

## TORT LIABILITY

### **Liability of State Highway Departments for Design, Construction, and Maintenance Defects**

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#### **INTRODUCTION**

This paper discusses tort liability of State highway departments for injuries caused by negligence in the design, construction, and maintenance of State highways. Reference is made here to a companion paper that follows on personal liability of State highway officials and employees for negligent design, construction, and maintenance of highways (Vol. 3, Ch. VIII, p. 1835 *infra*). Governing principles of liability for departments and individuals, though similar, actually emerged independently. Because these two bodies of law are products of differing policies and the interaction of the common law with modern statutes, some inconsistencies or contradictions in the decided cases respecting the two fields should be anticipated.

Until recently, State highway departments had little fear of suits against them for tortious injury to persons or property caused by negligence in the design, construction, and maintenance of highways; the departments were either immune from suit or from tort liability if subject to suit. In contrast, incorporated municipalities are more apt to be held liable for their torts, because the fact of incorporation has prompted the courts to treat them as private corporations. The primary state defense, of course, was the doctrine of sovereign immunity: the State, its agencies, or instrumentalities could not be sued unless consent to suit was given by the State or involved agency or department. Thus, a complaint filed against the State highway department would be dismissed as a matter of law because the State could not properly be made a defendant in its own courts without its consent.

The doctrine of sovereign immunity, although generally an insurmountable defense for most of the history of the United States, recently

has undergone considerable erosion, legislative modification, and, in some instances, outright abolition by judicial decision. Despite the current trend, several States still retain the doctrine, steadfastly refusing to modify or waive it without a clear legislative enactment.<sup>1</sup> By comparison, where there is a claim for negligence against the Federal Government, the claimant's remedy is provided by the Federal Tort Claims Act, enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, provisions of which are now scattered throughout various sections of the *United States Code*. Prior to the Act, the defense of sovereign immunity was an insurmountable obstacle to suit in tort against the United States government. Today, hundreds of suits permitted by the Act are filed each year and span the entire field of tort law.

Several States, however, retain sovereign immunity while providing for a means to redress injuries to persons or property caused by negligence attributable to the State. These special statutes, or limited waivers of sovereign immunity, often provide for a State claims commission vested with exclusive jurisdiction to consider:

. . . all claims for damages to the person or property growing out of an injury done to either the person or property by the State or any of its agencies, commissions, or boards.<sup>2</sup>

Representative states having a special body to consider tort claims are Arkansas,<sup>3</sup> Colorado,<sup>4</sup> Georgia,<sup>5</sup> North Carolina,<sup>6</sup> Tennessee,<sup>7</sup> and West Virginia.<sup>8</sup>

In contrast to those States that have enacted a partial waiver of sovereign immunity, a few States have enacted a general waiver of sovereign immunity.<sup>9</sup> The first, enacted in 1920 by New York, provides that it

. . . waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court<sup>10</sup>

<sup>1</sup> See, e.g., Delaware, Maine, Maryland, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, South Dakota, Virginia, Wisconsin, and Wyoming in Appendix A.

<sup>2</sup> See, e.g., ALA. CODE, tit. 12, §§ 333, 334.

<sup>3</sup> ARK. STAT. ANN. § 13-1401 *et seq.*

<sup>4</sup> COLO. REV. STAT., § 24-10-106 provides that governmental immunity is not to be asserted where injuries resulted from "Dangerous conditions which interfere with the movement of traffic on the traveled portion and shoulders or curbs . . . of any paved highway which is a part of the state highway system."

way system."

<sup>5</sup> GA. CODE ANN. § 47-504-510.

<sup>6</sup> N.C. GEN. STAT. § 143-291.

<sup>7</sup> Pursuant to TENN. CODE ANN., § 9-801-807, a Board of Claims hears claims arising out of the negligent construction or maintenance of State highways. See also § 9-812.

<sup>8</sup> W.VA. CODE § 14-2-1 *et seq.*

<sup>9</sup> See New York, Montana, and Washington in Appendix A.

<sup>10</sup> The Supreme Court in New York is a trial court and is not the highest State court as in most jurisdictions.

against individuals or corporations, provided that the claimant complies with the limitations of this article.<sup>11</sup>

Under such a general waiver, the State is treated as any other defendant in a tort suit, with certain exceptions as noted later herein. Moreover, plaintiff must prove the elements of his case by a preponderance of the evidence as in any tort or personal injury case, and, of course, be free himself of contributory negligence.

Numerous jurisdictions have abolished the doctrine of sovereign immunity by judicial decision, usually on the legal basis that, inasmuch as the courts created the doctrine of sovereign immunity, except where it is expressly provided by the State constitution or by statute, they similarly have the power to extinguish it. Nevertheless, many legislatures respond to the threat of possibly numerous tort suits against State agencies by enacting tort claims legislation setting forth procedures and defenses concerning actions alleging tortious conduct by the State and its employees. Although various State legislatures have passed ameliorative or restorative legislation, a few have not. Thus, the legislatures of Arizona,<sup>12</sup> Louisiana,<sup>13</sup> and Indiana<sup>14</sup> have failed to respond to their courts' abrogation of the doctrines of sovereign or governmental immunity. Tort claims statutes reflect the prevailing opinion that a State should assume, as must a private person or corporation, the responsibility of compensating victims of its negligence. On the other hand, the statutes reflect the special position and needs of the State for flexibility in the administration of government.

Tort claims acts are of two basic patterns. First, several States provide for immunity<sup>15</sup> with certain exceptions for named negligent acts of the State and its employees. The California Act reenacts general governmental immunity, which was abolished by the California courts.<sup>16</sup> Section 815(a) of the California Act provides that a "public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Exceptions to that immunity are provided in the Act; for example, a public entity may be held liable for certain "dangerous conditions"<sup>17</sup> or for nondiscretionary acts of employees,<sup>18</sup> but under certain conditions

<sup>11</sup> McKINNEY'S CONSOL. L. OF N.Y. ANN., Court of Claims Act, § 8.

<sup>12</sup> See *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

<sup>13</sup> See *Herrin v. Perry*, 215 So. 2d 177, *aff'd* 254 La. 933, 228 So. 2d 649 (1969).

<sup>14</sup> See *Perkins v. State*, 252 Ind. 531, 251 N.E.2d 30 (1969); *State v. Daley*, 32 Ind. Dec. 595, 287 N.E.2d 552 (1972); and *State v. Turner*, 32 Ind. Dec. 409, 286 N.E.2d 697 (1972).

<sup>15</sup> The difference between the terms "governmental immunity" and "sovereign immunity" is explained further herein. Because the sovereign may consent to suit, yet not consent to liability for certain governmental actions, the State may still have governmental immunity.

