THE LEGAL RESPONSIBILITIES OF MAINTENANCE OPERATIVES IN THE LIABILITY SECTOR

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•THE MAINTENANCE FUNCTION as it relates to highways, especially the modern expressway, has gradually become a subject of concern to the law and its practitioners. The erosion of the doctrine of sovereign immunity has helped to create an awareness of maintenance, with special attention given to the liability aspects which have not heretofore been prominent. The administrators involved in this area have utilized the governmental shield of immunity which has been provided by the judiciary, and so long as that shield remained in place the dual-edged sword of fault and compensation remained sheathed.

The above aids us in explaining why the law has not been concerned with maintenance prior to now. Financial considerations always operate in such a manner as to hone the blade of justice. Where large sums of money are involved, a challenge is provided, and challenge evokes interest. The burdens of fault and increased compensation therefore have begun to stir legal interest. This principle then is one of positive reaction and better government is the hoped-for result.

But the erosion of sovereign immunity is not entirely responsible for the new law-maintenance relationship. The tremendous strides forward made in maintenance operations are likewise responsible. Ecological considerations and the search for quality in life have focused the spotlight of public interest on maintenance operations of every sort, and the advances of maintenance have generated public interest. Public interest fosters challenge and the law is never very laggard in taking up that challenge.

The primary impetus of this paper then will be the legal responsibilities of maintenance operatives in light of increased judicial activity in the liability sector. The nature of the topic makes it somewhat esoteric but it is hoped that the technical considerations involved will also serve to make it somewhat didactic. Because it is esoteric in nature the paper will not aim to provide guidelines for any statutory construction. It should not be read as culminating in any model legislation, but mostly as a background report from which certain general propositions may be drawn. Much needs to be done yet in this area in order to accord to the maintenance function its proper importance in the legal framework. Much also needs to be done to alert all interested parties in the possible dimensions of maintenance problems as they are now upon us and as they may yet appear.

SOVEREIGN IMMUNITY

In discussing "standards" or "levels" of maintenance, it is first important to look at the fundamental law covering any cause of action arising from an alleged deficiency in standards. We are here concerned with a brief review of sovereign immunity as regards states, counties, and administrative bodies. On the federal level, sovereign immunity bars action against the government unless statutorily waived as in the Federal Tort Claims Act, 28 U. S. C. section 1491.

Basically, sovereign immunity is that principle which bars suit against the sovereign without the sovereign's consent or permission. On the state level any waiver of immunity must be statutory, and it has been held that such a statutory waiver is effective as to highways. This waiver is not absolute, however, as where such a statute exists it must be strictly construed.

The case of Seelye v. State, 34 N. Y. S. 2d (N. Y., 1942), is often cited as authority for this proposition. In that case, a vehicle proceeded off the highway pavement, became caught in a rut in the shoulder of the road, and careened out of control into an

accident. The court stated that immunity could only be waived by statute and then proceeded to examine all relevant statutes. Section 58 of the Highway Law fixed liability for accidents resulting from highway defects, and in substance this section stated that liability would ensue for defects on the "paved" portion of the road.

In the words of the court, a statutory derogation of sovereign immunity "must be strictly construed, and a waiver of liability must be clearly expressed." The court found no liability under this statute.

Of further interest to us here, the court stated that this defect would not be fatal if damages resulted from the misfeasance or negligence of a state employee performing a state duty. The question then becomes one of a state duty to maintain the shoulder outside of the right-of-way. The record said nothing as to inspection, control, the need for warning signs, or any act from which a duty to maintain could be inferred.

Hence, while the court found a right and a privilege to maintain the area, there was no duty to do so. Neither was there evidence that the superintendent of public works considered such maintenance necessary to protect the pavement. In the absence of a prima facie showing of claim or a preponderance of credible testimony by the claimant, the court held liability did not vest in the state.

As regards counties, there are several diverse applications of the doctrine. Generally, however, the courts have interpreted counties to be arms of the state, and when acting in that capacity to be protected by the state's sovereign immunity. It has further been acknowledged that county maintenance of highways is a governmental function.[1] There are other extensions of this doctrine and it has been held that a county is liable for negligent maintenance of roads whether maintenance is considered governmental or proprietary.[2]

In addition, liability has been vested by statute in some jurisdictions, and a statutory waiver of a state's immunity has been interpreted as acting for a county waiver.[3]

Finally, as regards state highway administrative bodies, the general rule is that sovereign immunity can only be waived by statute, and in the absence of such waiver the protection is absolute.[4] The changing nature of the law in this area is pointed out in two Louisiana cases. In Bazanac v. State Department of Highways, 218 So. 2d 121 (La., 1969), the Court of Appeals held that a statute which authorized the state highway department to sue or be sued did not waive tort immunity. But in Herrin v. Perry, 228 So. 2d 649 (La., 1969), the Supreme Court of Louisiana ruled that a statute which authorized the highway department to sue or be sued waived sovereign immunity.

