form of meeting minutes, testimony by the decision makers regarding the process involved, or other documents showing that the governmental entity made an affirmative policy decision."[28]

In *McCluskey v. Handorff-Sherman,*[29] the appellate court approved the trial court's decision to allow the state to present evidence regarding the careful scrutiny it gave potential projects and the process it used to determine the allocation of funds. "The trial court properly allowed evidence demonstrating the benefits and burdens of improving that piece of road."[30] The court also agreed with the trial court that the State could not offer "evidence comparing the relative safety of this road to every other highway in the State," a tactic it thought "would, in effect, permit the State to mount a poverty defense using alternative rhetoric."[31]

In *Cruz*, *supra*, the court held that there was no evidence explaining the precise budgetary limitations under which the City was operating, "nor was [there] any evidence adduced to explain why the expense budget for 'critical maintenance contracts' was only $2,000,000 when the Department of Transportation capital budget for bridges for 1985 was $244,000,000."[32] Thus, on the basis of the record, the court found that the City failed to show that its inaction was pursuant to a plan.

In the *Lopez* case, *supra*, from New Jersey construing New Jersey Statutes Annotated Section 59:2-3(c) and (d), the court found the defendant's evidence to be wanting; testimony that "'you only have funds for one' [was] insufficient evidence to permit a jury to conclude that the city faced competing demands and decided to use its manpower for something more pressing than inspecting potholes."[33] Regardless of whether the State's tort claims act has a resource allocation exemption, as in New Jersey, the *Lopez* decision is worthwhile reading regarding how to present and make a defense based on allocation of resources.

The absence of sufficient evidence to establish the defense is illustrated also by *Lake City Juvenile Court v. Swanson.*[34] The County argued that its funding decisions were discretionary, but the court ruled that the County presented no evidence on which the court could evaluate the nature of the County's conduct in failing to provide additional funds. The opinion noted that in *Voit v. Allen County*[35] there was evidence that the County engaged in a systematic process for determining highway improvements. In *Voit*, the County Board had considered several written recommendations, the changed condition of the county roads, and the allocation of available resources. Likewise, in *City of Crown Point v. Rutherford*,[36] the "key decision makers contemplated and balanced public policy factors and weighed budgetary considerations in the allocation of resources," leading the court to find that there was governmental immunity.

Lack of evidence regarding the defendant's decision-making has been a problem elsewhere. If there is no record concerning the government's "policy decision" to postpone resurfacing of affected streets, e.g., no "contemporaneous public record of Board action," then it has been held that there was no competent evidence that there was a systematic decision-making process.[37]

In sum, decisions regarding the allocation of resources generally are discretionary functions that are immune from judicial inquiry. Many courts allow the jury to consider how resources were allocated or whether there were funds available to cure the alleged highway deficiency. However, as seen, there is contrary authority.

A.3. The Financial Feasibility Defense

The transportation department may contend that it is not liable, because the department lacked the funds to correct a hazardous condition, or because it was not financially feasible or practicable to do so. Although a defense founded on allocation of resources may be suc-

[25] *Id.* at 75.

[26] *Id.*

[27] 607 N.Y.S.2d 969.

[28] Serviss v. Department of Natural Resources, 711 N.E.2d 95, 98 (Ind. Ct. App. 1999) (citations omitted; case involved a sledding accident).

[29] 68 Wash. App. 96, 841 P.2d 1300 (Wash. App. Div. 2 1992), *aff'd* 125 Wash. 2d 1, 882 P.2d 157.

[30] 841 P.2d at 1307.

[31] *Id.*

[32] 607 N.Y.S.2d at 971.

[33] Lopez, 584 A.2d at 827.

[34] 671 N.E.2d 429 (Ind. App. 1996).

[35] 634 N.E.2d 767, 1994 Ind. App. LEXIS 514 (Ind. Ct. App. 1994), *transfer denied*, (Feb. 24, 1995).

[36] 640 N.E.2d 750, 754 (Ind. App. 4th Dist. 1994).

[37] Scott v. City of Seymour, 659 N.E.2d 585, 590–91 (Ind. App. 1995). Summary judgment for City reversed.

cessful, if made and presented properly, the mere contention that the state is not liable because of cost may not be a successful defense. In Montana, in *Townsend v. State,*[38] the court observed that

> *[t]he financial feasibility defense has been soundly rejected by our Court when cost is the State's sole excuse* for its failure to construct or maintain properly. State ex rel. *State ex rel. Byorth v. District Court* (1977), 175 Mont. 63, 572 P.2d 201. "However, where cost is but one among many factors affecting the State's choice of a particular method of construction or maintenance, it is relevant evidence on the reasonableness of the alternative taken." *Modrell v. State* (1978) 179 Mont. 498, 501, 587 P.2d 405, 406. (Emphasis supplied.)

Thus, the court held that the State could properly consider the cost to the State of making the repair when making a determination on the need for repair. In giving limited approval to such defense and reinstating the jury's finding in favor of the State, the court held:

> Here, cost is not the State's sole defense. There is a limit to how many potholes can be repaired in any given time period. The Department's supervisory employees made a decision based on the severity of the potholes, as well as the frequency and type of traffic on the road in determining whether repair of the potholes was immediately necessary. They took a calculated risk that the potholes were small enough and the traffic light enough that repair of the potholes could wait without endangering the safety of the traveling public. The jury agreed with the employees' decision. There is substantial credible evidence to support the jury's decision.[39]

Thus, according to the *Townsend* case, financial feasibility may be taken into account when it is but one of several factors considered, but financial feasibility is an impermissible defense when it is asserted as the sole reason or excuse for failing to take corrective action to protect public safety.

Furthermore, the mere argument that there were no funds, or that there were insufficient funds, may not be enough to mount a defense. As the court held in *McCluskey v. Handorff-Sherman,*[40] the lack of funds to repair an allegedly dangerous highway is an improper defense, even though the State followed the law governing allocation of resources concerning highway maintenance. The law governing priority of highway projects did not grant the State immunity from liability for negligent design or maintenance of unfunded projects. The State was responsible for the maintenance of its own network of roads. The State, unlike a municipality, was in control of the allocation of funds; if resources were insufficient, and if the road were unreasonably hazardous, the State had several options, including signing or closing the highway: "The State cannot avoid responsibilities for its fiscal decisions by stating that those decisions have assumed the status of law and thus are unassailable."[41]

A.4. Priority of Highway Projects or Programs as a Defense

Closely related to the allocation of funds defense is the defense that the department's inaction stemmed from a legitimate ordering of priorities with other projects based on the availability of funding; courts have held that a transportation department's "priority system" is itself a policy or planning operation of the state that is entitled to discretionary immunity.[42]

In *Trautman v. State*,[43] a claim arose out of the State's failure to install median barriers at an interchange. The court held that the case was properly dismissed, because the State's delay in implementing the project to correct the road's deficiencies stemmed from its legitimate ordering of funding priorities. Moreover, there was a reasonable basis for the State's subsequent amendment of the project to exclude the interchange because of an insufficient budgetary allocation. The State demonstrated that the failure to act was due to a recessionary period, which forced the transportation department to redirect its priorities to low cost, high return projects, and to cancel 54 consultant design projects outright.[44] In addition, there was evidence that during this time the design standards for guide rails and barriers were in flux, with extensive testing of alternative designs, and that improperly designed barriers likewise posed serious safety concerns.

There is other authority, however, holding that the timing of projects may not be protected by the discretionary function exception, particularly where the department has delayed unreasonably in undertaking projects that, by virtue of its own policy, should have been addressed urgently. Thus, in *Semadeni v. Ohio Dept. of Transportation,*[45] in May 1985, the department had proposed a new policy addressing installation of protective fencing on existing bridges, a policy that was approved by the Federal Highway Administration (FHWA) in July 1985. The purpose of the policy, in

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[38] 227 Mont. 206, 738 P.2d 1274, 1277, 1987 Mont. LEXIS 904 (1987).

[39] Townsend, 738 P.2d at 1277.

[40] 68 Wash. App. 96, 841 P.2d 1300 (Wash. App. Div. 2 1992), *aff'd* 125 Wash. 2d 1, 882 P.2d 157.

[41] McCluskey, 841 P.2d at 1307.

