A SYNTHESIS OF CASE LAW JURISPRUDENCE RELATING TO WET-WEATHER HIGHWAY CONDITIONS

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• THE increase in litigation caused by the derogation of sovereign immunity and by other factors has resulted in an increasing interest on the part of highway administrators in the sovereign's duties and consequent liability where those duties are not met. Legal liability for accidents occurring on icy and wet highways is an area that the public has been especially concerned with in recent years.

The extant case law on the subject has established three central areas and one subarea in the jurisprudence of maintenance liability. These areas are (a) compliance with general duties in order to escape liability; (b) damages resulting from noncompliance (negligence); (c) contributory negligence as a bar to recovery; and (d) advisory signing as a technique in meeting general duties.

There are several reasons for the past failure of contributory negligence theories. The chief reason has been the belief in social compensation engendered in such theories as that of the "deep pocket." Briefly, this theory states that restitution should be made by the element most capable of bearing the burden of loss. In cases where public agencies or agents are concerned that element is the public, who through the state should compensate an injured victim. Of course, flagrant negligence on the part of the claimant will operate to bar recovery even when there is negligence on the part of the state.

The public sector, in this age of growing inflation, population pressures, and public cognizance, is near the brink of bankruptcy. The state no longer has the limitless revenues necessary to meet all demands made upon it. Choices will have to be made. In this atmosphere, I think it can be hypothesized that contributory negligence will have an increasing vitality. Each and every case will be studied thoroughly to determine not only any negligence on the part of the state but also any negligence on the part of the claimant. Administrative rules and regulations, ordinances and statutes, and advisory practices will place more and more responsibility on vehicle operators to avoid negligent operation of their vehicles or risk the possibility of not recovering damages even when there is proven negligence on the state's part.

The use of advisory signing, mainly speed limits, is an area that has not yet been fully developed. The establishment of a doctrine will gradually appear in this area as the body of case law on contributory negligence grows. Certainly, where advisory signing is used, an immediate onus will be placed on motorists to comply for fear of being held contributorily negligent. However, the coin has two sides. Where advisory signing is used, an awareness on the part of the state of latent dangerous conditions is inferred. This will place the duty of special care on the state to ensure the safety of these areas.

Where recovery has been allowed for accidents that occur on icy, snow-covered or rain-slicked highways, it has usually been because these conditions have created a defect or obstruction. In other words, recovery is absolutely based on more than just the presence of slick conditions. Often such decisions seem wholly unfair to those charged with the duty of maintaining the road network because of poor roads, inadequate personnel, and sparse funds.

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On the other hand, where recovery has not been allowed because of the absence of some committed or omitted operation that created a danger to motorists, the decision seems unfair to the individual. Frequently, there is little that a motorist can do to avoid an accident resulting from a slick spot on a highway, and, in the absence of liability imposed on the state, the injured innocent must bear the brunt of the loss.

LIABILITY ON THE PART OF THE STATE

Let us first look at those cases that have discussed the allowance of recovery based on negligence of the state. (Because our research showed that few important cases occurred before 1956, the cases referenced in this paper date from 1956.) An early New York case (Babcock v. State, 191 N.Y.S.2d 783, N.Y., 1959) involved a claimant who had been injured when his car skidded on an ice patch. The evidence at the trial was held determinative of the state's negligence in allowing water to collect and form ice on the highway, which created a hazard to motorists. The court concluded that the state had actual notice of the condition because the maintenance foreman knew of the icing. Water frequently ran over the road at the locus of this accident, and it was common knowledge that cold weather would result in freezing conditions. Even more indicative of judicial attitude was the statement, "No adequate flare or sign was placed to warn a driver of the dangerous condition that existed..." The court further held that contributory negligence was not in issue here because testimony established that the claimant had been driving at 35 mph, the weather had been clear, and the road had been dry except at the locus of the accident where there had been ice and slush.