While there have been substantial indications of a trend toward complete abrogation of the doctrine of sovereign immunity, the general principles stated above are yet valid law. Each person should be familiar with the law in his own state on this doctrine.[5]

[1] *Contra, Klepinger v. Board of Commr's of County of Miami,* 239 N.E. 2d 160 (Ind., 1968), where bridge repair work was held to be ministerial and proprietary rather than governmental for liability purposes and where negligence in allowing an open trench across a bridge resulted in liability.

[2] *Rice v. Clark County,* 382 P. 2d 605 (Nev., 1963).

[3] *Bernardine v. New York,* 62 N.E. 2d 604.

[4] *See Thomas v. Baird,* 252 A. 2d 653 (Pa., 1969), where the Sup. Ct. of Pa. held that the Turnpike Commission was an instrumentality of the State engaged in a governmental function (where a collision involved a maintenance truck stopped on a highway) and hence was immune from liability for the negligence of employees; *Johnson v. Callisto,* 176 N.W. 2d 754 (Minn., 1970), where the Sup. Ct. of Minn. was asked to reject by judicial fiat the doctrine of sovereign immunity. The court refused to do so on the grounds that any change would have to be legislative.

[5] *See Arnold v. Shumpert,* 217 So. 2d 116 (Fla., 1968), where the Fla. Sup. Ct. held that a general law authorizing the purchase of insurance to cover county "property" and "operations" did not cover traffic signals and did not waive immunity as to those devices; *Lusietto v. Kingan,* 246 N.E. 2d 24 (Ill., 1969), where the court held that immunity protected the maintenance supervisor of a highway when performing duties which were governmental and discretionary and not ministerial in nature; *Phillips v. Town of Fort Oglethorpe,* 162 S.E. 2d 771 (Ga., 1968), where a court held that the maintenance of traffic signals is a ministerial function where negligence is actionable; *Rappe v. Carr,* 167 S.E. 2d 48 (N.C., 1969). where the Court of Appeals held that installation and maintenance of traffic signals was a "governmental" function and protected by immunity; *Fogers v. State,* 459 P. 2d 378 (Hawaii, 1969), where the court held that the placement of traffic signs and road marking was an "operational" function rather than a "discretionary" function and that liability would ensue from negligent maintenance; and *Shealor v. Ruud,* 221 So. 2d 765 (Fla., 1969), where the court held that installation of a warning system at a railroad intersection is a "proprietary" function and negligence in performance could lead to liability.

GENERAL DUTIES

The basic law of maintenance is that a highway traveler lawfully using the highway is entitled to have that highway maintained in a reasonably safe condition. But it is just as elemental to note that the state does not function in the role of guarantor as regards safety, nor does it ensure against injury resulting from obstructions or defects in the highway unless specifically required to do so by statute.

It is of primary importance then to establish that the one significant duty of maintenance operatives, in the absence of statute law to the contrary, is to exercise reasonable diligence to put and keep highways in a reasonably safe condition for the uses to which they are subject.[6] While this principle was established some time ago and the intervening years have seen an increased traffic flow and consequent altered traffic patterns, there has been little alteration in this duty to exercise ordinary care and prudence under existing circumstances.

The duty to use proper and reasonable care allows wide latitude in the exercise of administrative discretion. Continuing supervision and inspection are axiomatic but it is also axiomatic that there is no liability for the consequences of unusual or extraordinary occurrences.

In the case of McCullin v. State, Department of Highways, 216 So. 2d 832 (La., 1968), the plaintiff was injured in an accident arising out of an alleged defect in a graveled road. There was adequate testimony in the case from which the court could find regular maintenance and inspection. In addressing itself to this point, the court said:

> The State of Louisiana owes to the public a duty to maintain its highways so they will be in a reasonably safe condition for the traveling public at all times. This duty encompasses an obligation to have an efficient and continuous system of inspection of the highways and bridges. The Highway Department, however, is not required to maintain a perfect condition of repair or system of inspection, but its officers and employees are required to use ordinary and reasonable care in order to insure that the highways and bridges will be in a reasonably safe condition. (cite omitted).