[42] Schroeder v. Minn., 1998 Minn. App. LEXIS 1436 (1998); Wornson v. Chrysler Corp., 436 N.W.2d 472, 474–75 (Minn. App. 1989) (installation of traffic signals based on prioritization system was immune from liability); Friedman v. N.Y., 67 N.Y.2d 271, 287, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986); and Gutelle v. N.Y., 55 N.Y.2d 794, 795, 447 N.Y.S.2d 422, 432 N.E.2d 124, 1981 N.Y. LEXIS 3312 (1981).

[43] 179 A.D.2d 635, 578 N.Y.S.2d 245 (App. Div. 2d Dep't 1992), *appeal denied,* 79 N.Y.S.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940.

[44] Trautman, 578 N.Y.S.2d at 246.

[45] 75 Ohio St. 3d 128, 661 N.E.2d 1013 (1996). The decedent was killed in March 1990, when a chunk of concrete was thrown from an overpass through an automobile windshield.

part, was to discourage the throwing or dropping of objects from bridges onto lower roadways and other properties. By the date of Semadeni's accident, (2 years after the formulation of the initial funding program and nearly 5 years from the date of the policy's adoption), the transportation department had entered into contracts for only two projects, which were solely for the purpose of retrofitting existing bridges with protective fencing.

The court stated that it had previously held that once a governmental entity has made a discretionary decision, it has a reasonable time to implement that decision without incurring liability.[46] Here, the court noted that despite city and state transportation officials' concern about the problem of dropped objects, it was over 2 years from the time that the fencing policy was adopted and approved that the transportation department established funding for any protective fencing anywhere in the state: "Even then, the program established funding for only ten percent of the qualifying bridges in Ohio."[47]

The accident location in question was one of more than 400 bridges scoring 10 index points or more that were not approved for funding: "The Blair Avenue bridge justified a score of twelve index points by ODOT's own criteria, and pursuant to Policy 1005.1, ODOT's agents and employees were under a mandatory duty to complete its fencing within a reasonable time."[48] The court, reversing a judgment for the transportation department, held that "reasonable minds could only find that ODOT was negligent in failing to timely implement Policy 1005.1...."[49] Relying on *Anderson v. Ohio Dept. of Ins.,*[50] the court rejected the State's argument that "decisions as to the *manner* in which a basic policy decision is implemented fall within the scope of the State's reserved sovereign immunity, even if implementation decisions require State employees to exercise some degree of discretion."[51] In a decision that is post-*United States v. Gaubert*,[52] which ruled that discretion, at least under the FTCA, can be exercised at all levels of employment, the Supreme Court of Ohio in *Semandeni* ruled that time and manner decisions needed to implement a policy decision are not entitled to immunity.[53] The *Semandeni* case illustrates that, if a dangerous location was not corrected, a departmental policy pursuant to which hazardous sites have been noted as particularly severe and needing attention may be quite relevant in a later negligence action. (In an effort to establish priorities, the highway department, as in *Semandeni,* may cause certain reports to be generated. Pursuant to 23 U.S.C. § 409, certain data required to be collected by federal statute may not be discoverable or admissible into evidence.)[54]

In sum, the highway department may be able to establish that it had to prioritize either because of funding or because of safety concerns arising out of changing standards for highway design.[55] On the other hand, if the transportation department's policy requires that a high priority location must be addressed, any unintended delay by the state in funding the location's improvement or correction may fail to absolve the state of tort liability.[56]

A.5. The Department's Workload as a Defense

The department's staffing and workload priorities may be defenses. In making staffing decisions, the transportation department is engaging in the exercise of its discretionary functions. As held in *Adams v. City of Tenakee Springs*,[57] a city has discretionary immunity regarding the staffing of its fire department. The court's opinion in the *Adams* case, affirming a jury verdict, may be relevant to similar actions against a transportation department:

> Staffing a fire department, as the superior court concluded, is fundamentally a matter of resource allocation.... Decisions about how to allocate scarce resources are matters of policy immune from judicial review.... Thus, in *Freeman v. State*, 705 P.2d 918 (Alaska 1985), for example, we held the State immune from liability for not allocating adequate funds to provide highway dust control....[58]

It may be proper, moreover, for a jury to consider the defendant's workload in determining whether a defect existed and whether the defendant had a reasonable opportunity to correct it. As the court stated in *Hall v. Burns*,[59] the existence of a defect must be considered in context. Thus, it is fair that the jury be made aware of all of the circumstances, including: "(1) the miles of highway the [defendant] is responsible to repair and maintain; (2) the number of employees and equipment available; (3) the locations of the highway; (4) the ex-

[46] Semadeni, 661 N.E.2d at 1016–17.

[47] *Id*. at 1017.

[48] *Id*.

[49] *Id*. at 1018.

[50] 58 Ohio St. 3d 215, 569 N.E.2d 1042 (1991), *reh'g denied*, 59 Ohio St. 3d 720, 572 N.E.2d 697 (1991).

[51] Semadeni, 661 N.E.2d at 1017.

[52] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[53] Semadeni, 661 N.E.2d at 1016–17.

[54] Claspill v. Mo. Pacific R.R., 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). ("The plain language of section 409 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 which may be implemented utilizing federal-aid highway funds.'") 793 S.W.2d at 140.

[55] *Id*.

[56] When data have been collected for the purpose of federally-aided improvements, 23 U.S.C. § 409 may be available for the purpose of keeping the data out of evidence.

[57] 963 P.2d 1047 (Alaska 1998).

[58] Adams, 963 P.2d at 1051 (citations omitted).

[59] 213 Conn. 446, 569 A.2d 10 (1990).

tent of its use as compared to other highways; (5) the amount of money available; and (6) any other relevant factors, including other needs in the highway system."[60]

In essence, it is not proper to second-guess the defendant's decisions on staffing, as they are discretionary, and it is permissible in a negligence action against the transportation department for the trier of fact to consider the burdens on the department in responding to an alleged hazardous location.

In sum, there are precedents holding that the transportation department is exercising immune discretion when making decisions regarding the allocation of resources, including funds, personnel, or equipment. The department may be immune also for decisions concerning the priority of projects, as long as it does not unreasonably delay taking needed action. The cost of a project or the absence of funds for an improvement or repair, standing alone, may not serve necessarily as the basis of a successful defense. When relying on the allocation-of-funds or similar defenses, the department must be careful to introduce evidence demonstrating that its decision to act or not act was thoughtful, premeditated, and deliberate.

B. THE PUBLIC DUTY DEFENSE TO TORT LIABILITY

B.1. Origin and Nature of the Public Duty Doctrine

The public duty doctrine provides that before an injured person may recover in tort against a public entity or an officer or employee thereof, he or she must show that the defendant breached a duty owed to plaintiff, not merely that the defendant breached a duty owed to the public as a whole. Unless there is such a private duty owed to the plaintiff, there is no liability for the defendant's failure to enforce a statute or to provide police protection[61] or other services, which are intended to benefit the general public.[62]

The public duty doctrine has long been recognized as a defense in tort litigation against public entities and their officers and employees; however, the doctrine has been overshadowed by sovereign immunity, or, where there is no sovereign immunity, by the governmental defendant's potential immunity for the exercise of discretionary functions. Some jurisdictions, such as Arizona,[63] Colorado,[64] and Florida,[65] rejected the public duty doctrine. (However, it appears that Florida subsequently, in effect, reinstated the public duty doctrine.)[66]

The public duty doctrine developed in the law of personal liability of public officials and was adopted in the law of tort liability of the sovereign. Although virtually all states no longer have sovereign immunity in tort, in some states the public duty doctrine is important as a defense to tort actions against public entities.[67] The doctrine is more widely accepted in cases involving alleged inadequate police[68] and fire protection and inspection of buildings[69] than in highway cases. In *Hamilton v. Cannon*,[70] the court held that the public duty

[60] 569 A.2d at 26–27, *citing* Husovsky v. United States, 590 F.2d 944, 950 (D.C. Cir. 1978); Johnson v. State, 636 P.2d 47 (Alaska 1981); Butler v. State, 336 N.W.2d 416 (Iowa 1983). It should be noted that the *Hall* case arose under the Connecticut highway defect statute, C.G.S.A., § 13a-144.

[61] Eldridge v. Trenton, 1997 Tenn. App. Lexis 573 (1997) ("[T]he evidence presented at trial brings the actions of Defendant and the officers of the Trenton Police Department within the scope of the public duty doctrine of governmental immunity," as there is no "alleged duty to warn Plaintiff of a potential crime at his place of business." *Id*., *10. The special duty exception did not apply.)

[62] Nelson v. Salt Lake City, 919 P.2d 568, 572, 1996 Utah LEXIS 68 (Utah 1996) (implicit recognition of the public duty doctrine in a highway case).