<sup>16</sup> Deering, CAL. GOV'T CODE § 810 *et seq.*

<sup>17</sup> *Id.*, § 835.

<sup>18</sup> *Id.*, § 820.2.

may not be held liable for defective design of public property.<sup>19</sup> The Utah statute reaffirms immunity<sup>20</sup> for injuries caused by the public entity's exercise of a governmental function,<sup>21</sup> but waives immunity where an injury is caused by defective, unsafe, or dangerous roads and highways.<sup>22</sup>

The second pattern of tort claims acts permits tort suits against the State, but excepts from liability those tort actions based on certain activities of the State agency or employee, chiefly any activity in "exercise or performance or the failure to exercise or perform a discretionary function or duty."<sup>23</sup> The exemption from liability because an injury arose out of a discretionary duty or function is the primary defense to tort suits based on negligent highway operations. The "discretionary exemption" is based on the similar doctrine in the common law immunizing a State officer or employee when engaged in the performance, or nonperformance, of discretionary duties.<sup>24</sup>

Another approach by legislatures in several jurisdictions is to provide for a statutory action by a claimant for injuries resulting from a "defective highway."<sup>25</sup> In Kansas:

(a) Any person who shall without negligence on his part sustain damage by reason of any defective bridge or culvert on, or defect in a State highway, not within an incorporated city, may recover such damages from the State.<sup>26</sup>

The highway defect statutes either provide for or have been construed to preclude an action based on the negligent plan or design of the highway.<sup>27</sup> For example, liability may not be predicated on the defective plan or design of the highway which "was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared."<sup>28</sup> The defective plan or design exception receives further treatment later.<sup>29</sup>

A final method of handling State tort claims is illustrated by the New Mexico<sup>30</sup> and Oklahoma<sup>31</sup> Acts, which authorize an agency to procure liability insurance. However, these Acts are of little assistance to the claimant where the authorized insurance is not procured, because without the insurance the claimant will be unable to satisfy any judgment

<sup>19</sup> *Id.*, § 830.6.

<sup>20</sup> UTAH CODE ANN., § 63-30-1.

<sup>21</sup> *Id.*, § 63-30-3.

<sup>22</sup> *Id.*, § 63-30-8.

<sup>23</sup> See, e.g., Alaska, Hawaii, Idaho, Iowa, Nebraska, Nevada, New Jersey, Oregon, Texas, Utah, and Vermont in Appendix A.

<sup>24</sup> The common law doctrine of discretionary versus ministerial duties is discussed at length in the companion paper on personal liability of State highway officials and employees (Vol. 3, Ch. VIII, p. 1835

*infra*).

<sup>25</sup> See, e.g., CONN. GEN. STAT. 13a, § 144, KAN. STAT. ANN., § 68-419, and MASS. ANN. L., Ch. 81, § 18.

<sup>26</sup> KAN. STAT. ANN., § 68-419(a).

<sup>27</sup> *Id.*, § 68-419b.

<sup>28</sup> *Id.*

<sup>29</sup> See Text at footnotes 126-128, 148-157, and 224-270.

<sup>30</sup> N. MEX. STAT. ANN. § 5-6-18.

<sup>31</sup> OKLA. STAT. § 157.1.



obtained.<sup>32</sup> Thus, a claimant in these as well as other jurisdictions may encounter an effective statutory limit on the amount of any judgment that may be obtained or satisfied.<sup>33</sup>

Four principles involved in a tort action against the State highway department for negligent design, construction, and maintenance are discussed herein. First, a primary defense is the State's immunity from suit and liability. Second, in those States where the action is based on a general waiver statute the case is decided in the same manner as any negligence or personal injury action, with certain exceptions, of course. Third, in many jurisdictions the action is purely statutory with a distinctive body of case law and procedures. Fourth, the question presented where tort claims acts are in force usually is whether negligence in the plan or design, construction, or maintenance of the highway is "discretionary," and therefore immune.<sup>34</sup>

With respect to the discretionary function exemption and its application to highway tort suits, it appears that on balance negligence, errors, or defects in the plan or design of a highway are not actionable. Moreover, several States have at least attempted to preclude an action based on defective design where the plan or design was "duly considered" and was acceptable by prevailing standards at the time of approval.<sup>35</sup> Also, the courts have held generally that there is immunity where the plan or design is adopted by the proper government body or agency after due consideration and evaluation.<sup>36</sup> Finally, the plan or design of highways is thought by the courts to involve the exercise of discretion at high levels where policies are considered and evaluated; thus, immunity usually attaches. However, immunity may be lost where the plan or design was implemented negligently or where there are "changed circumstances" after the adoption and execution of the plan or design demonstrating that the highway is dangerous in actual use.

The negligent construction or maintenance of State highways will likely, but not always, result in liability, where, of course, proximate causation is shown, because construction and maintenance are considered to be nondiscretionary, ministerial or routine functions, and "operational level" activities, not involving matters of policy. Thus, on balance, the State is more likely to be held liable where the claim arises out of the negligent construction or maintenance of highways.

This is only a general summary of the principles involved in tort suits of this nature, principles that are often ill-defined and difficult to apply. What follows is a more thorough analysis of these various ap-

<sup>32</sup> See, e.g., N.MEX. STAT. ANN. § 5-6-20.

<sup>33</sup> See North Carolina, Rhode Island, South Carolina, Texas, and Vermont in Appendix A.

<sup>34</sup> As will be seen, the task of determining the meaning of the term "discretion" has

not been without some difficulty, to say nothing of its application.

<sup>35</sup> See, e.g., CAL. GOV'T CODE § 830.6; and KAN. STAT. ANN., § 68-419(b).

<sup>36</sup> Weiss v. Fote, 7 N.Y.2d 579, 167 N.E. 2d 63, 200 N.Y.S.2d 409 (1960).

proaches and principles pertinent to tort liability of State highway departments for injuries caused by the negligent design, construction, or maintenance of State highways.

## THE DEFENSE OF SOVEREIGN IMMUNITY TO TORT SUITS

### Historical Background

The defense of sovereign immunity emerged in the United States because of practical or policy considerations and possibly because of a misunderstanding of the doctrine as it had existed in England prior to the American Revolution. In a series of early decisions<sup>37</sup> the Supreme Court of the United States held that Federal and State governments were immune from suits commenced without their consent. The doctrine was given further impetus by Holmes' famous dictum in *Kanananako v. Polybank*,<sup>38</sup> that the immunity of a sovereign from suit and liability rests upon no "formal conception, or absolute 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 that right depends."