Another case involving improper drainage occurred in the Washington, D.C., area (Jennings v. U.S., 207 F.Supp. 143, D.C., Md., 1962). A question arose as to liability on the theory of nuisance in connection with icy road conditions that had formed as a result of insufficient drainage facilities. The court studied the testimony and found that the drainage facilities had been inadequate, that frequent users of the highway had been aware of the problem, and that the agency responsible for maintenance of the highway should have been aware of the situation. The court further found that the existence of an insufficient drainage system had created a condition that was a nuisance, that the patch of ice on the highway was attributable to a long insufficiency of drainage facilities, and that the patch of ice was the effective cause of the injuries in the complaint. It was further found that the government could have abated the nuisance and was therefore liable.

In both of these cases a common thread can be detected. Both notice and acts of omission were present in each instance. In one case it was failure to warn by signing; in the other case it was failure to reform a defective condition. The total impact of these cases is brought home in a third case (Stern v. State, 224 N.Y.S. 2d 126, N.Y., 1962) in which the claimant had been driving at 40 mph when he noticed a posted speed of 30 mph. As he attempted to slow his vehicle, it began to skid. It was raining and a collision occurred. The court laid down basic principles early in the decision. Because of their universality, they are quoted as follows:

> It has been universally held by the courts of this state that the State of New York owes a duty to the public to keep its highways in a reasonably safe condition for travel and that a duty rests upon the state to maintain warning signs on a state highway if circumstances presented reasonably demand....Ordinarily a defendant is not liable for conditions due solely to the weather, but where the highway because of some existing condition becomes more slippery than the usual highway when wet, and is rendered dangerous for the traveling public, the state may become liable to those injured thereby.

In light of these principles, the court queried whether this highway became abnormally slippery when wet. State troopers testified, as did other witnesses, that there had been oil spots on the highway and that a slippery condition had existed that remained until the oil film was washed away. The court predicated recovery on this basis, saying, "...there is an established fair preponderance of evidence that the macadam portion of the highway in question becomes more slippery than normal pavement when wet and that such conditions existed prior to the accident." The state, concluded the court,

should have been aware of the condition and was negligent because it had not removed the hazard or warned travelers of its presence. (We will return to this case later in our discussion of contributory negligence.)

The next case involved an unusual accident (City of South Bend v. Fink, 219 N.E. 2d 441, Ind., 1966). The claim was for damages resulting from death by drowning that had allegedly occurred when an automobile left the road and proceeded into a river. The road had been barricaded and used as a recreational sledding area. Prior to this accident, the barricades had been removed, and the claimant contended that this had indicated the street was safe for travel. However, the claimant also contended the street had been neither salted nor sanded, nor had there been removal of curb accumulations of snow and ice. Neither barricades nor guardrails had been present along the descent of the street to prevent a car from leaving the road and crashing into the river. The principle of law upon which a remedy is granted or denied in such a case may be stated as follows:

> ...reasonable care must be exercised to keep a street in reasonably safe condition for travel. But there is no liability for injuries caused by deposits in the street due to the natural accumulation of snow and ice. Reasonable diligence under such conditions has been interpreted to mean timely notice and an opportunity to remove the accumulation.

In this situation, the court found that the city had actually encouraged the creation and continuance of a dangerous condition on the hill and that the condition had not been merely the result of a natural accumulation of snow and ice. In such a case, an instruction using the words "active vigilance" as a requisite of the city is not confusing or ambiguous to the jury. There is no evidence supporting such a notice on the part of the city, and the terms "active vigilance" and "reasonable diligence" considered with all other evidence is not reversible error. Similar terms to these have been used in many cases, too numerous to cite here, in referring to knowledge of a defect in a vehicular way.