[63] Ryan v. State, 134 Ariz. 308, 656 P.2d 597, 1982 Ariz. LEXIS 293 (1982), *later proceeding*, 150 Ariz. 549, 724 P.2d 1218, 1986 Ariz. App. LEXIS 556 (Ct. App. 1986), *superseded by statute as stated in* Bird v. State, 170 Ariz. 20, 821 P.2d 287, 1991 Ariz. App. LEXIS 310 (Ct. App. 1991) (holding that the state has absolute immunity regarding the licensing and regulation of any profession or occupation).

[64] Leake v. Cain, 720 P.2d 152, 1986 Colo. LEXIS 574 (Colo. 1986), *superseded by statute as stated in* Aztec Minerals Corp. v. Romer, 940 P.2d 1025, 1996 Colo. App. LEXIS 300 (Ct. App. 1996), *reh'g denied,* (Dec. 19, 1996) (holding that governmental immunity act precluded claim against the State for issuing a certain permit).

[65] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1979 Fla. LEXIS 4645 (Fla. 1979), *on remand*, 372 So. 2d 1022, 1979 Fla. App. LEXIS 15402 (Fla. Dist. Ct. App. 3d Dist. 1979), *appeal after remand*, 398 So. 2d 488, 1981 Fla. App. LEXIS 19857 (Fla. Dist. Ct. App. 3d Dist. 1981), and *on remand,* Cheney v. Dade County, 372 So. 2d 1182, 1979 Fla. App. LEXIS 15463 (Fla. Dist. Ct. App. 3d Dist. 1979).

[66] Everton v. Willard, 468 So. 2d 936 (Fla. 1985) (court relied on both discretionary immunity and public duty doctrines).

[67] The doctrine may apply in some areas but not others. *See* Houle v. Galloway Sch. Lines, Inc., 643 A.2d 822, 826-27 (R.I. 1994) (The doctrine applied to the design of bus routes but not to the negligent operation of a school bus; even so, "the elements of egregious conduct" may permit the negligent design claim to go to the jury.).

[68] Annot., *Governmental Tort Liability for Failure to Provide Police Protection to Specifically Threatened Crime Victim,* 46 A.L.R. 4th 948, 955, *citing* Stafford v. Barker, 129 N.C. App. 576, 502 S.E.2d 1 (1998), *review denied*, 348 N.C. 695 (1998); Walther v. KPKA Meadowlands Ltd. Partnership, 581 N.W.2d 527 (S.D. 1998) and Orozco v. Dallas Morning News, Inc., 975 S.W.2d 392 (Tex. App. 1998).

[69] Annot., *Municipal Liability for Negligent Fire Inspection and Subsequent Enforcement,* 69 A.L.R. 4th 739, 745, *citing* Jaramillo v. Callen Realty, 588 N.Y.S.2d 61 (1992) (faulty wiring); *see also* O'Connor v. New York, 58 N.Y.2d 184, 460 N.Y.S.2d 485, 447 N.E.2d 33, 1983 N.Y. LEXIS 2886 (1983), *reh'g denied*, 59 N.Y.2d 762, 1983 N.Y. LEXIS 5014 (1983) (gas explosion).

[70] 267 Ga. 655, 482 S.E.2d 370, 372 (1997), *citing* Department of Transp. v. Brown, 267 Ga. 6, 471 S.E.2d 849, 852 (1966) (automobile accident victim's survivor not required to show that the victim had a special relationship with the State in

"does not apply outside the police protection context" and rejected the DOT's assertion that it had no liability in the absence of a special relationship between the DOT and the plaintiff's decedent, a car-collision victim.

Although the public duty doctrine is recognized by a majority of jurisdictions, there appears to be a trend to reject the doctrine in the law of tort liability of public entities.[71] For example, in *Hudson v. East Montpelier*,[72] the court declined to adopt the "'public duty doctrine' and its 'special relationship exception'…which in recent years has been rejected or abolished by most courts considering it." The courts that have rejected the public duty doctrine have done so primarily in the belief that it was merely a form of sovereign immunity.[73] Under the public duty doctrine, however, there is no tort liability, because under the circumstances of the case the defendant owed no duty to the injured plaintiff.

Sovereign immunity and the public duty doctrine, however, are distinct issues. Sovereign immunity does not deny the tort but precludes any liability. In contrast, under the public duty doctrine, because there is no duty owed to the plaintiff, there is no tort, and, therefore, no liability. As the court stated in *Davidson v. City of Westminster:*[74]

> In sorting out the issues presented, it is important to consider first things first. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.

Most courts do not equate the absence of sovereign immunity with the existence of liability in all cases.[75] Many courts have agreed that the public duty doctrine is not a relic of sovereign immunity.[76] Furthermore, it has been held that "the purchase of insurance…does not constitute a waiver of the public duty doctrine."[77]

B.2. The Public Duty Doctrine in Highway Cases

There is a lack of uniformity among the states that have considered the public duty doctrine as a defense in highway litigation. The jurisdictions that rejected the public duty doctrine, usually on the basis that it is a form of sovereign immunity, certainly will not apply the doctrine in highway cases. Even some jurisdictions, which recognize and apply the doctrine in non-highway cases, will not do so in highway cases. A number of courts distinguish between providing highways for use by the public and furnishing other governmental services to protect the public. Thus, police and fire protection and building and safety inspections may be held to be public duties, whereas in a few jurisdictions safe highways may be held to involve a special duty owed to highway users.

As seen in previous chapters, there are numerous examples in which the courts have held that the transportation department had no duty under the circumstances to a highway user. Thus, there may be no duty to control traffic at uncontrolled highway intersections by installing stop signs or traffic signals or installing median barriers on highways,[78] or to provide street lights on highways,[79] left-turn lanes,[80] or shoul-

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connection with its decision to open the road on schedule rather than when it was complete).

[71] *See* Annot., *Modern Status Of Rule Excusing Governmental Unit From Tort Liability On Theory That Only General, Not Particular, Duty Was Owed Under The Circumstances,* 38 A.L.R. 4th 1194 (1985).

[72] 161 Vt. 168, 638 A.2d 561, 566 (1993).

[73] Adams v. Alaska, 555 P.2d 235 (Alaska 1976) (first modern case to reject public duty doctrine), *superseded by statute as stated in* Wilson v. Anchorage, 669 P.2d 569, 1983 Alaska LEXIS 473 (Alaska 1983) (holding that the legislature amended statute to preclude municipal liability in actions based on the inspection of private property for violations of statutes, regulations, and ordinances or for hazards to health or safety).

[74] 32 Cal. 3d 197, 185 Cal. Rptr. 252, 649 P.2d 894, 896, 1982 Cal. LEXIS 219 (1982).

[75] *See* Cootey v. Sun Investment, Inc*.,* 68 Haw. 480, 718 P.2d 1086 at 1091 (1986) ("Whether there is a duty of care owed by the government tortfeasor to the injured party should be determined by an analysis of legislative intent of the applicable statute or ordinance.").

[76] *See, e.g*., O'Brien v. State, 555 A. 2d 334,336, 1989 R.I. LEXIS 35 (R.I. 1989)

(We are of the opinion that the special- duty doctrine does not resurrect the concept of sovereign immunity but it does take into account the unquestionable fact that many activities performed by government could not and would not in the ordinary course of events be performed by a private person at all.).

See also Texaus Inv. Corp., N.V. v. Haendiges, 761 F.2d 252, 256, 1985 U.S. App. LEXIS 31021 (6th Cir. 1985) ("Ohio case law strongly supports the proposition that the abolition of sovereign immunity did not abolish the private duty/public duty doctrine."); Johnson v. Municipal Univ. of Omaha, 169 N.W.2d 286 (Neb. 1969); and Motyka v. Amsterdam, 15 N.Y.2d 134, 256 N.Y.S.2d 595, 204 N.E.2d 635, 1965 N.Y. LEXIS 1652 (1965).

[77] Jungerman v. Raytown, 1995 Mo. App. Lexis 1752 (Mo. App. 1995). (However, the doctrine did not bar suit against the involved police officers.)

[78] *See* Annot., *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused By Failure To Erect Or Properly Maintain Traffic Control Device At Intersection,* 34 A.L.R. 3d 1008. The annotation collects cases holding, for example, that in the absence of statute, the initial decision whether or not to erect or install a traffic control device is not actionable, *citing, e.g.*, McKinley v. Cartersville, 232 Ga. App. 659, 503 S.E.2d 559 (1998). The article also collects cases in which under various circumstances the highway authority was held to have a duty to provide or maintain them.