This duty to use ordinary care referred to by the court has been interpreted to involve an anticipation of defects which could result naturally from use or climatic conditions and in the absence of anticipation thereof, liability may well ensue.[7]

The case of Shaw v. State, 290 N.Y.S. 2d 602 (N.Y. Ct. Cl., 1968), involved a wrongful death claim which resulted from an accident in which the occupant of a stranded car was killed when he stood conversing with the occupants of another vehicle which had stopped partially on and partially off the highway and which was struck by an oncoming vehicle. The plaintiff claimed negligence in the maintenance of the highway. There was testimony that there was snow on the road and that it was cold, but it had not snowed on the day of the accident. A gusty wind was blowing, and conditions were similar throughout the immediate area.

In holding that the state was not negligent, the court said:

> ...In the exercise of reasonable care and maintenance *the State is not required to go to the limits of human ingenuity to accomplish safety of the highway.* (cite omitted). The brief period of time during which the snow condition due to weather and gusty wind conditions had existed was not sufficient to constitute constructive notice to the State which imposed negligence on it for failure to sand. Mere presence of snow or ice on the highway in the wintertime and the mere fact that a vehicle skidded thereon do not constitute negligence on the part of the State. (cite omitted). Under the weather conditions prevailing that afternoon and early evening there was an element of hazard which was obvious and reliance could not be placed on the presumption of the safety of the highway. (cite omitted). The cause of the accident cannot be attributed to the State under the facts herein.... (Emphasis added.)

It has further been held that the discharge of the duty in accordance with generally accepted engineering standards and practices meets the test of reasonable care.[8]

[6] *Strickfaden v. Greencreek Highway Dist.,* 248 P. 456.

[7] The general rule is that the frequency of inspection depends on the condition, location, and circumstances surrounding the alleged cause of the injury.

[8] *Legg v. City of New Orleans, Department of St. Div. of Tr. E.,* 219 So. 2d 798 (La., 1969).

SPECIFIC DUTIES

This section of the paper will discuss the duty of the maintenance operative to warn the public of the existence of defects, obstructions, and unsafe places of which the state has notice. Such a warning may be in the form of guardrails, barriers, signs, lights, or other means which shall be discussed in more detail later. It should be noted here that the courts place special importance on warnings at night and where climatic conditions may call for them.

It is generally felt that there is no duty to warn of every defect, nor is a warning necessary where a traveler exercising reasonable care could discover the obstruction. But where a warning is required, the test of sufficiency is not merely whether barriers or lights or signs have been erected, but whether they are sufficient to fulfill the purpose of their erection. There is a further question here for maintenance operatives and that is whether a maintenance manual and regulations may in effect become law.[9]

In the case of Brown v. State Highway Commission, 444 P. 2d 882 (Kansas, 1968), a claim was entered against the state for damages arising out of an intersectional collision. The central question before the court was whether a stop sign which was allegedly obstructed by bushy vegetation constituted an actionable highway defect.

It is of notable importance for us here to recognize that in discussing liability for a state highway defect, which is purely statutory, the court said that liability hinged on the scope of the statute. In this regard, the Kansas Supreme Court maintains the proposition that there is no legal foot-rule by which to measure conditions generally and determine with exact precision whether a condition in a state highway constitutes a defect. Each case is handled separately and included or excluded from the coverage of the statute accordingly.

In the case at bar the state highway commission had adopted a manual on uniform traffic control devices for streets and highways, and under Kansas statute section 8-511 the duty is imposed on the commission to maintain traffic control devices upon all state highways in conformity with the manual, which in the court's interpretation has the full force and effect of the law.

There is statutory discretion extant to designate state highways as throughways, but not to mark or control only such intersections on a state highway as the commission decides. Once a highway is declared a through highway by posting, there is an absolute duty to comply with the manual in controlling vehicular traffic using or entering such through highway. The court said:

> With the adoption of the Manual on Uniform Traffic Control Devices for Streets and Highways by the State Highway Commission pursuant to legislative authorization, these regulations have the force and effect of law. The State Highway Commission concedes that it has an absolute duty to conform to the rules set out in this Manual. If the obligation thereby imposed upon the State Highway Commission is to have any significance, *it requires that the installation and maintenance of a stop sign to control traffic entering a through state highway from a county road be sufficient and render the stop sign efficient to convey the message intended to control such* traffic.

The court then looked to the applicable manual sections set out by the trial court; these sections specified that, when there were obstructions to view, the height of a sign was to be 7 feet. The evidence showed a cluster of bush-like trees which obstructed view on the crossroad. The placement of the sign at less than 7 feet then constituted a defect in the highway because it did not convey the message intended.