The final case in this section (Freeport Transport, Inc. v. Commonwealth, Dept. of Hwys., 408 S.W. 2d 193, Ky., 1966) involved a truck that had skidded off the highway. A claim filed with the Board of Claims against the Department of Highways was denied on the grounds that (a) the defect had not been created through negligence and (b) the department had had no notice of the condition. The Circuit Court upheld the Board of Claims. In the Court of Appeals, the evidence revealed that a bituminous sealing had begun to flake off shortly after repair, which exposed the primer coat and allowed the surface to become slippery when wet. Eight months after the initial flaking, the accident occurred. There was no contradiction by the defendants that a dangerous condition had existed. In light of this, the court found the Board of Claims had tacitly assumed the existence of an intermittently hazardous condition. Notice as a basis of liability was discussed, and the court said that, although no actual notice was present, "...circumstances may have been such that knowledge was imputed or presumed." The time factor was an important element in this determination. For 8 or 9 years prior to the patching job, no accident had occurred at this spot; however, in the 8 months following it, there were seven accidents. Finally, both the Board of Claims and the lower court had emphasized the existence of a hazard when the road was wet, which seemed to indicate a duty to inspect only when the road was dry. The court felt that the latent nature of the defect would make it less easily discoverable, but this was just one of the circumstances to be considered in determining whether the defect should have been discovered over a long period of time. Another consideration was the type of traffic and design of the highway involved. The court then concluded that, under the circumstances, a dangerous, latent defect had been shown to exist for a sufficient period such that the department should have had notice of it. The failure to discover and correct it constituted negligence. There was a dissent by Justice Montgomery:

> The effect of the holding is that it is made the duty of the Department of Highways to keep under constant inspection, wet weather or dry, every mile of the many thousands of miles in this state. This includes toll, interstate, federal, primary, secondary, and rural highways. When it

rains how often must the department inspect for slick spots on the road up Chicken Gizzard Ridge and over to Possum Trot?

This decision holds that the department is responsible for any accident attributable to any so-called defective road condition that has existed for eight months because it is presumed that the department will by then have notice of the condition. The availability of funds for such purpose is not considered....

NO LIABILITY ON THE PART OF THE STATE

As was indicated in the preceding section, the ordinary standard of care to be used by the state in carrying out its duties is that of reasonable anticipation. In certain circumstances the state has been found to have fallen short of that standard. In most cases, however, a policy that is established as a result of discretionary procedures and that is followed as setup is sufficient to meet the standard.

Such a situation arose in a New York case involving the scheduling of maintenance patrols (Wheeler v. State, 156 N.Y.S. 2d 660, N.Y., 1956). In that case there was an action for injuries that had been sustained when an automobile skidded on ice and crashed into a bridge abutment. The road was clear on the afternoon of the accident, but there had been a light snow the previous day. The ice had apparently formed when shoulder snow melted and ran across the highway. The locus was known as a possible ice-hazard spot. The highway on which the accident occurred was regularly patrolled by a maintenance crew, but 5 days prior to the accident the crew had been placed on summer schedule and Saturday routine patrols had been stopped. There was a reasonable belief that the winter patrol schedule would have revealed the ice. The court found that the state was not liable. There was no evidence of actual notice nor had sufficient time passed for constructive notice to be made. The main question was whether the state should have anticipated a snowfall on April 8 or 9. Testimony indicated that sanding this late in the season would have been unusual. The court found the evidence too meager to determine whether reasonable care would have demanded continuance of winter scheduling through April.

It is also well established that, to prove liability on the part of the state, it is necessary to show that negligence is the proximate cause of an accident (Edwards v. State, 159 N.Y.S. 2d 589, N.Y., 1957; see also Gladstone v. State, 256 N.Y.S. 2d 493, N.Y., 1965). Accordingly, a condition that would not be hazardous in clear weather and icy conditions in general along great stretches of roadway even though ice is present at a possible defective drainage site are not enough to prove proximate cause.

It is also not enough for a claimant to show that a highway is slippery because of rain. It is common knowledge, or so it seems from these cases, that macadam becomes slippery when wet; hence, there must be proof of some defect, obstruction, or obligation within the state's control to prove negligence. Negligence is not to be inferred from a car skidding; nor is there a duty upon the state to construct and maintain shoulders such that they can be used for general travel. The standard here is a reasonably safe condition for use by a prudent driver traveling at a reasonable speed in an emergency (Eckerlin v. State, 184 N.Y.S. 2d 778, N.Y., 1959).