[79] *See* Annot., *Governmental Tort Liability As To Highway Median Barriers,* 58 A.L.R. 4th 559, 579 (1987). The article collects cases in which the courts held that the governmental defendant had no duty to install guardrails or barriers along the median, *citing, e.g.*, Wallace v. Department of Transp., 701 A.2d 307 (Pa. Commw. Ct. 1997), *allocatur denied,* 727 A.2d 134, 1998 LEXIS 1676 and Hull v. Chicago, 236 Ill. App. 3d 405, 177 Ill. Dec. 128, 602 N.E.2d 1300 (1st Dist. 1992).

ders.[81] It has been held that there is no duty to provide crosswalks for pedestrians.[82] The court in Ohio held that the department had no duty to provide protective screening on a pedestrian bridge to prevent objects from being thrown onto the highway below.[83] Even where the public duty doctrine is not recognized, the issue of whether the state has a duty under the circumstances is an essential issue in a tort case.[84] The absence of a duty may be a valid defense under the state's statute imposing liability for a "dangerous condition" of public property.[85]

Although the public duty doctrine is not applied often in highway cases, possibly because of confusion of the doctrine with immunity for discretionary functions, or simply because of oversight, there are a few such cases.[86] In *Keene v. Bierman,*[87] the plaintiff, injured when the car in which he was riding struck a tree approximately 3 ft from the road, sued the state highway engineer who designed the highway. The court based its decision on both the discretionary function immunity and the public duty doctrine. As for the latter doctrine, the court stated: "Here [the state highway engineer] had no relationship with Cope [the injured plaintiff] as an individual and therefore his status as a professional would not give rise to any basis for liability. Any duty owed by Hare was owed to the public generally."[88]

In a case involving the alleged faulty design of a highway, it was held that the official's duty was to the public, not to the plaintiffs.[89] Similarly, in *Genkinger v. Jefferson*,[90] a county engineer's "duty [to erect warning signs was] one owing to the general public and not to any certain individual...." Later, in *Harryman v. Hayles*,[91] the court disagreed and stated that the court's conclusion that the individual defendants owed no duty to the plaintiffs was wrong, because the conclusion was based on a theory that depended on governmental immunity. Elsewhere, county commissioners were held not liable for the absence of guardrails, again because their statutory duties were owed to the public, not to any individual.[92] (Of course, Iowa[93] and Colorado[94] later rejected the public duty doctrine.)

In a series of highway decisions in Rhode Island, commencing with *Knudsen v. Hall,*[95] the courts upheld the application of the public duty doctrine to deny liability in a variety of factual situations.[96] On the other

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[80] Antenor v. L.A., 174 Cal. App. 3d 477, 220 Cal. Rptr. 181, 1985 Cal. App. LEXIS 2758 (2d Dist. 1985).

[81] Pickering v. Washington, 260 So. 2d 340, 1972 La. App. LEXIS 6556 (La. App. 1st Cir. 1972) *cert. denied,* 261 La. 1062, 262 So. 2d 43, 1972 La. LEXIS 4960 (1972) *cited with approval in Williams v. Peterson*, 551 So. 2d 37 (La. 1989), in which the court held that there is also no duty to install stop signs at an uncontrolled intersection merely because there have been a number of accidents there. *Cf.* Kyle v. Bogalusa, 506 So. 2d 719, 1987 La. App. LEXIS 9383 (La. App. 1st Cir. 1987) (question of fact whether there was a duty to provide a shoulder on a state highway).

[82] Swett v. Algonquin, 169 Ill. App. 3d 78, 119 Ill. Dec. 838, 523 N.E.2d 594, 1988 Ill. App. LEXIS 595 (2d Dist. 1988), *appeal denied*, 122 Ill. 2d 595, 125 Ill. Dec. 238, 530 N.E.2d 266 (1988).

[83] Zebrasky v. Ohio Dep't of Transp., 16 Ohio App. 3d 481, 16 Ohio B. 564, 477 N.E.2d 218 (1984), *mot. overruled.*

[84] Chance v. State, 567 So. 2d 683, 686–87, 1990 La. App. LEXIS 2190 (La. App. 3d Cir. 1990) (county sheriff did not owe a duty to DOTD to inform it of wash-out on state highway, where after DOTD settled suits it sought indemnification from sheriff).

[85] Gray v. America West Airlines, Inc., 209 Cal. App. 3d 76, 256 Cal. Rptr. 877, 1989 Cal. App. LEXIS 266 (4th Dist. 1989).

[86] Nelson v. Salt Lake City, 919 P.2d 568, 572, 1996 Utah LEXIS 68 (Ut. 1996) (implied recognition of the public duty doctrine in a highway case); Oppe v. Missouri, 171 Ill. App. 3d 491, 121 Ill. Dec. 882, 525 N.E.2d 1189, 1988 Ill. App. LEXIS 938 (4th Dist. 1988), *appeal denied,* 122 Ill. 2d 579, 125 Ill. Dec. 222, 530 N.E.2d 250 (1988).

[87] 184 Ill. App. 3d 87, 132 Ill. Dec. 600, 540 N.E.2d 16, 1989 Ill. App. LEXIS 883 (5th Dist. 1989).

[88] 540 N.E.2d at 17.

[89] Rose v. Mackie, 177 N.W.2d 633 (Mich. 1970); *see*, however, Bush v. Oscada Area Schools, 405 Mich. 716, 275 N.W.2d 268, 273, 1979 Mich. LEXIS 346 (1979) (In the Governmental Tort Liability Act, the "[l]egislature intended to protect the general public from injury by imposing upon governmental agencies the duty to maintain safe public places, whether such places are public highways or public buildings.").

[90] 250 Iowa 118, 93 N.W.2d 130, 132, 1958 Iowa Sup. LEXIS 405 (1958).

[91] Harryman v. Hayles, 257 N.W.2d 631, 638, 1977 Iowa Sup. LEXIS 1138 (Iowa 1977) (duty runs to all those rightfully using the roads), *overruled in part by* Miller v. Boone County Hosp., 394 N.W.2d 776, 1986 Iowa Sup. LEXIS 1321 (Iowa 1986) (involving constitutionality of notice provision).

[92] Richardson v. Belknap, 73 Colo. 52, 213 P. 335, 1923 Colo. LEXIS 290 (1923), *overruled in part by* Liber v. Flor, 143 Colo. 205, 353 P.2d 590, 1960 Colo. LEXIS 558 (1960) (members of board of county commissioners could be held liable if they were actual tortfeasors or if they were negligent in supervising subordinates), and *overruled in part by* Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968, 1971 Colo. LEXIS 890 (1971) (doctrines of governmental and sovereign immunity prospectively overruled as to tort claims against counties, school districts, and the state).

[93] Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979).

[94] Leake v. Cain, 720 P.2d 152, 1986 Colo. LEXIS 574 (Colo. 1986), *superseded by statute as stated in* Aztec Minerals Corp. v. Romer, 940 P.2d 1025, 1996 Colo. App. LEXIS 300 (Ct. App. 1996) *reh'g denied* (Dec. 19, 1996); *see* Board of County Comm'rs v. Moreland, 764 P.2d 812, 1988 Colo. LEXIS 204 (Colo. 1988) (stating that the general duty–special duty test is no longer relevant).

[95] 490 A.2d 976 (R.I. 1985).

[96] Carroccio v. Moran, 553 A.2d 1076 (R.I. 1989) (failure to keep highway in state of repair); Polaski v. O'Reilly, 559 A.2d 646 (R.I. 1989) (stop sign mutilated beyond recognition and obscured by trees, shrubs, and bushes); and Kowalski v. Campbell, 520 A.2d 973 (R.I. 1987) (negligence in maintaining safety lines on a highway).

hand, a number of jurisdictions (e.g., Arizona, Iowa, Colorado, and Wisconsin[97]) have not applied the public duty doctrine in highway cases. In *Duran v. City of Tucson,*[98] the court held that the public duty doctrine did not apply to governmental activities relating to highway services or facilities.[99] The courts in Louisiana[100] and New Mexico[101] have held that, although the maintenance of highways is a duty owed to the general public, the failure to properly carry out this function is actionable by an injured individual.