The court held that a stop sign on the side of a state highway within the right-of-way of the highway, which is defectively installed or obstructed from view so that it is inefficient to convey the message intended for traffic control, is a statutory defect.

The issue of notice to the authorities was disposed of by holding that notice need only be actual and not strictly formal. Circumstantial evidence was then used and testimony was taken from the foreman for the state highway commission in charge of maintenance

[9] *See State v. Watson,* 436 P. 2d 175 (Ariz., 1967), in which it was held that highway safety regulations are generally admissible in evidence. They may be properly considered as evidence of standard custom or usage throughout the country, or as evidence that the State failed to meet safety standards set under its statutes.

at the point in question, to the effect that he had driven on the road with sufficient regularity for the jury to find actual notice.

APPLICATION

In this section we will discuss several maintenance situations as the courts have looked at them in recent years. For the sake of clarity, the section will be subdivided into individual units discussing signing, lighting, traffic control signals, pavement markings, and miscellaneous.

Warning Signs

There is a general duty to place warning signs at a dangerous highway condition where a motorist's visibility is obstructed. These signs must be "adequate" to warn of the danger present in order to relieve the sovereign of liability. Several other factors, however, may operate to mitigate the potential of liability.

The courts have held that, where a motorist passes a series of observable warning signs informing the public of exits prior to a barricade, there is a positive duty on the part of the motorist to observe such signs. Failure to do so on his part has been interpreted to be contributory negligence and acts as a bar to recovery.[10] In the Weinberg case, the plaintiff contended that it was negligence on the part of the state for failure to maintain lighted smudge pots at the scene of a barricade. The court looked to the testimony of a sign foreman for the department of highways in which it was disclosed that there were five different warning signs indicating an exit and barricade. Some of these signs were four to five feet above the ground. As to the adequacy of other signs, the court said:

> ...The smaller signs were thirty by thirty-six inches and were visible at night to approaching automobiles. These signs were described as consisting of black lettering on a white background and were aluminum scotchlighted for reflection purposes.
>
> It is difficult to understand how a motorist could pass these warning signs without bringing his vehicle under such control as to prevent him from driving into an obstruction on the highway. In our opinion the type and nature of the pre-warning signs were such as to provide adequate warning to plaintiff whose duty it was to observe and heed the approach signs which were reflectorized and designed to amply warn a prudent night traveler having proper headlights on his vehicle.

Similarly, the courts have said that where a traveler on a public highway is warned by proper notice of obstructions or excavations in the road, but he continues on his own without knowledge of what obstruction is ahead, the state has satisfied its duty and recovery is barred.[11]

The question of intersection signing has been the most prominent in recent judicial decision. The courts have been undecided on the question as the following discussion will serve to point out. In one case involving a T-intersection collision between a motorist and a county dump truck, the court found no liability as the determination of whether or not to place a stop sign, a warning sign, or a yield sign at the intersection approach was a legislative decision under the aegis of the county board, and not a judicial question. The court stated that, although there was a duty to maintain signs once they had been erected, there was no duty on the county to place a sign at a highway intersection in the first place.[12]

The courts have found liability, however, for failure to place warning signs at the sudden end of a roadway at a T- intersection where the road ended in a ditch.[13] The need for more than just a general warning sign at an especially dangerous intersection

[10] *Weinberg v. State, Department of Highways,* 220 So. 2d 587 (La., 1969). *See also Swazell v. Commonwealth,* 441 S.W. 2d 138 (Ky., 1969), where a court held that two 30-inch-square signs reading "Road Closed" and "Bridge Out", placed on the pavement with a lighted smudge pot between them, was adequate notice.

[11] *Lyon v. Paulsen Building & Supply, Inc.,* 160 N.W. 2d 191 (Neb., 1968).

[12] *Dusek v. Pierce County,* 167 N.W. 2d 246 (Wisc., 1969).

[13] *LeJeune v. State, Department of Highways,* 215 So. 2d 150 (La., 1968).

is pointed out in the case of Hall v. State, Department of Highways, 213 So. 2d 169 (La., 1968). In this case, a passenger in an automobile was killed when the vehicle went off the roadway and plunged into a body of water. The road in question had an abrupt 44-degree-alignment change after crossing through an intersection. A deep drainage canal paralleled the roadway and a straight direction through the intersection leads directly thereto. In discussing the duty to place a warning sign here, the court said:

> An unusually dangerous trap for such traffic resulted from the deep and unobservable water body into which, in effect, northbound traffic suddenly terminated—that is, when the travelway turned sharply left, without barricade or sign to warn of the change of direction. Further, because of the blending coloration of the surface areas and the depression of the canal, headlights of northbound traffic on Lincoln Road could not alert an oncoming motorist to this trap.
>
> There is no dispute as to the violation of duty on the part of the governmental authority responsible, because of the failure to erect signs or barricades to protect the traveling public from this unusually dangerous hazard resulting from what in effect was the sudden termination of the travelway into a deep and dangerous body of water....