In an interesting case (Commonwealth, Department of Highways v. Brown, 346 S.W. 2d 24, Ky., 1961), suit was brought because of an accident caused solely by an icy condition of a curve on a highway maintained by the Department of Highways. The department had been fully aware of the condition for 36 hours prior to the accident. However, the department in no way contributed to the condition; it simply had not cleared the highway of snow and ice at the locus. The ultimate question was whether it was the duty of the department to remove snow and ice from the highway or to give warning of dangerous conditions caused by the natural accumulation of snow and ice. The court interpreted the statute governing the case as not placing such an affirmative duty upon the state. This was so even though the state had for years assumed responsibility for cleaning the highways on a regular basis. That activity was considered a gratuity. (In connection with this case, dissenting opinion of Justice Montgomery in Commonwealth v. General & Excess Insurance Co., 355 S.W. 2d 695, Ky., 1962, should be read and compared to his earlier dissent in the Freeport case.)

It is generally held that the state is not an insurer but is responsible for maintaining reasonably safe highways. If this general duty is carried out with reasonable diligence by the state, an accident resulting from natural causes will not make the state liable. Such factors were present in a case where an automobile that had been traveling at a speed of approximately 25 mph during a snowstorm was involved in a collision (Dodd v. State, 223 N.Y.S. 2d 32, N.Y., 1962). There had been no defect in the highway, and the salting crew had arrived within moments of the accident. The court found that the accident had occurred in broad daylight when merely driving on the road created a hazard of unusual risk.

The next case (Tetreault v. State, 269 N.Y.S. 2d 812, N.Y., 1966) presents several interesting considerations that merit detailed discussion. It involved a tractor-trailer that had skidded off the highway at the crest of a hill during a snowstorm. The road was slushy and deteriorating. The claim was based on negligent construction, maintenance, and repair of the highway and on failure to erect adequate warning signs of dangerous conditions. Although the Bill of Particulars covered negligence due to snow, slush, and ice on an unsalted and unsanded highway, the court allowed an investigation of the highway banking because there was no prejudice, surprise, or bad faith. Referring to this investigation, the court found that "...the highway was crowned in the center and banked to the west.... There is no expert proof that such was improper construction." In order for the claim to succeed, then, negligence in maintenance had to be proved. The evidence at the trial led to these conclusions: The claimant's rig had been traveling at about 15 mph at skid; there had been approximately 2 in. of snow on the ground; and the maintenance crew in charge of sanding and salting had been notified of the conditions and, at the time of the accident, was proceeding to the hill with a truckload of salt. The court said:

> The fact that there was snow on this road, that the road was slippery, and, that the subject vehicle skidded and jack-knifed, does not establish negligence against the state. Although the state is under a duty to maintain its highways in a reasonably safe condition for travel, it is not an insurer of the safety of its highways. Therefore, before we can fix the state's liability, we must determine whether or not it met the standard of reasonable care on the maintenance of its highway under the circumstances prevailing. Certainly, the state cannot be held to a standard of care which requires it to maintain a 24-hour watch over thousands of miles of highway during the winter months. Such is particularly true in the mountain regions of Northern New York, where many times a driver must weigh the necessity of reaching his destination against the readily perceivable dangers of continuing his journey.

The court further found that the road conditions had not existed an inordinate length of time and that the state employees reacted with celerity.

The following case (Christo v. Dotson, 155 S.E. 2d 571, W. Va., 1967) involved an interpretation of a West Virginia statute imposing liability for a roadway being out of repair. It established the general rule that, regarding municipal corporations, snow and ice alone do not constitute a defect. The court cited a Kansas statute and similar interpretation as a basis. The rule, according to the court, was stated as such: "In order to establish liability based upon a defect in a street or highway of such nature for the street to be considered out of repair, there must be an accumulation of snow and ice amounting to an obstruction...." The court also cited an earlier case (Boyland v. City of Parkersburg, 90 S.E. 347) that indicated that the word repair as used in the statute included an obstruction on the highway as well as defects in it and that, although ice and snow may render a street out of repair, there must be an accumulation amounting to an obstruction before it comes within the purview of the statute. The court concluded:

> Even if there were some ice on the bridge where this accident occurred it appears questionable whether or not it was the proximate cause of this accident without which there could be no recovery. However, there is nothing in the evidence contained in the record of this case to indicate that even if there were some ice on the bridge in question there was any accumulation of such magnitude as to create an obstruction and to come within the meaning of the statute as being "out of repair."