Although the public duty doctrine is recognized in a majority of jurisdictions in police and fire protection and building and safety inspection cases, the doctrine has not been asserted as often or as successfully in highway litigation. Moreover, the trend appears to be one of rejection of the doctrine because of the belief that it is a relic of sovereign immunity. However, the public duty doctrine is distinct both from sovereign immunity and immunity for discretionary functions; neither doctrine of immunity is based on the absence of a tort. Rather, as the public duty doctrine holds, if the defendant had no duty to the injured person, regardless of immunity, there is no tort.

Because the absence of a duty of care is the threshold issue in any tort action, it may be advisable to assert the public duty doctrine as a defense along with other defenses and immunities, including the transportation department's immunity for discretionary functions. Although the public duty doctrine should be raised as a defense, the defense in highway cases is not as successful as in other cases involving public services.

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[97] Coffey *v.* Milwaukee*,* 247 N.W.2d 132 (Wis. 1976).

[98] 20 Ariz. App. 22, 509 P.2d 1059 (1973) Ariz. App. LEXIS 615 (1973), *disapproved as stated in* Daggett v. Maricopa 160 Ariz. 80, 770 P.2d 384, 387, 1989 Ariz. App. LEXIS 11 (Ct. App. 1989) (county enacted regulations requiring it to approve and inspect swimming pools).

[99] *See also* State v. Superior Court of Maricopa County, 599 P.2d 777 at 785 (Ariz. 1979) ("A duty to the individual may also exist when the governmental agency is itself the active tortfeasor. For example, if the State of Arizona is building highways it has a duty to the individual driver to build safe highways.").

[100] Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980).

[101] Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728, 1984 N.M. LEXIS 1688 (1984).

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).

SECTION 6

SHIFTING OR SHARING OF LIABILITY AMONG THE TRANSPORTATION DEPARTMENT AND OTHERS

A. PROTECTING THE TRANSPORTATION DEPARTMENT FROM LIABILITY

A.1. Introduction

This section and the next discuss other means by which the transportation department may protect itself from liability through contractual indemnity, insurance, and statutory caps on damages. As seen in Part B, the transportation department may attempt to shift liability to another defendant or as yet unnamed defendant based on contribution, equitable indemnity,[1] or subrogation.[2]

A.2. Contractual Indemnity

A transportation department may include an indemnity provision in a contract to protect itself from claims arising out of the other party's conduct, leading to third-party claims against the department. In transportation construction contracts, the contractor may be required to indemnify the transportation department. For instance, the contract documents may provide that

> "[t]he Contractor shall indemnify and save harmless the [Transportation] Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; …or because of any act or omission, neglect, or misconduct of the Contractor[.]"[3] Where an accident occurs in a construction zone, the transportation department may have rights of indemnity from the contractor under the construction contract with the prime contractor for third-party lawsuits against the transportation department. Also, the transportation department may be named as an additional insured under the contractor's policy.

However, the transportation department is unlikely to be able to claim indemnity from others arising out of the department's own negligence. Indemnities are strictly construed. A party may contract to indemnify itself against its own negligence only if the other party knowingly and willingly agrees to indemnify; courts disfavor such clauses because "to obligate one party to pay for the negligence of the other party is a harsh burden…."[4]

In *State v. Thompson*,[5] the State sued a truck stop operator in a third-party action arising out of a highway accident. The court noted that "in order for an indemnitor to be liable for the indemnitee's own negligence, there must be a written contract between the parties which contains a clear and unequivocal provision by which the alleged indemnitor knowingly and willingly assumes the onerous burden of indemnification for the indemnitee's negligence." The court rejected any implied in law indemnity theory of the State,[6] ruling that Amoco, the truck stop operator, could not be held liable for negligent acts of the State: "This [contractual] provision contains no mention of the indemnification of the State by Amoco in case of the State's own negligence.… [T]his provision is simply too vague to impose the burden of indemnification upon Amoco…."[7]

Another form of contractual responsibility exists when the transportation department is engaged in an activity with another department or agency or with a business enterprise such that the two or more parties are joint venturers or partners. In such a situation, the transportation department may be held liable for the negligence of an employee of a co-venturer under the doctrine of the existence of a joint enterprise.[8]

A.3. Insurance

There are many issues that could be discussed in regard to insurance coverage issues. However, the principal issue considered here is whether the state's purchase of insurance affects the transportation agency's amenability to suit in tort. There is authority that the state waives its immunity when it procures liability insurance.[9] The state statute may or may not provide for a waiver, or there may be a limited waiver of immunity up to the limit of the liability insurance purchased.[10]

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[1] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 418 (1999).

[2] 73 AM. JUR. 2D Subrogation § 3 (2001)

[3] Vankirk v. Green Constr. Co., 195 W. Va. 714, 466 S.E.2d 782, 786, n.2 (1995)*, cert. denied,* 518 U.S. 1028 (1996).

[4] Moore Heating v. Huber, Hunt & Nichols, 583 N.E.2d 142, 145 (Ind. App. 1991).

[5] 179 Ind. App. 227, 385 N.E.2d 198, 216 (1979).

[6] 385 N.E.2d at 216–17.

[7] *Id.* at 217. The provision had been included because of Amoco's application for access to a limited access highway.

[8] Tex. Dep't of Transp. v. Able, 981 S.W.2d 765, 1998 Tex. App. LEXIS 5860 (Ct. App., Houston, 1998).

[9] HARPER & JAMES, THE LAW OF TORTS § 29.4; Wright v. State, 189 N.W.2d 675, 680 (N.D. 1971), *overruled* in Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 636 (1994). In *Wright*, the court held that it "was within the discretion of the State Highway Department to determine whether a policy of insurance against liability should be purchased, who should be covered, and the extent of the coverage.… [T]he purchase of the policy was not a waiver of the immunity of the State from suit.…" In *Bulman*, the North Dakota Supreme Court abolished the State's sovereign immunity from tort liability but noted that its "decision should not be interpreted as imposing tort liability on the State for the exercise of discretionary acts in its official capacity, including legislative, judicial, quasi-legislative, and quasi- judicial functions." Bulman, 521 N.W.2d at 640. Abrogation was prospective so that the legislature could implement a plan for liability insurance or self-insurance. Whether liability insurance itself was a waiver does not appear to have an issue in *Bulman*.

[10] Henry v. Okla. Turnpike Auth., 478 P.2d 898, 901 (Okla. 1970) (The "said statute requires only a limited insurance liability to be purchased.… This statute did not authorize a full and complete waiver [of sovereign immunity of the Turnpike Authority] and we so hold.").

In *Askew v. Miller Mutual Fire Insurance Co.*,[11] the court noted that the highway department was subject to suit only to the extent it was protected by liability insurance. Because of the policy's exclusions, the plaintiff's action could not be sustained, as the policy, *inter alia*, did not cover the nonexistence of signs warning motorists of animals.[12]

In *Smith v. Cooper,*[13] the court held that the legislature did not withdraw the immunity of state employees when it enacted a statute permitting state agencies to purchase insurance to protect their officers and employees against liability. The court held that "the insurance…would be useful with regard to matters in which the employees have traditionally not enjoyed immunity."[14] In *Hughes v. County of Burlington*,[15] the court ruled that the existence of liability insurance coverage for the County did not preclude the defense of governmental immunity: "the procurement by a governmental unit of liability insurance does not of itself effect a waiver of whatever governmental immunity from suit would otherwise prevail."[16]

The procurement of insurance may give rise to other issues under a state tort claims act. For instance, in *Kee v. State Highway Admin*.,[17] there were material issues on whether a suit came within the Tort Claims Act for which the State had waived tort immunity at the time of the accident and whether the claim was covered under an insurance policy also in effect at the time of the accident. Under the Tort Claims Act, the State had waived its immunity only to the extent that the State was covered by an insurance program. The treasurer was only authorized to provide insurance to the extent that funds were budgeted. Although there were other issues regarding what had been waived,[18] on the insurance issue the court held that the statutory provision "indicates a clear intent…to provide only a limited waiver of the State's immunity in the first year of the Tort Claims Act."[19] Furthermore, "the State had not waived its immunity from tort suit [under certain provisions of the Tort Claims Act] in 1982 because the Treasurer had no authority to purchase insurance coverage.… [T]he state defendants retained their immunity for causes of action accruing in 1982 and falling only within § 5-403(a)(5)…."[20]

In a concurring opinion in *Johnson v. County of Nicollet*,[21] which held that the decision of the County not to place a guardrail between the road and the river bank was not an immune discretionary act, the concurring judge stated that the County had waived its immunity by purchasing liability insurance, but noted that in another case,[22] the court had not considered whether a city's purchase of liability insurance was a waiver of discretionary immunity.