The court held the state responsible for this negligence under a pertinent statute which defined a highway as "whatever way or place of whatever nature open to the use of the public for the purpose of vehicular traffic," LSA-RS 32:1(8). The duties with regard to these roads, including the duty to erect and maintain warning signs was delegated to the department of highways under LSA-RS 48:345(1950, as amended by Act 501, section 2, of 1954; repealed by Highway Regulatory Act of 1962).

Other decisions have served to emphasize the unsettled nature of the law in this area. The courts have held that there is no duty, statutory or otherwise, to erect a "Stop Sign" at an intersection unless it has been officially designated a "Stop" intersection.[14] A similar Arizona holding established that, while there was no duty to erect a "Stop" sign at an intersection, there was a duty to warn of an obvious danger in the road system. The presence of dikes located on private property off the right-of-way then becomes a factual issue to determine whether or not they can be considered a hidden danger.[15]

A Washington state court adopted the rule that there is no municipal duty to maintain an unobstructed view at an intersection, and that a street is not rendered so inherently dangerous so as to require warning signs where the natural vegetation tends to obstruct the motorist's view of an intersection.[16]

Finally, the adequacy of an existing warning sign was contested in Meabon v. State, 463 P. 2d 789 (Wash., 1970). In this case a car skidded off the road due to an oil overlay placed on the pavement surface which had become slippery as a result of climatic conditions. The state had erected a warning sign which read "Slippery When Wet." No sign had been posted to reduce speed. The court refers to the existence of a posted sign which read, in fact, 60 mph.

The court also referred to the existence of the department of highways maintenance manual, which, in a section on smooth and slippery areas, describes methods of remedying such conditions. The manual was not followed until subsequent to the accident which is the subject of this suit.

The court cited the duty imposed upon the state in the maintenance of its highways as being that of ordinary care to keep them in a reasonably safe traveling condition. Inherent herein is the duty to eliminate a dangerous condition or to warn adequately thereof. The court then held that an instruction as to the adequacy of warning signs is critical in determining state liability. There is no rule of absolute liability in Washington and adequacy becomes a factual question.

The state contended further that the manual for traffic control devices established a standard of care and that compliance therewith would relieve liability. The contention was that the standard was the posting of a prescribed warning sign.

The court held: (a) that this injury arose from conduct within the accepted concepts of negligence applicable to private persons; and (b) compliance with the manual was

[14] *Coffman v. Fisher*, 455 P. 2d 281 (Ariz., 1969).

[15] *Rogers v. Ray*, 457 P. 2d 281 (Ariz., 1969).

[16] *McGough v. City of Edmonds*, 460 P. 2d 302 (Wash., 1969).

relevant, particularly in light of the state's failure to also post an "Advisory Speed" sign as described in the manual. No dismissal of the suit was granted on this contention.

There was a dissent in this case that held that an instruction as to adequacy would make adequacy the sole criterion for liability. This, the dissent said, would act to impinge on the state's duty to keep a highway reasonably safe for travel, so the instruction should have been denied.

Safety Barriers

The law in this area is fairly well settled and has been for some time. Where safety barriers are necessary to ensure a reasonably safe road for travel, then there is a duty to erect them. There are numerous factors which the court looks at in determining reasonability, among them being the character of the highway in question, the width and construction of the road, the slope or descent of the banks where the road is elevated, the direction of the road, and whether or not the dangerous condition is obvious or hidden. Ordinarily, as a rule of thumb, the court looks to see if the danger is of an unusual nature, such as a bridge approach. At least guardrails are considered necessary in such a situation and, if there is an unsafe traveling condition, then a barrier across the road may be required to make the road reasonably safe.

There are some specific instances which need to be pointed out to which the courts apply special attention: where a highway is higher than the adjoining ground; points of ingress and egress, especially where there has been a grade change; and the replacement of an abandoned right-of-way by a new right-of-way where the road is deceptive. All must be carefully studied.

The character and strength of the barriers are left to engineering discretion and there is no judicial rule as to sufficiency other than that they must make the road reasonably safe for travel. However, more is necessary to escape liability than a general warning or guide for maintaining the right-of-way.