Contemporary articles on the American law of sovereign immunity often assert that the rule 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.

Since the Middle Ages, the English have had a "definite conception of private rights and a profound conviction that an impairment or violation thereof by public authority constituted a wrong for which redress must be accorded."<sup>39</sup> Scholars have concluded that during the medieval period the king had considerable control over any writs that might be issued against him but that he did not claim immunity.<sup>40</sup> By 1268 the king could not be sued *eo nomine* in his own courts; however, a series of procedural devices evolved which enabled suitors to obtain relief from the government.

Some of these took the form of writs against the king himself, brought as petitions of right requiring his consent; this type of remedy has been over-generalized into the broad abstraction of sovereign immunity. Others took the form of suit against an officer or agency of the Crown, not requiring consent.<sup>41</sup>

<sup>37</sup> See, e.g., *Cohens v. Virginia*, 6 Wheat 264 (U.S. 1821); *Hans v. Louisiana*, 134 U.S. 1, 10 Sup. Ct. 504 (1890); *Beers v. Arkansas*, 20 Howard 527 (U.S. 1857); *Smith v. Reeves*, 178 U.S. 436, 20 Sup. Ct. 919 (1900).

<sup>38</sup> 205 U.S. 349, 353, 27 Sup. Ct. 526, 527 (1907).

<sup>39</sup> Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 2, 17 (1925) [hereinafter cited as BORCHARD].

<sup>40</sup> *Id.* at 18-19.

<sup>41</sup> Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 (1963) [hereinafter cited as JAFFE].

The procedures for legal redress against the Crown are not clear until approximately the reign of Edward I with the emergence of the petition of right, followed by other writs meeting special situations. Some writs were matters of grace while others were matters of right; nevertheless, the writs demonstrate that the King was not privileged to do wrong.<sup>42</sup>

Apparently there was little change in procedures following the reigns of Edward I (1272–1307) and Edward III (1327–1377) except for a greater exercise of power by the King in the exchequer, chancery, and Parliament, to prevent any encroachment beyond that which he sanctioned.<sup>43</sup> However, after Parliament in 1341 proclaimed that aggrieved parties should have a remedy against the King or his ministers, claims against the King became more common in the court of exchequer and in chancery.<sup>44</sup> Thus, for centuries the aggrieved Englishman had remedies for disseisin to recover chattels or land wrongfully taken and for other torts.<sup>45</sup>

Over the centuries, however, the rule was established that there could be no recovery against the Crown for torts committed by its servants. The only remedy was to pursue the servant and to hold him personally liable for his torts. Thus, by the end of the fifteenth century the King's officer or agent was alone accountable for torts while in the employment of the Crown.<sup>46</sup>

The basis of English decisions, such as *Feather v. The Queen*,<sup>47</sup> that the petition of right did not permit a recovery against the Crown for torts of a Crown servant was not

. . . the Crown's immunity from suit, since the power of the court to entertain the petition in all cases of "right" was equivalent to a waiver of immunity. The reason was rather that the doctrine of *respondeat superior* was held to be inapplicable. Since, it was argued, the King cannot commit a tort, no one can commit a tort in his name—one who cannot do a thing himself cannot do it by another.<sup>48</sup>

The doctrine of *respondent superior*<sup>49</sup> conceptually was difficult for the English judges to apply to the Crown because, first, they had found it difficult to apply in the private sector for torts of agents working within the confines established by their principals. Second, it was difficult to apply the doctrine to an undefinable entity, the State or the Crown, containing a disparate group of officers performing numerous functions.<sup>50</sup>

The English common law was the basis of the American doctrine of

<sup>42</sup> BORCHARD, *supra* note 39, at 23.

<sup>43</sup> *Id.* at 26.

<sup>44</sup> *Id.* at 27–28.

<sup>45</sup> *Id.* at 33–34.

<sup>46</sup> *Id.* at 30–31.

<sup>47</sup> 6 B&S 257, 295, 122 Eng. Rep. 1191, 1205 (Q.B. 1865).

<sup>48</sup> JAFFE, *supra* note 41, at 8.

<sup>49</sup> "Let the master answer." This maxim means that a master is liable in certain cases for the wrongful acts of his servant and a principal for those of his agent. BLACK'S LAW DICTIONARY, Fourth Edition (West 1951).

<sup>50</sup> JAFFE, *supra* note 41, at 210.

sovereign immunity after 1789; however, legal scholars are in general agreement that the English sovereign was neither above the law nor immune from suit in many matters. Claims, including those arising out of damage to or appropriation of property or chattels, would lie against the sovereign.

Perhaps the major effect of the doctrine of sovereign immunity was procedural. Claims in form "against the crown" were to be pursued by petition of right. These included certain of the claims involving property in which the Crown had an apparent interest, but by no means all of them. The *monstrans de droit* at common law, the petition in the exchequer, bills, it may be, in Chancery, and the prerogative writs might determine claims to real and personal property, and to money in the Treasury. Contracts could be enforced by petition of right. There was a wide range of actions for damages against officials. Officials who acted in excess of jurisdiction or refused to act could be reached by prerogative writs. *The one serious deficiency was the nonliability of government for torts of its servants.*<sup>51</sup> (Emphasis added.)

In sum, the English sovereign was answerable for numerous wrongs when the proper procedures were followed, but the sovereign was not responsible for torts of officers or servants.

Following the American Revolution the English common law became the basis of American jurisprudence. 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 *Chis olm v. Georgia*:<sup>52</sup> 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 which could grant consent to suit, by analogy, must be the legislature.<sup>53</sup> Ultimately, in a series of American decisions, the doctrine of sovereign immunity was held to be applicable to the Federal and State governments.<sup>54</sup>

The general rule that a State could not be sued without its consent was stated in *Beers v. Arkansas*<sup>55</sup> 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 that the sovereign was immune from suit regardless of the action, the United States 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 in-

<sup>51</sup> *Id.* at 18-19.

<sup>52</sup> 2 U.S. 419 (1792).

<sup>53</sup> *Id.* at 435-446.

<sup>54</sup> See note 37, *supra*.