It appears that the effect of the transportation department's purchasing liability insurance and the extent to which defenses are waived in tort actions may vary among the states. State transportation attorneys should consult applicable statutory provisions and state court decisions before advising transportation officials on this issue.

A.4. Statutory Limitations on Damages, Punitive Damages, and Attorney's Fees

Some legislatures have enacted statutory maximums or caps on the amount and/or type of damages that may be recoverable against a governmental defendant. Although the statutes vary from state to state, they reflect public concerns about the effect of recoveries in tort against transportation and other public agencies that may seriously deplete public resources.

The type and scope of statutory caps vary. In some instances, the jurisdiction may only provide for a cap on a recovery for each plaintiff. In others, a cap on damages per plaintiff arising from the same cause of action or occurrence may be combined with an aggregate limit.[23] Sometimes the statutes provide that the court may not award prejudgment interest.[24]

In Florida, the state is liable "for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment."[25]

The constitutionality of statutory, monetary maximums, as well as provisions for requiring notice and special statutes of limitations, have been challenged in several jurisdictions. Their constitutionality has been upheld, usually for the same reasons.[26] In Minnesota, the court held that, because the $100,000 statutory cap on tort judgments against the state agency did not unfairly discriminate between governmental tortfeasors

[11] 86 N.M. 239, 522 P.2d 574 (1974).

[12] Askew, 522 P.2d at 575 (1974).

[13] 256 Or. 485, 475 P.2d 78, 83 (1970).

[14] *Id.*

[15] 99 N.J. Super. 405, 240 A.2d 177 (1968), *cert. denied,* 51 N.J. 575, 242 A.2d 379 (1968).

[16] 240 A.2d at 182; *see* Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) (rejecting waiver theory), *reh'g denied*, Oct. 21, 1997.

[17] 313 Md. 445, 545 A.2d 1312 (1988).

[18] Kee, 545 A.2d at 1319.

[19] *Id*. at 1318.

[20] *Id*.

[21] 387 N.W.2d 209 at 213 (Minn. App. 1986).

[22] Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984).

[23] 42 PA. CONS. STAT. ANN. § 8528(b) (limiting damages arising from a single or related cause of action to $250,000 per plaintiff and $1,000,000 in the aggregate).

[24] FLA. STAT. ANN. § 768.28 (5); Nevins v. Ohio Dep't of Transp., 132 Ohio App. 3d 6, 724 N.E.2d 433, 1998 Ohio App. LEXIS 6265 (1998) (no prejudgment interest in tort claim against the transportation department).

[25] FLA. STAT. ANN. § 768.28 (5).

[26] Hart v. Salt Lake County Comm'n, 945 P.2d 125, 1997 Utah App. LEXIS 93 (Ut. Ct. App. 1997) (statutory damage cap did not violate state constitutional law).

and private tortfeasors, the statute did not violate the Equal Protection Clause. The court held that the state's classification was rationally related to its legitimate governmental interest in protecting public funds and aiding budgetary planning.[27]

The application of the statutory limit in some situations that may arise is not always simple, however. In *Tulewicz v. Southeastern Pennsylvania Transp. Agency*,[28] the Pennsylvania Supreme Court interpreted that state's statutory cap on damages. In *Tulewicz*, multiple claims for damages resulted after a Southeastern Pennsylvania Transportation Agency (SEPTA) bus killed the plaintiff's decedent.[29] After the actions were consolidated for trial, the court awarded plaintiff as a relative and as decedent's personal representative $2,500,000 under the Wrongful Death Act and $250,000 under the Survival Act.[30] SEPTA argued that the two claims and verdicts arose out of the same occurrence, and, therefore, had to be aggregated to avoid exceeding the statutory limitation of $250,000 per plaintiff.[31]

The court, rejecting the Agency's argument, reasoned that the two actions were designed to compensate two different categories of plaintiffs: on one hand, the spouse and members of the family for their loss, and on the other, the decedent through her legal representative.[32] Even though there was only one plaintiff, the case was brought on behalf of two distinct plaintiffs.[33] Thus, the statutory $250,000 limitation applied to the respective claims but not in the aggregate.

Insofar as punitive damages are concerned, statutes in some jurisdictions may exempt transportation and other public agencies from such damages.[34] If legislation does not do so, then the courts must decide the issue. The trend appears to favor denying punitive damages in successful suits against public agencies.[35]

Thus, as seen, there are several legal doctrines that may permit the transportation department to protect itself from liability. A contractual indemnity is unlikely to succeed if the transportation department is seeking indemnification for claims arising out of its own negligence. On the other hand, the transportation department may purchase insurance. Statutory limits on the amount of damages and the preclusion of punitive damages have been upheld in most states in which they have been imposed.

B. SHIFTING LIABILITY FROM THE TRANSPORTATION DEPARTMENT TO OTHERS

B.1. Contribution, Counterclaims, and Cross-claims

Contribution is based on equity.[36] The common-law prohibition against contribution among joint tortfeasors generally has been abrogated by statutes that create a substantive right of contribution.[37] Contribution distributes the loss by requiring each culpable party to pay a proportionate share to one who has discharged the joint liability.[38] By comparison, indemnity shifts the entire loss from one tortfeasor, who has been compelled to pay it, to another who should bear it instead.[39] Contribution sounds primarily in tort and is based on the duty of each tortfeasor to the injured party.[40]

There appear to be differences among the states on whether the remedy of contribution is available.[41] In the District of Columbia, for example, contribution is an equitable concept, which recognizes that each tortfeasor found to be liable should share the burden of making the plaintiff whole.[42] Contribution is available

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[27] Lienhard v. State, 417 N.W.2d 119, 1987 Minn. App. LEXIS 5121 (Minn. Ct. App. 1987), *aff'd in part and rev'd in part*, *en banc*, 431 N.W.2d 861, 1988 Minn. LEXIS 278 (Minn. 1988); *cf.* Lyles v. Commonwealth, Dep't of Transp., 516 A.2d 701 (Pa. 1986) (holding that the provision of the Pennsylvania Sovereign Immunity Act limiting tort liability of a Commonwealth party to $250,000 did not violate the equal protection provisions of the Federal or Pennsylvania Constitutions); *cf.* Schuman v. Chicago Transit Auth., 407 Ill. 313, 95 N.E.2d 447 (1950) (rejecting a constitutional challenge to the notice of claim requirement and the reduced statute of limitations for personal injury suits against the CTA).

[28] 529 Pa. 588, 606 A.2d 427 (1992).

[29] 606 A.2d at 428.

[30] *Id.*

[31] *Id.* at 430.

[32] *Id* at 431.

[33] *Id.*

[34] *E.g.*, CAL. GOV'T CODE § 818 (no exemplary damages); FLA. STAT. ANN. 768.28 (5) (no punitive damages); TEX. GOV'T CODE ANN. § 101.024 (same); 42 PA. CONS. STAT. § 8521(c) (omitting punitive damages from categories of recoverable damages).

[35] *E.g.,* Metropolitan Atlanta Rapid Transit Auth. v. Boswell, 261 Ga. 427, 405 S.E.2d 869 (1991); Teart v. Washington Metro. Area Transit Auth., 686 F. Supp. 12, 14 (D.D.C. 1988) (refusing to grant punitive damages in the absence of an express statutory grant); and George v. Chicago Transit Auth., 58 Ill. App. 3d 692, 374 N.E.2d 679, 1978 Ill. App. LEXIS 2375 (1st Dist. 1978); *but see* Magaw v. Mass. Bay Transp. Auth., 21 Mass. App. 129, 485 N.E.2d 695 (1985) (stating that any limitation on the transportation authority's tort liability is for the legislature to decide).

[36] 18 C.J.S., *Contribution* § 2, at 4–5.

[37] *Id.* § 12, at 15.

[38] *Id.* at 16.

[39] Eagle-Picher Indus. v. United States, 290 U.S. App. D.C. 307, 937 F.2d 625 (D.C. Cir. 1991).

[40] *Id.*

[41] Robinson v. Alaska Properties and Inv., 878 F. Supp. 1318 (D. Alaska 1995) (stating that under Alaska law, there is no recognition of either contribution among join tortfeasors or noncontractual indemnity.).