The courts do consider that barriers should be maintained so that they are reasonably strong enough to carry out their purpose. That is, they should be able to withstand the ordinary weights and forces to which they may be subjected. The courts look to ordinary traffic conditions, and generally do not require maintenance to withstand an unusual degree of force.

In the case of State v. Hart, 292 N.Y.S. 2d 320 (N.Y., 1968), the state brought an action against defendant motorist for negligent damage to guardrails along a state highway. The defense sought to establish that posts and guardrails are for the special use of a public traveler and that a citizen of the state is entitled to their protection as a safety device without cost. In discussing state duty as regards guardrails, the court said:

> It is true that the duty of the State to provide adequate guardrails is coupled with the responsibility for failure to comply with that duty. (cite omitted). But this duty is not absolute. Liability arises only where the situation is inherently dangerous, or of such an unusual character as to mislead a traveler exercising reasonable care. There is no duty to fence a road or to provide barriers merely to prevent travelers from straying off the highway (cite omitted).

It is of some interest here to look at the court's consideration of the defendant's claim. While the court recognizes that there may be some merit to the argument, it held that it was nevertheless presently untenable. The court said:

> ...The rationale may appear to have logic, but the irresistible conclusion is that guardrails are placed upon highways as a safety measure and their mere presence does not invite such an affirmative and indelicate use. Negligent destruction of guardrails is obviously not normal wear and tear nor a commonly accepted practice. Their function becomes directly operative in time of an emergency usually created by the beneficiary of their presence or by the negligence of others. If this negligence can be established, the State of New York or any other instrumentality or division thereof is entitled to recover for damages to its property....

The question of the duty to erect barricades or warning signs arose in the case of Mullins V. County of Wayne, 168 N.W. 2d 246 (Mich., 1969), in which the plaintiff was

injured when he collided with a private barrier at the terminus of a road. The plaintiff contended that there was a duty on the county's part to erect a barricade or signs at the terminus of a road which dead ended. The court looked to the relevant statute and case law and concluded that there was a duty to keep the road so that it would be reasonably safe and convenient for public travel.[17] Looking to the prior case law, the court said the following:

> The principle that emerges is that as part of its duty to construct and keep the road reasonably safe and convenient for public travel the road authority is required to provide such devices at points of especial danger as may be necessary to warn the driver where the margins of the roadway end or to prevent his vehicle from leaving the road.

Referring to an earlier decision,[18] the court stated that it would restrict statutory coverage to the preservation of the status quo. Hence, repairs under that decision would be necessary where the road had fallen into disrepair; obstructions were to be removed; fallen signs were to be replaced; but that would be the limit of duty. Now the court feels that this decision completely ignored the statutory requirement of keeping the road reasonably safe for travel. In the words of the court:

> ...According to that opinion it doesn't make any difference whether the road leads over a cliff or into the Detroit River, whether there are railways or barriers, or whether manifestly dangerous conditions are warned against.

The court differentiates this case from the theory of an "every-deviation-of-the-road" case by categorizing it as a terminating road case. The fear of the defendant was that every claim would be submitted to the jury under this decision. The court rejected this contention, however, in citing several cases where the courts held the jury could not infer negligence because of an inadequate evidentiary showing.

The question then, for the court, was resolved by holding that the trier of fact was to decide whether or not the failure to erect a barrier was a flagrant defect in construction. The court also held that the adoption of the uniform traffic signal control statute which allowed discretion in erecting signs did not relieve the authority of the duty to construct and keep a road reasonably safe for travel.

Lighting

The law as regards lighting holds that a peculiar condition rendering lighting necessary to make the road reasonably safe for travel leads to a duty to light the road. It has been judicially established therefore that where lighting is extant, the inadequacy thereof, especially where there is a danger which would be evident during the daylight but not at night, may lead to liability. Ordinarily the number and character of lights are left to the sovereign's discretion by the judiciary, so long as there are no defects in the road. In addition, the courts are not likely to impose liability for a defect in lighting if the road is reasonably safe for travel.

In the case of Baran v. City of Chicago Heights, 251 N.E. 2d 227 (Ill., 1969), the plaintiff sued for injuries which he received when his automobile went through a dead-end street and struck a tree. Both sides introduced testimony, with the plaintiff's witness testifying that the intersection was improperly illuminated. He also testified that the light pole was improperly placed. This would result in a blending of the overhead light with the plaintiff's headlight. The court said:

> ...The court has long recognized that where a city undertakes to provide lights, it is liable for injuries which result from deficient or inadequate ones. (cite omitted). In holding a city responsible for injuries thus caused the court is not reviewing the city's discretion in selecting a plan. It is not controlling or passing upon the city's estimate of public needs. Nor is it deciding what the "best" kind of improvement may be. It is simply saying that when a city creates a hazardous condition and someone is injured as a consequence it must respond in damages, just as others are required to do....