<sup>55</sup> 20 Howard 527 (U.S.), 61 U.S. 991 (1858).

dividuals, 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.<sup>56</sup>

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.<sup>57</sup>

### Sovereign Immunity versus Governmental Immunity

Thus, it was held that an action would not lie against a State unless consent to suit was given by the legislature. That consent to suit had been given did not mean that the State had 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 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.<sup>58</sup>

The distinction between *suability* and *liability* is applicable to actions against the State highway departments, and it generally is held that State highway departments, commissions, or authorities are mere agencies of the State, and that a negligence action will not lie against the department because the State is the real party in interest. The suit cannot be maintained unless the State's immunity from both suit and tort liability is waived.<sup>59</sup>

Until recently the vast majority of jurisdictions held that the State highway department shared in the sovereign immunity of the State and, therefore, was immune from suit.<sup>60</sup> For a State to waive immunity from suit the courts require that the legislative intent to do so must be very clear. Thus, where highway commissions are authorized to "sue and be sued," the courts are reluctant to construe such a provision to authorize any negligence suits against the agency on the ground that such a provision is intended to enable the agency to perform necessary functions such as entering into and enforcing contracts.<sup>61</sup> Of course, a few

<sup>56</sup> *Id.* at 692.

<sup>57</sup> *Kanananako v. Polybank*, 205 U.S. 349, 353, 27 Sup. Ct. 526, 527 (1907).

<sup>58</sup> *JAFFE*, *supra* note 41, at 4.

<sup>59</sup> See Annot., *Liability, and suability, in negligence action, of state highway, toll*

*road, or turnpike authority*, 62 A.L.R.2d 1222 (1958) and cases cited at page 1224.

<sup>60</sup> *Id.* See also Appendix A.

<sup>61</sup> See, e.g., *Tounsel v. State Highway Dep't*, 180 Ga. 112, 178 S.E. 285 (1935) and *State ex rel. Fetzer v. Kansas Turn-*

courts have held to the contrary on the grounds that a turnpike or highway commission is not an *alter ego* of the State and is a separate corporate entity, vested with the power to raise its own revenue; therefore, the turnpike or highway commission may be sued in tort.<sup>62</sup>

In *Herrin v. Perry*,<sup>63</sup> involving the collision of plaintiff's truck with a negligently parked State highway truck, the court held that the Louisiana State Highway Department did not enjoy immunity from suit. In so holding, the Court viewed the department as a separate, distinct legal entity rather than as the alter ego of the State.<sup>64</sup> Moreover, the Court noted that the Louisiana Constitution provided that the legislature could waive immunity from "suit and from liability." The legislature was held to have waived immunity from suit where it had provided that the highway department had all of the "rights, powers and immunities incident to corporations" and could "sue and be sued, implead or be impleaded."<sup>65</sup>

In Pennsylvania, *Rader v. Pennsylvania Turnpike Commission*<sup>66</sup> held, notwithstanding the "sue and be sued" provision in the Commission's charter and the fact that tolls are charged, that the Commission is not liable for failure to spread ashes or other abrasive material on the highway or to have equipment available to eliminate ice accumulation on the turnpike; the Commission enjoyed the same immunity in actions arising out of the negligence of its agents and employees in the maintenance of highways as did the Commonwealth. However, *Specter v. Commonwealth of Pennsylvania*<sup>67</sup> reversed *Rader*, holding that the Commission was not a part of the Commonwealth as that term is used in Article I, Section 4 of the Pennsylvania Constitution, because the legislature had made a clear distinction between the Commission and the Commonwealth by granting the Commission broad powers and financial independence.

Another issue raised frequently is whether the purchase of liability insurance by the State to cover employees' negligence constitutes a waiver of sovereign immunity. *Wright v. State*<sup>68</sup> held, in an action against the State to recover for personal injuries allegedly sustained in a motor vehicle accident involving a truck owned by the State and operated by an employee, that the State highway department's purchase of a liability policy which covered only its employees was not a waiver of immunity of the State from suit.

pike Auth., 176 Kans. 683, 273 P.2d 198 (1954).

<sup>62</sup> See *Hope Natural Gas Co. v. West Virginia Turnpike Comm'n*, 143 W. Va. 913, 105 S.E.2d 630 (1958); *Herrin v. Perry*, 215 So. 2d 177, *aff'd* 254 La. 933, 228 So. 2d 649 (1969) (highway commission).

<sup>63</sup> 254 La. 933, 228 So. 2d 649 (1969).

<sup>64</sup> *Id.* at 654.

<sup>65</sup> *Id.* at 654 to 656. See also *Bazanae v. State Dep't of Highways*, 255 La. 418, 231 So. 2d 373 (1970) (involving an injury to property during highway construction) and *Taylor v. New Jersey Highway Auth.*, 22 N.J. 454, 126 A.2d 313 (1956).

<sup>66</sup> 407 Pa. 609, 182 A.2d 199 (1962).

<sup>67</sup> 341 A.2d 481 (Pa. 1975).

<sup>68</sup> 189 N.W.2d 675 (N.D. 1971).



As indicated, immunity from suit and from liability are two distinct issues. Although a jurisdiction may authorize suit, the department may still be immunized from negligence in the exercise of governmental functions which would include nearly every State function except those of a commercial, proprietary nature.

Where suit is authorized, recovery is predicated on the basis of the doctrine of *respondeat superior*; that is, that the State is liable for the negligent acts of its employees. The defense of the department is that the action complained of was committed in the performance of a governmental function.<sup>69</sup> At the State level the general rule is that highway functions are governmental, for which liability may not be imposed for negligence. Hence, judicial opinions may use the terms governmental immunity and sovereign immunity interchangeably, failing to indicate that the former means immunity from liability and the latter immunity from suit. For example, in *Fonseca v. State*,<sup>70</sup> a legislative waiver of immunity from suit did not waive immunity from liability where the negligent act was incidental to the performance of a governmental function (i.e., the maintenance of the highway).

#### **Trend Towards Governmental Responsibility**

The doctrine of sovereign immunity in American law reflects certain policy decisions. The doctrine's viability

. . . is said to rest upon public policy, the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful . . . ; the very dubious theory that an agent of the state is always outside the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.<sup>71</sup>

The courts which abolish the rule do so on the grounds that the doctrine has outlived any usefulness; that it is inherently unfair and illogical; that it is already riddled with exceptions which produce incongruous and ridiculous results; that liability generally follows negligence; that governmental entities are quite capable of assuming any financial loss produced by tort judgments, particularly since liability insurance is 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, among other reasons.<sup>72</sup> In short, many courts and legislatures have concluded

<sup>69</sup> See Annot., *supra* note 59, at 1230.

<sup>70</sup> 297 S.W.2d 199 (Tex. Civ. App. 1956).

<sup>71</sup> PROSSER ON TORTS, (4th Ed. 1971) at 975.