[42] Machesney v. Larry Bruni, P.C., 905 F. Supp. 1122 (D.D.C. 1995).

only to joint tortfeasors,[43] but there is authority that the tortfeasors need not be joint in the strict sense for the contribution statute to apply.[44] Contribution may be available whether the acts of the tortfeasors are separate, independent, or concurrent, and the applicable statute may cover tortfeasors who are liable in tort on separate legal theories.[45] All joint tortfeasors need not be defendants in the action by the plaintiff for contribution to be available.[46]

A model act, the Uniform Contribution Among Tortfeasors Act (UCATA), creates a substantive right of contribution among joint tortfeasors. There is authority both allowing and disallowing contribution in states with comparative negligence statutes.[47] Of course, there is no basis for contribution if the other tortfeasor is immune from liability.[48] There are several annotations on topics that are relevant to actions arising out of claims against transportation agencies,[49] as well as to issues arising under the UCATA.[50] Several sections of the *American Law of Torts* (1993) discuss the law of contribution, including the applicability of notice of claims provisions; prerequisites to contribution; and adjusting contribution for relative or comparative causal fault.

The state may claim contribution from other tortfeasors responsible for the plaintiff's injury, and Pennsylvania has permitted a private tortfeasor to recover by way of contribution against the transportation agency.[51] It has been held that the state is not excluded from the operation of the UCATA on the theory that government entities are not "persons" for the purposes of the Act.[52]

It should be noted that a Michigan decision compels the state to contribute, even though sovereign immunity was not expressly waived. In *Sziber v. Stout*,[53] involving the state's contribution statute, the third-party defendant county road commissions argued that the statute applied only to private tortfeasors. The road commissions maintained that "the only cause of action which may be maintained against the road commissions, otherwise immune from liability, is that for which the Legislature has specifically and narrowly waived immunity...."[54]

Relying on its prior decisions, the court disagreed, noting that in Michigan "contribution is substantive in nature and not dependent on the whim of the original plaintiff...."[55] The court held that "the Michigan statute abrogates the common-law bar prohibiting contribution among 'wrongdoers' and established a substantive cause of action independent of the underlying suit which gave rise to it...."[56] The court held that the Michigan statute created a substantive cause of action for contribution available to the third-party plaintiffs, "which is wholly independent of the underlying tort action, unaffected by the governmental immunity statute, and which may be prosecuted to judgment, providing that the other requirements of the contribution statute are met."[57] It should be noted that the court also held that the state statute requiring written notice by the injured person of the injury and the highway defect within 120 days of the accident was inapplicable to actions for contribution.[58]

In *Bernard v. State ex. rel. Dept. of Transp. & Development*,[59] the transportation department was not entitled to contribution from a highway contractor for an accident caused by the removal of a turning lane. It was held that the contractor was not the culpable party where the contractor had complied with department's plans and specifications, where the contractor was one of several on the project, and where the department had controlled the placement of warning signs.

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[43] In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547 (S.D.N.Y. 1994), *appeal denied,* 874 F. Supp. 81 (S.D.N.Y. 1995), *application denied*, 162 F.R.D. 271 (S.D.N.Y. 1995).

[44] Berard v. Eagle Air Helicopter, 195 Ill. Dec. 913, 629 N.E.2d 221, 257 Ill. App. 3d 778 (1994).

[45] Employers Mut. Cas. Co. v. Petroleum Equip., Inc., 190 Mich. App. 57, 475 N.W.2d 418 (1991).

[46] Henry v. Consolidated Stores Int'l Corp., 89 Ohio App. 3d, 417, 624 N.E.2d 796 (1993).

[47] 18 C.J.S., *Contribution* § 12.

[48] *Id.* § 29.

[49] Annot., *Contribution Between Negligent Tortfeasors at Common Law,* 60 A.L.R. 2d 1366; Annot., *Extent To Which State Law is Applicable in Actions Under Federal Tort Claims Act*, 1 L. Ed. 2d 1647, § 14; Annot., *Right of United States Under Federal Tort Claims Act to Recover Contribution or Indemnity from Joint Tortfeasor,* 15 A.L.R. Fed. 665, Annot., *Tortfeasor's General Release of the Co-tortfeasor as Affecting Former's Right to Contribution Against Co-Tortfeasor,* 34 A.L.R. 3d 1374.

[50] Annot., *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort,* 57 A.L.R. 3d 867, and Annot., *Contribution or Indemnity Between Joint Tortfeasors On Basis of Relative Fault*, 53 A.L.R. 3d 184. Agreements and releases that may affect the liability of the other joint tortfeasor are discussed in 22 A.L.R. 5th 483, 6 A.L.R. 5th 883, and 24 A.L.R. 4th. 547

[51] Cruet v. Certain-Teed Corp., 432 Pa. Super. 554, 639 A.2d 478 (1994), *appeal denied,* 541 Pa. 639 (1995).

[52] Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994), *reh'g denied,* May 1994.

[53] 419 Mich. 514, 527, 358 N.W.2d 330, 335 (1984).

[54] 358 N.W.2d at 334.

[55] *Id.* at 335.

[56] *Id.*

[57] *Id*. at 336. (Footnote omitted).

[58] In that regard, the court overruled *Morgan v. McDermott*, 382 Mich. 333, 169 N.W.2d 897 (1969). As for the statute of limitations, the court ruled that the 6-month provision in the contribution statute applied; moreover, the cause of action accrued when the third party plaintiff has paid more than his or her share. Sziber, 358 N.W.2d at 337–38.

[59] 640 So. 2d 694 (La. App. 3d Cir. 1994), *cert. denied*, 643 So.2d 165 (La. 1994).

In *Scovell v. TRK Trans, Inc.*,[60] the appellate court had held that, because the State had waived its immunity from tort liability, liability was subject to the right of contribution. In *Scovell*, the plaintiff sued a trucking company for wrongful death; TRK filed a third-party claim against the State for contribution and indemnity. The appellate court held that the statutory scheme in Oregon did not require that the original plaintiff be able to maintain an action in tort against the third-party defendant, the State, at the time that the contribution action was commenced. It was not necessary for the plaintiff to have given any pre-suit notice to the transportation commission. "Because TRK provided the required notice of its claim, it is entitled to maintain its third-party action."[61] However, the court did agree that the third-party complaint "failed to allege any relationship between itself [the defendant] and the state, or between its duty, fault or liability, if any, and that of the state which would entitle it to indemnity."[62]

The Supreme Court of Oregon reversed the decision and reinstated the judgment of the circuit court pursuant to *Beaver v. Pelett*,[63] decided the same day as the appeal from *Scovell v. TRK Trans, Inc.* The court held in *Beaver* that the State had consented to the claim for contribution under the tort claims act, but that the claim was insufficient to satisfy the requirement that the injured party must provide notice to the State.[64] The court stated: "We do not believe that the legislature intended a public body to become indirectly liable to a third party for an alleged tort of which it had no notice and for which the original injured party therefore could not recover damages."[65]

In sum, in actions involving the transportation department, counsel will need to consult local statutes and decisions to determine whether contribution is an available remedy under the circumstances of the case.

B.2. Equitable Indemnity

Equitable indemnity allows one tortfeasor to receive a full or partial indemnity from a joint tortfeasor on a comparative fault basis.[66] The very nature of equitable indemnity is that a contract for indemnity is unnecessary and recovery is allowed where, as a result of the defendant's breach of contract or tortious activity, the cross-claimant is required either to defend itself or bring an action against a third party.[67] The doctrine is explained in one case as

> a restitutionary concept; it is "a right which inures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable...." "Indemnity does not invariably follow fault; it is premised on a joint legal obligation to another for damages...." Accordingly, "[t]here can be no indemnity without joint and several liability by the prospective indemnitor and indemnitee...."[68]

If there are joint tortfeasors, one may be compelled to pay damages for the negligent or tortious act of another, but such a general statement is subject to numerous exceptions.[69] For instance, there may be a recovery if "there is a great disparity in the fault of the parties"; where one is "less culpable than the principal wrongdoer"; or where "one tortfeasor was only technically or constructively at fault."[70] In California, for example, the doctrine permits the defendant to seek apportionment of the loss between wrongdoers in proportion to their relative culpability, so there will be equitable sharing of losses between multiple tortfeasors.[71] Under the "comparative equitable indemnity" doctrine, the defendant has the right to bring in other tortfeasors who are allegedly responsible for the plaintiff's injury through a cross-complaint or by a separate complaint for equitable indemnification.[72]

However, a motorist who had been sued along with the state department of transportation in an action arising out of a collision at an intersection did not have an implied indemnity claim against the transportation department for an award of statutory attorney's fees. The court stated that liability for implied indemnity cannot be founded merely upon the absence of fault of one codefendant.[73]

There is authority that comparative negligence principles do not preclude an award of restitution under the doctrine of equitable indemnity to a non-negligent, settling codefendant.[74] However, there is also authority that the alleged tortfeasor must have been at fault to

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[60] 71 Or. App. 186, 691 P.2d 911 (1984), *rev'd, en banc,* 299 Or. 679, 705 P.2d 1144 (1985).