[17] *See Kowalczy v. Bailey*, 153 N.W. 2d 660 (Mich., 1967).
[18] *Mullins v. Wayne County*, 144 N.W. 2d 829 (Mich., 1966).

Traffic Signals

The law as regards traffic signals is that there is a duty, a failure of which may lead to liability if it is a proximate cause of an injury, to maintain the lights in a traffic control signal. But liability has been established under the theory of maintenance of a nuisance rather than on a negligence theory. Two recent cases point out the nature of the law in this area.

In the case of Town of Fort Oglethorpe v. Phillips, 165 S.E. 2d 141 (Ga., 1968), a claim was entered for an injury suffered at an intersection with a malfunctioning traffic signal. The responsible authorities had had notice of the defect. In fact, six accidents had been reported on the day prior to the day this one had occurred. The town demurred and claimed immunity. The court disposed of the negligence theory by concurring with the general rule, which it stated to be:

> The general rule is that in maintenance and operation of a traffic light system the city functions in a governmental capacity thereby relieving the city of liability for failure to keep traffic lights functioning properly.

The court further stated that the improper operation of a traffic light was not such a defect or obstruction as to bring it under the statutory liability associated with street maintenance. The court felt that obstructions or defects under the statute meant physical obstructions or defects in the road. Liability was extended, however, under the theory that the operation or maintenance of a nuisance is actionable whether a governmental or ministerial function.

Frankhauser v. City of Mansfield, 249 N.E. 2d 789 (Ohio, 1969), briefly discussed the governmental-proprietary dichotomy and flatly stated that the maintenance of a traffic signal is a governmental function for which liability can only be statutory.

But the court then looked to section 723.01 of the revised code which charged municipal corporations to keep the streets open, in repair, and free from nuisance. Liability is then predicated upon a nuisance theory. The court said:

> ...In our opinion, a nonfunctioning overhead electric traffic signal on a municipal street affects the physical condition in or on highways, and may be determined to be a nuisance by a jury under proper instructions. As to its object, *inter alia,* Section 723.01 places an obligation on a municipality to keep highways and streets open for the purposes for which they are designed and built, i.e., to afford the public a safe means of travel.

The court then looked at the importance of traffic signals to modern transportation and highway traffic control and maintained that exclusion of traffic signals from the list of obstructions in a highway, such as potholes, would be overly technical. Accordingly, a cause of action could vest for allegations of malfunction and notice where the malfunction was a proximate cause of the claimed injury.

Pavement Markings

Liability will ensue from a failure to place warning markings on highway pavement, including center stripes which indicate thoroughfare direction, where the failure is the proximate cause of an accident.

In Rogers v. State, 459 P. 2d 378 (Hawaii, 1969), plaintiffs were injured in an auto accident when a main road upon which they were traveling turned right, but another road slanted left and in taking the road to the left they were involved in an intersectional collision. The plaintiffs had never traveled the road before and became misled into turning left by the surface appearance of the roads, centerline stripings, road signs, and route numbers which were observable from an approach to the intersection. The court felt that the intersection was too deceptive and the route markers were placed too near the intersection to be of value.

The circuit court had found negligence in permitting these conditions to exist, which then became the proximate cause of the accident. The state contended that negligence in restriping the road lines was not actionable under the state tort liability act which exempts "discretionary" duties. In this connection there was a contention that discretion of the state employees was involved in restriping the pavement and placing the road signs after the chief engineer had picked the spots.

The court felt that to allow this contention would be to emasculate the state tort liability act, for discretion is involved to some degree in every action of a government employee.

The court examined federal law as the state act was modeled after the federal tort claims act, but found no definition as to operational level acts. The court said:

> ...However, we may draw from the decisions in those cases, and others involving the discretionary function exception, a conclusion that operational-level acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors....
>
> Here, such matters as the kinds of road signs to place and where to place them, and which center line stripings to repaint and where to repaint them, did not require evaluation of policies but involved implementation of decisions made in everyday operation of governmental affairs....

The court then affirmed the Circuit Court, holding that the state was liable here as this conduct was not within the discretionary exception of the act.

Miscellaneous

This section will serve to discuss two situations which cannot be categorized in any of the preceding sections and which arise far less frequently than any situation heretofore discussed.