<sup>72</sup> These reasons are the basis of several decisions in which the courts have abolished immunity of States or other governmental entities. See, e.g., *Muskopf v. Corning*

that the doctrine of sovereign immunity is indeed an "anachronism, without rational basis, and has existed only by the force of inertia."<sup>73</sup>

In spite of the recent trend holding States accountable for their torts, there are, nonetheless, jurisdictions in which the defense of sovereign immunity is available to the highway department when sued in tort.<sup>74</sup>

One of the first States to abolish sovereign immunity where the State highway department was involved directly as a defendant was Arizona in *Stone v. Arizona Highway Comm'n.*<sup>75</sup> There the Supreme Court of Arizona abolished the rule of State immunity as a rule of law in Arizona holding that the State highway department was liable under the rule of *respondeat superior* for the negligence of those individual employees who actually were guilty of some tortious conduct or of those individual employees who were in sufficient control of the highway or the particular job as to be in fact responsible.<sup>76</sup>

In sharp contrast to the *Stone* decision, a Maryland decision held that a suit against the Maryland State Roads Commission could not be maintained because the Department had not waived its immunity from tort suit. Thus, in *Jekofsky v. State Roads Comm'n.*<sup>77</sup> the plaintiff did not have a cause of action where it was claimed that the Commission had improperly planned and constructed Interstate 495 in Montgomery County, Maryland, thereby causing plaintiff's car to go out of control and strike a steel pole on the side of the road. Only the legislature, said the Maryland Court, could modify the doctrine to permit the instant action arising out of negligence in highway operations.<sup>78</sup>

The *judicial* trend is toward holding governmental entities, including the State and its agencies or departments, responsible for negligent conduct,<sup>79</sup> but the *legislative* trend is to permit tort suits against the State

Hosp. Dist., 359 P.2d 457 (1961); Lipman v. Brisbane Elementary School Dist., 359 P.2d 465 (Calif. 1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Spanel v. Mounds View School Dist., No. 621, 118 N.W.2d 795 (Minn. 1962); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); and Carlisle v. Parish of Baton Rouge, 114 So. 2d 62 (La. App. 1959).

<sup>73</sup> 359 P.2d at 460.

<sup>74</sup> See States in Appendix A.

<sup>75</sup> 93 Ariz. 380, 381 P.2d 104 (1963).

<sup>76</sup> 381 P.2d at 113. The reader may wish to note that the doctrine of *respondeat superior* was not applicable to the Commissioners of the State Highway Commission. "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." *Id.* at 114. Moreover, the State Highway Engineer and Deputy State Engineer, who were not personally present at the place where construction and repair were under way, could not be held personally liable for the negligence of their subordinates. *Id.*

<sup>77</sup> 264 Md. 471, 287 A.2d 40 (1972).

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 13 Ill. 2d 11, 163 N.E.2d 89 (1959); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); *Hamilton v. City of Shreveport*, 247 La. 784, 174 So. 2d 529 (1965); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d

only for designated conduct or levels of activity or decision making. Consequently, legislation is often enacted following any judicial abolition of immunity.<sup>80</sup>

Even adherents to the rule of governmental responsibility do not call for unlimited accountability. Although legal scholars note the incongruities and injustices of the law of sovereign immunity due to the exigencies and growth of the modern state, they do not call for an absolute rule of liability but for liability with "appropriate bounds."<sup>81</sup> The principles of tort liability as explained further demonstrate the current bounds of tort liability of the State highway departments.

1 (1961); *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); *Walsh v. Clark County School Dist.*, 82 Nev. 414, 419 P.2d 774 (1966); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 678 (1962); and *Stone v. Arizona State Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

<sup>80</sup> See, e.g., the material on legislative and judicial history of immunity in several states cited in Comment, 78 DICK. L. REV. 365, 368 (1974): ARIZ. REV. STAT. ANN. § 26-314 (Supp. 1972) (statutory supplement to *Stone v. Arizona State Highway Comm'n*, 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. 195, 429 P.2d 45 (1968)]; CAL. GOV'T CODE §§ 810-996.6 (West 1966) [detailed tort claims act subsequent to *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 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. No. 302*, 18 Ill. 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. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961)]; MINN. STAT. ANN. §§ 466.01-17 (1963) [followed *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) which abrogated governmental immunity]; NEB. REV. STAT. §§ 23-1401 to 2420 (1970) [followed *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 895 (1968), and *Johnson v. Municipal University of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969), 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 School 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. Dep't of Conservation*, 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*, 261 A.2d 896 (R.I. 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)].

<sup>81</sup> BORCHARD, *supra* note 39, at 3.

## STATUTES WAIVING TORT IMMUNITY OF THE STATE HIGHWAY DEPARTMENT

As stated, States may not be made defendants in their courts without their consent. Where a tort action is brought against the State highway department, the initial question is whether the department has consented to suit. In an increasing number of jurisdictions the question of suability is no longer presented, because, either by judicial or legislative action, consent to suit has been given. Moreover, consent to be held liable to some degree for certain kinds of tortious acts has been given.

### State Claims Acts

One method of hearing tort claims is represented by State claims acts.<sup>82</sup> Such acts, which differ greatly in scope and procedure from State to State, 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.<sup>83</sup> Such an independent body will have exclusive jurisdiction, but in many instances its decisions will be subject to review either by the courts<sup>84</sup> or by the legislature.<sup>85</sup> The Act may provide for certain exclusions from liability,<sup>86</sup> or define the jurisdiction of the commission or board in very specific<sup>87</sup> or in very broad<sup>88</sup> terms. The legislature may appropriate a specific amount each fiscal year to cover awards,<sup>89</sup> or there may be an arbitrary limit on recoveries by claimants.<sup>90</sup>

Although the State claims acts differ greatly, the decisions rendered, although perhaps not restricted by rigid rules of evidence,<sup>91</sup> will apply rules prevalent in negligence suits for personal injuries and property damage.<sup>92</sup> For example, the North Carolina Industrial Commission

. . . determine[s] whether or not each individual claim arose as a result of a negligent act 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 . . .<sup>93</sup>

<sup>82</sup> See, e.g., ALA. CODE, tit. 55 § 333; ARK. STAT. ANN. § 13-1401 *et seq.*; MINN. STAT. § 3.66; N.C. GEN. STAT. § 143-291; and W. VA. CODE, § 14-2-1.

<sup>83</sup> See, e.g., W. VA. CODE § 14-2-12 and ALA. CODE, tit. 55, § 334.

<sup>84</sup> See, e.g., N.C. GEN. STAT. § 143-293.

<sup>85</sup> See, e.g., W. VA. CODE § 14-2-23.

<sup>86</sup> *Id.*, § 14-2-14.

<sup>87</sup> See, e.g., ALA. CODE, tit. 55, § 334.

<sup>88</sup> See, e.g., N.C. GEN. STAT. § 143-291.

<sup>89</sup> See ALA. CODE § 343.