[61] 691 P.2d at 915.

[62] *Id*.

[63] 299 Or. 664, 705 P.2d 1149 (1985).

[64] 705 P.2d at 1152–54.

[65] *Id*. at 1153.

[66] 42 C.J.S., *Indemnity §* 38; *see also* Annot., *Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault*, 53 A.L.R. 3d 184.

[67] Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992).

[68] Fieldstone Co. v. Briggs Plumbing Products, Inc., 54 Cal. App. 4th 357, 62 Cal. Rptr. 2d 701, 706 (4th Dist. 1997). (Citations omitted).

[69] 42 C.J.S., *Indemnity*, §§ 36 and 37; *see* Annot., *Release of or Covenant Not to Sue One Primarily Liable for Tort, But Expressly Reserving Rights Against One Secondarily Liable, As Bar to Recovery Against the Latter*, 24 A.L.R. 4th 547.

[70] 42 C.J.S., *Indemnity*, § *37.*

[71] GEM Developers v. Hallcraft Homes of San Diego, Inc., 213 Cal. App. 3d 419, 261 Cal. Rptr. 626 (4th Dist. 1989).

[72] 261 Col. Rept. at 631.

[73] Watson v. Department of Transp., 68 Cal. App. 4th 885, 1998 Cal. App. LEXIS 1046, 80 Cal. Rptr. 2d 594, 597–98 (1998).

[74] Rowley Plastering Co. v. Marvin Gardens Dev. Corp., 180 Ariz. 212, 883 P.2d 449 (Ariz. Ct. App. 1994).

some extent before being able to claim an indemnity. For example, in *Watson v. Dept. of Transp.,*[75] the trial court found the defendant motorist to be free of fault, the transportation department to be 90 percent at fault, and the plaintiff to be 10 percent at fault. The court held that the motorist who was held not liable could not recover his attorneys' fees by cross-complaint against the transportation department: "[i]f the alleged tortfeasor is not liable at all no tenable claim can be made for indemnity.... [L]iability for implied indemnity cannot be founded merely upon the absence of fault of one co-defendant."[76]

In cases involving multiple parties and equitable indemnity, the cross-complainant's failure to file a notice of claim under the applicable state torts claims act prior to asserting a claim against the transportation department has been litigated. Whether the action is permissible may turn on when the equitable indemnity claim accrued. In *People ex rel. Dept. of Transp. v. Superior Court of Los Angeles County,*[77] the plaintiff, who was injured in an automobile accident, instituted an action against a number of individuals. However, the plaintiff did not file a timely claim against California under its tort claims act. Several defendants, however, filed an equitable indemnity action against the State, alleging that the latter's negligence in blocking several lanes of the highway was the proximate cause of the plaintiff's injuries. The State argued that the claim had to be dismissed, because the cross-complainant had failed to file a timely claim under the statute.

The court held that a tort defendant's cross-claim for equitable indemnity is separate and distinct from the plaintiff's tort action: "a tort defendant does not lose [its] right to seek equitable indemnity from another tortfeasor simply because the original plaintiff's action against the additional defendant may be barred by the statute of limitations."[78] The court stated that "[i]t is well-settled that a cause of action for implied indemnity does not accrue or come into existence *until the indemnitee* [i.e., the initial defendant] *has suffered* actual loss through payment."[79] The statutory notice was not required where the cross-complaints were filed prior to the accrual of the cause of action for equitable indemnity: "[w]hen an equitable indemnity action is pursued prior to the accrual of the cause of action through a third party cross-complaint, it has been held that no prior claim need be filed."[80]

[75] 68 Cal. App. 4th 885, 80 Cal. Rptr. 2d 594 (3d Dist. 1998).

[76] Watson, 80 Cal. Rptr. 2d at 599.

[77] 163 Cal. Rptr. 585, 608 P.2d 673 (1980), *superseded by statute as stated in* Cal. v. Superior Court, 143 Cal. App. 3d 754, 192 Cal. Rptr. 198 (1st Dist. 1983).

[78] People ex rel. Dep't of Transp., 608 P.2d at 676.

[79] *Id*. at 677 (emphasis in original).

[80] *Id.* at 685. As for the plaintiff's failure to give a pre-suit notice to the state, the court ruled that "a preservation of the defendant's indemnity rights in these circumstances is [not] simply an 'indirect' way to permit an injured plaintiff to avoid the effect of the claims statute." *Id*. at 684.

B.3. Subrogation

Subrogation is an equitable principle that applies equally to tort and contract actions and that arises by operation of law.[81] "Subrogation that does not result from agreement between the parties is usually known as legal subrogation…a creature of equity, existing independently of custom or statute...."[82]

If a third person negligently causes a defect in a highway, resulting in a claim against the transportation authority, and if the department is compelled to pay damages, then the public authority is subrogated to the cause of action that the injured party primarily had against the one causing the defect.[83] Thus, subrogation is the substitution of one person in the place of another with reference to a lawful claim or right, so that one party (the substitute) succeeds to the rights of another. Once subrogation occurs, the substitute, in effect, steps into the shoes of the other party to whom the substitute became subrogated.[84] Equity seeks through subrogation to prevent the unearned enrichment of one party at the expense of another. The rule of subrogation does not apply to joint tortfeasors;[85] however, the initial tortfeasor may maintain an independent action for subrogation against a subsequent tortfeasor aggravating the injury.[86]

The doctrine arises in tort cases involving governmental authorities and highways: "Where a tort claim has been paid by one whose liability therefor was secondary, he may be subrogated to the rights of the injured party against the wrongdoer," provided, of course, he was legally chargeable with liability.[87] Subrogation claims, therefore, are possible against contractors, licensees, or other third persons.[88] For the public authority to recover, the general rule is that it must have been only "passively negligent."[89] In *Berliner v. Kacov*,[90] the city was not entitled to indemnification from an abutting owner where the jury found that the city had been "100%" negligent in failing to maintain the street in a reasonably safe condition.[91]

As in the discussion on equitable indemnity, an important issue that could be overlooked is the matter of the giving of a timely notice of a claim to the govern-

[81] Czyzewski v. Gleeson, 49 Ill App. 3d 655, 364 N.E.2d 557, 7 Ill. Dec. 396 (1977); and Consolidated Freightways v. Moore, 38 Wash. 2d 427, 229 P.2d 882 (1951).

[82] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 3.

[83] *See* 73 AM. JUR. 2D *Subrogation*. Usually the obligation being paid must have been paid in full. *Id*. §§ 26, 30.

[84] State v. Tradewinds Elec. Serv. Contr., 80 Haw. 218, 908 P.2d 1204, 1208 (1995).

[85] W.A. Ellis, Inc. v. Ellis, 115 Colo. 12, 168 P.2d 549 (1946).

[86] Keith v. B.E.W. Ins. Group, 595 So. 2d 178 (Fla. App. 1992).

[87] 73 AM. JUR. 2D §§ 30, 31 (2001).

[88] *Id.*

[89] *Id.*

[90] 51 A.D.2d 962, 380 N.Y.S.2d 722 (App. Div. 1976).

[91] Berliner, 380 N.Y.S.2d at 725–26.

mental defendant. In *Allied Mutual Ins. Co. v. Director of N.D. Dept. of Transp.,*[92] an automobile insurer asserted subrogation rights in an action against the transportation department; the plaintiff's insured was injured and one passenger killed in a collision when the department's employee drove a loader across a highway median. The insurer's subrogation claim was defeated because of the failure to give the required written statutory notice of claim.

Insofar as the shifting of liability from the transportation department to others, if the defendants are joint tortfeasors, then the department may be able to recover against a codefendant or third party under the equitable indemnity doctrine. If the department pays on behalf of another party and is not itself negligent, then it may be possible to claim against the responsible party under subrogation principles. Subrogation may be precluded if the subrogor and the subrogee are joint tortfeasors. Finally, it may be possible for joint tortfeasors to seek contribution from the other.

[92] 1999 N.D. 2, 589 N.W.2d 201 (1999).

Index

Index of Cases

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