In the case of Shapley v. State, 292 N.Y.S. 2d 289 (N.Y., 1968), the plaintiff brought suit against the state for injuries arising from an accident. The central contention was that the state was negligent for leaving sand and gritty material on a highway near the scene of the accident following winter weather.

The majority of the court held that the record did not permit a finding of negligence, as, if such materials were on the highway, there was no showing of the amount or that it was the cause, proximate or otherwise, of the accident.

A dissenting opinion, however, felt that the doctrine of reasonableness was strained in the majority opinion. The court of claims, which had been affirmed by the majority, held that it was unreasonable to charge the proper authority with the duty to clear the road every time it thawed and re-cinder it for every snow or ice hazard. The dissent said:

> ...This is not a case of alleged failure to remove sand during a two- or three-day interval between heavy storms in the heart of winter. Here, there was more than a 20-day interval. Judicial notice may be taken of the fact that extensive snow storms are unlikely in southeastern New York State after April first. The storm for which the sanding was done in this case was so minor that weather stations at nearby points, albeit lower in elevation, did not record snow....

The dissent felt that, applying these facts to the doctrine of reasonability, the court should have applied general tort principles to see if there was negligence. Without adopting a rule of law that the authorities should not be expected to clear the sand off the road, the dissenting opinion felt that sufficient proof was present to find negligence.

In the case of Siegel v. State, 290 N.Y.S. 2d 351 (N.Y., 1968), the plaintiff brought an action against the state for injuries received when a tree fell on his automobile while it was being driven on an expressway. The court looked at the record and extended recognizance that the accident had a damaging result. The question was, as regards us here, whether the state had responsibility for maintenance and control of the tree.

The state acknowledged that it maintained the tree. The court found that the fall of the tree was the proximate cause of the accident. The tree in question was a tulip tree on which the foliage was at the top. Pruning had taken place over two years prior to the accident and had not been done since. The record contained expert testimony to the effect that the tree had been attacked by carpenter ants and was decayed in portions. The state's witness, the tree-pruner foreman for that section of the road, testified he saw no evidence of insects in this tree in his records. The court then established the state's duty:

> The responsibility of the State in relation to falling trees is the same as that of a municipality, and requires the exercise of reasonable care.

> It is essential to establish that the State had either actual or constructive notice of a dangerous or hazardous condition of the tree, requiring its removal. There is a duty to use reasonable diligence in inspecting trees that are likely to become decayed and dangerous to users of the State's highways. Failure to so inspect is negligence which becomes the proximate cause of the accident.

The court then applied this reasoning and found that the state had or should reasonably have had constructive notice of a decayed condition of the tree, and that its failure to take steps to remedy the condition in the more than two years since the tree had last been pruned, during which period the decay was visible to an observant eye, constituted negligence for which the state was liable.

CONCLUSION

In instituting maintenance "standards" it is necessary to keep in mind that in the absence of specific guidelines the courts operate under the doctrine of reasonability. But where specific guidelines are extant the court will follow them. A possible conflict appears then in a situation where, under the doctrine of reasonability, the court, in its discretion can find a set of circumstances to be beyond the strictures of liability, but liability will ensue where guidelines are present. An example of such a conflict can easily be hypothesized. Suppose an accident occurs at an intersection partially shrouded by vegetation. A traffic control sign stands approximately 6 ft, 7 in. above the ground. Under the Brown case, see infra, the courts may hold that, if a standard were set which called for a 7-ft sign, liability may vest. But in the absence of specific standards, the court, by following the doctrine of reasonability may find mitigating circumstances and deny liability. I do not mean to say that this will be the case in all situations. I am merely trying to convey a sense of some possible difficulties in which maintenance operatives may find themselves. Uniformity is certainly desirable where possible. I do not mean to imply that, in every instance where a distance, or a height, or a size is made explicit, that courts will be inflexible.

We are in a period when the law is operating under a theory which can be called the "deep pocket" theory. In its simplest form this theory holds that the most capable party pays. Social jurisprudence now maintains that an individual should not be made to bear the full cost of an injury alone and an application of the "deep pocket" leads to the inevitable conclusion that the state will be made increasingly responsible.

I offer these statements as a caveat. If "standards" are the answer, then careful study not only of commonly accepted engineering principles but also of socioeconomic principles is essential. The law is only one component of such study.

There is one final legal principle operative here and it provides a fitting end to our discussion. It is a theory perhaps even more applicable than that of the "deep pocket." I refer to the theory which circulates among lawyers by word of mouth, and that is, do not let the camel get his nose under the tent. Its meaning is obvious. Gentlemen, I am afraid what we have seen today is the nose of the camel.