The next case (Gambino v. State, 280 N.Y.S. 2d 91, N.Y., 1967) involved a car that had skidded on the downside of a hill, struck a tree, veered to the opposite side of the road, and collided with a concrete culvert. A rain, snow, and sleet storm had preceded the accident, and the road was wet and icy in spots. The claimant maintained that improper construction and maintenance of the highway were responsible for the accident. An examination of the record by the court revealed that (a) there was no testimony that the driver's view of the hill contributed to the accident; (b) there was no evidence that holes or ditches on either side of the road contributed to the accident; and (c) a state exhibit revealed score marks in a herringbone pattern on the pavement. The score marks were described as being a system, or a pattern, of grooves embedded or impressed in the surface of the concrete pavement in a herringbone pattern. It was further stated that the apex of this pattern was at the centerline of the pavement, and the ends pointed downgrade approximately 45 deg with the centerline at that angle. There was no dispute that the purpose of the pattern was to increase the friction of the surface and to produce added traction. It is interesting that the claimant's expert referred to the system as "ineffectual and possibly adverse", apparently without contest by the state. But the court found no evidence in the record that this condition had contributed in any way to the accident. The court concluded that, under the circumstances, to find negligence here would be to place an "impossible burden" upon the state and be tantamount to making the state an insurer. In the words of the court, "Sudden storms, as with frost conditions, are part of nature, dependent upon the season of the year...." The court also stated:

> ...It had a duty to construct and maintain its highways in a reasonably safe condition, in accordance with the terrain encountered and traffic conditions to be reasonably apprehended. But even so, a certain risk was unavoidable. Roads cannot always be straight and level, and curves with descending grades are always potentially dangerous. A highway may be said to be reasonably safe when people who exercise ordinary care can and do travel over it safely.

CONTRIBUTORY NEGLIGENCE

Although the doctrine of contributory negligence has not had much acceptance, it is always considered in liability cases because it is an affirmative defense.

In a New York case (Scheelde v. State, 160 N.Y.S. 2d 686, N.Y., 1957), there was a claim for damage resulting from a skidding accident that occurred on slippery pavement. The claimant testified that he had been driving at approximately 35 mph, that the road, weather, and visibility had been clear as he approached the locus of the accident, but that he had not seen the condition complained of. However, evidence of weather bureau observations on that day established that about $\frac{1}{10}$ in. of snow had fallen between 11:00 a.m. and 3:30 p.m. on the day of the accident, and this was enough to rebut testimony of clear weather. In utilizing this evidence the court cited an ancient Chinese proverb that said, "The palest ink is better than the most retentive memory." The court further inferred from the record that the accident occurred during a snowfall that caused the conditions complained of. The alleged negligence on the part of the state was for failure to sand. However, there was no proof of actual notice, and the time lapse was too short to impute constructive notice. There was some evidence of previous accidents that could give rise to notice of a dangerous condition of which warning should have been given, but the evidence was vague and indefinite and was not sufficient to prove negligence as the proximate cause of the accident. In discussing contributory negligence, the court said:

> Under the weather conditions prevailing at the time, "the presumption of safety" of public highways "will not serve as an excuse for blind indifference to consequences,"...of, as insurance against the risks inherent in automobile travel in the winter,...and, the failure of the driver to slow down the speed of his automobile and to proceed with caution is evidence of negligence which is the sole proximate cause of the accident, and, is imputable to the claimant....

In the Stern case, discussed previously, it was found that the evidence militated against a finding of negligence on the part of the driver. The most relevant factors were (a) the tires on the car were new; (b) the driver had never driven the road in ad-

verse conditions; and (c) there was only one relevant sign, a 30-mph speed sign. The claimant had cautiously decelerated the vehicle by tapping the brakes lightly, and he did not apply his brakes with force until the vehicle had crossed into the opposite lane. There was no evidence of failure to control the car, and the claimant succeeded in his suit. The court's procedure in this case is very interesting; it leads to the conclusion that bald tires as well as reckless speed or loss of control can be equally responsible for defeating a plaintiff's claim.