<sup>90</sup> See N.C. GEN. STAT. § 143-291.

<sup>91</sup> See, e.g., W. VA. CODE § 14-2-15.

<sup>92</sup> See, e.g., ALA. CODE, tit. 55, § 339.

<sup>93</sup> N.C. GEN. STAT. § 143-291.

### Highway Defect Statutes

A second method of waiver of both suability and liability of the State highway department is represented by the highway defect statute. Although several statutes listed in Appendix A might be categorized as highway defect statutes, only two examples are cited here. Connecticut has a statutory provision which states that:

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 duty of the commissioner of transportation to keep in repair . . . may bring a civil action.<sup>94</sup>

Similarly, Kansas has a statute that authorizes one to sue the State where the claimant sustains damage "by reason of any defective bridge or culvert on, or defect in a State highway, not within an incorporated city."<sup>95</sup>

These statutes are different from others discussed herein because the question is *not* whether a state officer or employee has been negligent. Rather, the issue is whether the claimant's injuries were caused by a "defect" within the meaning of the statute (i.e., is the "defect" in the highway one which the legislature intended to be liability producing) because the state had assumed the duty, after notice, of not allowing the dangerous condition to persist. In sum, the liability is statutory<sup>96</sup> as the cause of action is for the recovery of damages for breach of statutory duty.<sup>97</sup>

### General Waiver of Immunity

The third type of waiver of immunity from suit and liability is the blanket waiver, such as the New York Act, which provides:

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations . . .<sup>98</sup>

The New York courts have held that liability for the negligent planning,

<sup>94</sup> CONN. GEN. STAT. tit. 13a, § 144.

<sup>95</sup> KAN. STAT. ANN. § 68-419(a). § 68-419(b), however, excludes actions for injuries caused by the design of the highway where it was "prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared."

<sup>96</sup> *Rockhold v. Board of County Comm'rs*, 181 Kan. 1019, 317 P.2d 490 (1957);

*Schroder v. Kansas State Highway Comm'n*, 199 Kan. 175, 428 P.2d 814 (1967); *Kelley v. Broce Construction Co., Inc.*, 205 Kan. 133, 137, 468 P.2d 160 (1970).

<sup>97</sup> *Shirlock v. MacDonald*, Highway Comm'rs, 121 Conn. 611, 186 A. 562 (1936).

<sup>98</sup> MCKINNEY'S CONSOL. L. OF N.Y. ANN. Court of Cl. Act, § 8.

construction, and maintenance of the State highway system, although not existing at common law, has been assumed by the State's affirmative action.<sup>99</sup>

### Tort Claims Acts

The last, and major, type of waiver authorizing tort suits against the State is the tort claims acts, many of which are modeled after the Federal Tort Claims Acts, which either reenact immunity from liability with certain exceptions<sup>100</sup> or waive immunity from liability with certain exclusions; for example, where discretionary duties are involved or where specific activities are undertaken.<sup>101</sup> The tort claims acts are discussed separately in the later section on "Immunity from Liability Based on Discretionary Function or Activity."

### STATE'S DUTY TO TRAVELING PUBLIC GENERALLY

There is considerable difficulty in attempting to summarize the law applicable to the design, construction, and maintenance of highways where actions are brought pursuant to these many and varied statutes.<sup>102</sup> Each jurisdiction has its own law, which evolves from the many attempts to apply the statute creating the right of action under the designated conditions. Nevertheless, general rules may be formulated for these statutory actions, which tend to be strictly confined to their terms in order to preclude actions believed not to be authorized by the legislature. For example, such a waiver statute is strictly construed in *Murphy v. Ives*,<sup>103</sup> brought to recover damages in an action authorized by statute for injuries sustained on State highways or sidewalks.<sup>104</sup> In actions alleging accidents because of a highway abutment, the plaintiffs properly had a cause of action based on the defective highway statute but a separate count alleging common law nuisance was not maintainable, because the legislature had not consented to be sued for other than the statutory cause of action.<sup>105</sup> That is, immunity had not been waived to permit a common law action in nuisance against the State.

Although it is difficult to summarize general rules on the duty owed by the State to users of the highway,<sup>106</sup> it is said

<sup>99</sup> See, e.g., *Neddo v. State*, 194 Misc. 379, 85 N.Y.S.2d 54 (1948), *aff'd* 275 A.D. 492, 90 N.Y.S.2d 650 (1949), *aff'd* 300 N.Y. 533, 89 N.E.2d 253 (1949), *aff'd* 275 A.D. 982, 91 N.Y.S.2d 515 (1949); and *Seelye v. State*, 178 Misc. 278, 34 N.Y.S.2d 205 (1942), *aff'd* 267 A.D. 941, 47 N.Y.S. 2d 618, 620 (1944).

<sup>100</sup> See, e.g., UTAH CODE ANN. §§ 63-30-1, 63-30-8, 63-30-10.

<sup>101</sup> See, e.g., ALASKA STAT. § 09.50.250.

<sup>102</sup> Tort Claims Acts are considered in the section on "Immunity from Liability Based on Discretionary Function or Activity," *infra*.

<sup>103</sup> 196 A.2d 596 (Conn. 1963).

<sup>104</sup> CONN. GEN. STAT., tit 13a § 144.

<sup>105</sup> 196 A.2d at 598.

<sup>106</sup> See, generally, 39 AM. JUR. 2d *Highways* §§ 337-603 setting forth principles that have been applied in a variety of factual situations.



. . . that persons using highways, streets, and sidewalks are entitled to have them maintained in a reasonably safe condition for travel. One traveling on a highway is entitled to assume that his way is reasonably safe, and although a person is required to use reasonable care for his own safety, he is neither required nor expected to search for obstructions or dangers.<sup>107</sup>

Even in a jurisdiction holding the State to the same standard of care as private corporations or citizens the State is not an "insurer of the safety of travelers using its highways."<sup>108</sup> A duty transcending that of reasonable care and foresight will not be imposed upon the State.<sup>109</sup> Thus, where the design and construction of a highway, according to accepted practice at the time of construction, does not include a median barrier, the State may not be held liable for the delay in erecting barriers once it determines that they are needed.<sup>110</sup> Warning and directional signs, in the absence of any record that the area is hazardous, are adequate for the reasonably careful driver.<sup>111</sup> Moreover, all that is required of the State "is to adequately design, construct, and maintain said highways and to give adequate warning of existing conditions and hazards to the reasonably careful driver."<sup>112</sup>

In sum, 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.<sup>113</sup> Although the State has no duty to make the roads absolutely safe,<sup>114</sup> a motorist using a public highway has the right to presume that the road is safe for the usual and ordinary traffic, and he is not required to anticipate extraordinary danger, impediments, or obstructions to which his attention has not been directed.<sup>115</sup> Moreover, the State's obligation of reasonable care may encompass an efficient and continuous system of highway inspection.<sup>116</sup> 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.<sup>117</sup> 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 involved department.<sup>118</sup>

<sup>107</sup> 39 AM. JUR. 2d, *Highways* § 337, at p. 721. Compare, however, § 353 stating the general rule that liability may not follow errors or defects in design or plan adopted by a public body acting in a quasi-judicial or legislative capacity, involving a true exercise of discretion, and the plan adopted was not obviously and palpably dangerous. *Id.*, p. 736.