It has further been held that in a two-vehicle collision, contributory negligence on the part of both drivers will operate to bar recovery regardless of the condition of the highway (Christo v. Dotson, 155 S.E. 2d 571, W. Va., 1967).

The manner in which a vehicle is operated is a primary consideration in the examination for contributory negligence. Factors such as the distance traveled from the first skidding, the ability to retain the pavement, and leaving the pavement, returning, and leaving on the opposite side of the roadway all act to impute doubt on the manner in which a vehicle has been operated (Gambino v. State, 280 N.Y.S. 2d 91, N.Y., 1967).

In the following case (Frehafer v. State, 301 N.Y.S. 2d 156, N.Y., 1969), the claimant was driving up an incline of a three-lane road (two lanes proceeding southerly—the claimant's direction). While passing vehicles, he went over the crest of the hill and observed that the road narrowed to two lanes. He applied his brakes, skidded on the wet pavement, fishtailed to the opposite side of the road, and collided with an oncoming vehicle. Although the court found state negligence in designing and signing the highway at the place of the accident, which operated as the proximate cause of the accident, the court also found that a prudent driver would have had his car sufficiently under control on the crest of a hill in anticipation of possible hazards. The speed limit was 50 mph, which was the claimant's speed. The court concluded by saying:

> Upon the present record, it cannot be said that the sign which indicated that the claimant's outside lane would narrow rather than his driving lane created a trap because there is no evidence that claimant observed the sign and, therefore, the sign, as such, could not be the proximate cause of the happening of the accident. However, as claimant approached the crest of the hill there was a "no passing" sign and before that there was the sign indicating that the road narrowed. While those signs have been inadequate to warn the claimant that his lane would shift to the right, nevertheless they were adequate to warn of a hazardous driving condition ahead and out of sight as one approached the crest of the hill. Under such circumstances a reasonable and prudent person would have proceeded at less than the posted rate of speed or would have been prepared to brake his car so as not to lose control when he reached the hazardous situation on what was described as a wet and slippery road.

ADVISORY SIGNING

There has been little discussion of advisory speed signing in the case law. Other signs, such as warning signs, directional signs, and lane-change signs, have been discussed more frequently. As a practical guide, it is sufficient to say that signing should be used at all locations where a hazardous condition has formed and has been brought to the attention of the state. It has, in fact, been stated that the duty to warn the public of a dangerous condition rests upon the party who has the duty to maintain the highway. The courts have held it to be negligent to permit a dangerous condition to exist without adequate warning (Citron v. County of Nassau, 268 N.Y.S. 2d 909, N.Y., 1965). By implication, it is fair to say that advisory speed signs may be included therein.

A California case (Johnston v. County of Yolo, 79 Cal. Rptr. 33, Cal., 1969) included expert testimony designed to show that a road jog constituted a hidden danger that should have been revelaed by warning signs and reflectorized "paddle" markers. Sections 830.4 and 830.8 establish immunity for a condition consisting solely of a failure to post regulatory or warning signs and signals. The second sentence of section 830.8 qualifies this immunity where there has been a failure to post warning of a hidden danger. The county charges error in the jury instructions covering this phase of the case. The court held that the lower court did not err in giving an instruction in the following form:

> A public street or highway is not in dangerous condition as that term has been defined solely because of the fact that the entity did not provide a speed restriction sign. Physical conditions such as width, curvature, grade and surface conditions, or any other condition readily apparent to a driver, in the absence of other factors, do not require special downward speed zoning, because the basic speed law under the instruction which I have already given is sufficient regulation as to such conditions.

The court further examined county justification for the restriction as an expression of Vehicle Code section 22350, the basic speed law that forms part of a comprehensive system of substantive rules covering public tort liability for dangerous conditions of public property. The system's rules of liability are qualified by its rules of immunity—sections 830.4 and 830.8 comprehensively describe the relationship of traffic sign posting to the liability and immunity rules. The court also felt Vehicle Code section 22358.5 served to discourage speed limit signs made needless by obvious road conditions.

Although that case is restricted to somewhat limited circumstances, it does aid in giving some flavor of judicial reasoning where advisory speed signing is involved.