<sup>108</sup> *Stuart-Bullock v. State*, 38 A.D.2d 626, 326 N.Y.S.2d 909, 912 (1971).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 913.

<sup>113</sup> *Id.* See also, *McDevitt v. State*, 154 N.Y.S.2d 874, 136 N.E.2d 845 (1956).

<sup>114</sup> *Baker v. Ives*, 162 Conn. 295, 294 A.2d 290, 293 (1972).

<sup>115</sup> *Id.*

<sup>116</sup> *McCullin v. State Dep't of Highways*, 216 So. 2d 832, 834 (La. App. 1969).

<sup>117</sup> See *Commonwealth v. Maiden*, 411 S.W.2d 312 (Ky. 1966).

<sup>118</sup> See, e.g., NEV. REV. STAT. § 41.033.

Inherent in the State's duty of ordinary care is the duty to eliminate, to erect suitable barriers, or to adequately warn the traveling public of hazardous conditions. Therefore, the adequacy of barriers or posted warnings is critical to the question of the State's liability, for the State may not avoid liability simply by erecting a barrier or posting a warning sign. Compliance with a standard manual on traffic signs following an evaluation of the exigencies of the highway condition are relevant issues in considering whether the State has met its standard of care.<sup>119</sup> Where, for example, a dangerous condition is permitted to exist in the highway for a period of at least two months, the fact that the department is engaged in repairing the road at the time of the accident is not an exercise of ordinary care when proper precautions such as the erection of suitable barriers or warning devices are not undertaken.<sup>120</sup>

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. In some instances, however, the State must have notice of the condition for the requisite statutory period. In *Kelley v. Broce Construction Co.*,<sup>121</sup> the notice period of five days, where all of the factors creating the defect that caused the accident took place on the same day of the accident, was not met and the State was held not liable. The court held 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.<sup>122</sup>

However, constructive notice usually is all that is required in order to find that the State has the duty to take reasonable action.

It is well settled that the state is under an obligation to maintain its highways in a reasonably safe condition; that when a condition renders it unsafe for persons using it in the exercise of reasonable care and such condition has existed long enough to give the state constructive notice it is incumbent upon the state to take whatever action is reasonably required for the protection of travelers on the highway, even though a third person created that condition.<sup>123</sup>

Thus, where 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.<sup>124</sup> It has been held that it is not necessary for the State to have notice of faulty construction, maintenance, or repair of its highways as the State is deemed to know of its own acts.<sup>125</sup> In sum, the

<sup>119</sup> See *Meabon v. State*, 1 Wash. App. 824, 463 P.2d 789 (1970).

<sup>120</sup> *Commonwealth v. Young*, 354 S.W.2d 23 (Ky. 1962).

<sup>121</sup> 205 Kan. 133, 468 P.2d 160 (1970).

<sup>122</sup> *Id.* at 166.

<sup>123</sup> *Kenyon v. State*, 21 A.D.2d 851, 250

N.Y.S.2d 1007 (1964).

<sup>124</sup> *Id.*

<sup>125</sup> *Coakley v. State*, 26 Misc. 2d 431, 435, 211 N.Y.S.2d 668, 663 (1961), *aff'd* 15 A.D.2d 721, 222 N.Y.S.2d 1023 (1962); *Morales v. New York State Thruway Auth.*, 47 Misc. 2d 153, 262 N.Y.S.2d 1731 (1965).

duty to act may arise once the State has actual, perhaps for the statutory period, or constructive notice of the dangerous condition. That is, the duty to act may arise when the State either knew or should have known of the existence of a dangerous condition.

The duty of care owed by the State to users of the highway exists in a variety of factual situations, and it is feasible only to offer a few illustrations. It may be noted that the illustrative cases which follow are particularly relevant to jurisdictions in which ordinary or general rules of negligence law are applicable to tort suits against the highway department; that is, jurisdictions in which there is a general waiver of immunity, principally New York and, of course, numerous cities and counties in the United States, the latter category being outside the scope of this paper. Only the following representative cases are included, because the result in cases involving the highway department will depend on whether negligence is established by a preponderance of the evidence, or will depend on other issues such as proximate causation or contributory negligence.

### Design Defects

As explained further in the section on "Application of Discretionary Function Exemption to Highway Design," the public entity is usually not liable for defects or errors in design of highways. As stated in *Weiss v. Fote*:<sup>126</sup>

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-

<sup>126</sup> 7 N.Y.S.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960). See also the following cases, which are discussed at length in Annot., *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, 885 that are cited for the general rule that governmental entities are not liable for injuries which result from a faulty plan or design: *Perrotti v. Bennett*, 94 Conn. 533, 109 A. 890 (1920); *Donnelly v. Ives*, 159 Conn. 163, 268 A.2d 406 (1970); *Lundy v. Augusta*, 51 Ga. App. 655, 188 S.E. 237 (1935); *Mason v. Hillsdale Highway Dist.*, 65 Idaho 833, 154 P.2d 490 (1944); *Dobbs v. West Liberty*, 225 Iowa 506, 281 N.W. 476 (1938); *McCormick v. Sioux City*, 243 Iowa 35, 50 N.W.2d 564; *Gould v. Topeka*,

32 Kan. 485, 4 P. 822 (1884); *Louisville v. Redmon*, 265 Ky. 300, 96 S.W.2d 866 (1936); *Cumberland v. Turney*, 177 Md. 297, 9 A.2d 561 (1939); *Paul v. Farley*, 228 Minn. 264, 37 N.W.2d 427 (1949); *Cowling v. St. Paul*, 234 Minn. 374, 48 N.W.2d 430 (1951); *Carruthers v. St. Louis*, 341 Mo. 1073, 111 S.W.2d 32 (1937); *Truhlar v. East Paterson*, 4 N.J. 490, 73 A.2d 163 (1950); *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177 (1968); *Blackwelder v. Concord*, 205 N.C. 792, 172 S.E. 392 (1934); *Klingenberg v. Raleigh*, 212 N.C. 549, 194 S.E. 297; *Nashville v. Brown*, 25 Tenn. App. 340, 157 S.W.2d 612 (1941); and, more recently, *Cameron v. State*, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777 (1972); and *Catto v. Schnepf*, 121 N.J. Super. 506, 298 A.2d 74, *aff'd* 62 N.J. 20, 297 A.2d 841 (1972).

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 inexperienced hands what the legislature has seen fit to entrust to experts.

Thus, a jury in *Weiss* was not permitted to review the Board of Safety's judgment that 4 seconds represented a reasonably safe "clearance interval" (the time allowed for the east-west traffic to clear the intersection before the north-south traffic was green-lighted) where there was nothing to suggest that the decision was either arbitrary or unreasonable.

To state the matter briefly, absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it—and there is no indication of either here—we perceive no basis for preferring the jury verdict, as to the reasonableness of the "clearance interval," to that of the legally authorized body which made the determination in the first instance.<sup>127</sup>

Exceptions to this general rule of nonliability for design defects or errors are noted herein in the sections on "Plan or Design as Highway Defect" and "Application of Discretionary Function Exception to Highway Design."<sup>128</sup>

### Negligent Implementation of Plan or Design

In *McCauley v. State*<sup>129</sup> the court held that the State has a duty to position and maintain guardposts adequately. The decedent's estate sought to recover where the decedent was forced to the freshly plowed shoulder of the road to avoid a snowplow. In attempting to reenter the roadway, decedent's car skidded across the road, through the space between the guardposts (apparently connected by cables), over the steep bank beyond the posts, and into the river. In addition to finding that the decedent acted prudently under the circumstances, the court held that the decedent's estate could recover if the guardposts were negligently maintained and were a cause of the accident.<sup>130</sup> The State's duty to protect against the danger from the steep bank on the State's right-of-way and the river below was not met where the guardposts did not conform to the contract plans and were far enough apart to permit the decedent's car to pass between them.

<sup>127</sup> *Id.*

<sup>128</sup> See also the exceptions noted and discussed in Annot., *supra*, note 126.

<sup>129</sup> 9 A.D.2d 488, 195 N.Y.S.2d 253 (1960).

<sup>130</sup> *Id.* at 260.

Although these plans are not conclusive on the standard of protection required at this point, they are some evidence of it. There is proof for claimants that the posts were not located in accordance with reasonable engineering practice and there is no proof by the state that the guard posts as located did conform with reasonable standards.<sup>131</sup>

The *McCauley* case thus holds that the deviation from a plan or design, or the negligent execution or construction of the design, is evidence, where the deviation is a proximate cause of the injury or death, that the State has not afforded adequate safeguards and exercised reasonable care.

#### Failure to Comply with New Standards

Although the State has a duty to erect appropriate barriers and highway signs, the State, because it is not an insurer of the highway, has no duty to replace existing signs that are adequate and conform to earlier safety standards. As held in *McDevitt v. State*,<sup>132</sup> there is a limit to the State's duty with respect to proper signs. In *McDevitt* a car skidded on a snowy and icy road, went out of control, and crashed through a bridge railing. Plaintiffs charged that the State was negligent in providing inadequate road signs because the signs used did not conform to the present Manual of Uniform Traffic Control Devices. The court held that the highway signs installed prior to the present manual but in conformance with the rules and regulations when erected and in good serviceable condition at the time of the accident are adequate warning to the reasonably careful driver.<sup>133</sup> *McDevitt* illustrates that the State's duty to erect proper signs and barriers does not include the replacement of existing signs which are adequate to warn the motorist even though not in strict compliance with present standards.

#### Duty to Improve or Replace Highway

The *McDevitt* case raises the issue, discussed again later, of the State's duty to correct dangerous conditions in the roadway which develop after the approval and implementation of the plan or design. In *Weiss v. Fote, supra*, the court suggested the rule that once having planned, for example, an intersection, the State was under a continuing duty to review its plan in the light of actual operation.<sup>134</sup> In *Kaufman v. State*<sup>135</sup> the claimant had failed to negotiate a zigzag curve; however, the court held that the State had not negligently constructed and maintained the road, that there were adequate warning signs, and that the driver was contributorily negligent.

<sup>131</sup> *Id.* at 260-261.

<sup>132</sup> 1 N.Y.2d 540, 136 N.E.2d 854 (1956).

<sup>133</sup> *Id.* at 847.

<sup>134</sup> 200 N.Y.S.2d 415 (1960), citing *East-*

*man v. State*, 303 N.Y. 691, 103 N.E.2d 56 (1951).

<sup>135</sup> 27 A.D.2d 587, 275 N.Y.S.2d 757 (1966).

Although by today's enlightened criteria the road would possibly not be properly constructed, it is readily evident that it did comply with the standards applicable when it was planned and built in 1911 and *the state was not required to rebuild the road at this point, a major undertaking according to the testimony, unless the curve could not be negotiated at a moderate speed.*<sup>136</sup> (Emphasis supplied.)

### Negligent Maintenance

Where negligent maintenance is the basis of the tort suit plaintiff must still show breach of the State's duty of reasonable care. In *Meabon v. State*,<sup>137</sup> a passenger was injured when the vehicle left a State highway owing to the roadway's slippery condition. Sealer coats applied by the State to remedy the excessive oiliness of the asphalt were known by the maintenance superintendent to be prohibited during certain months by the department's specifications but were applied anyway in an effort to remedy an existing dangerous condition. This effort failed to alleviate the condition and sand and gravel were used, but the dangerous condition remained. Finally, signs were added indicating that the roadway was "slippery when wet"; however, the speed limit remained posted as "60 mph."

The plaintiff passenger objected to an instruction at trial submitting the question of the adequacy of the warning devices to the jury on the basis that the instruction would preclude her recovery under a theory of concurrent causation; i.e., the State's and the driver's negligence. The Court held, however, that the plaintiff's argument would mean that the State's compliance with the requirement of an adequate warning would be a defense from liability for injury to a driver, but not for injury to a passenger.

The logical conclusion of [plaintiff's] theory would result in the imposition of absolute liability upon the state for failure to eliminate dangerous highway conditions, resulting in injuries to passengers, without consideration of the adequacy of any warning of the dangerous condition . . . Such is not the rule in Washington.

The standard of care required of the state in the maintenance of its public highways remains the same towards both the driver and his passengers . . . *Until plaintiff proves a breach of the state's duty of ordinary care, the state has committed no legal wrong.* (Emphasis added.)<sup>138</sup>

Thus, in the jurisdictions applying ordinary negligence rules, the plaintiff must show that the State has not exercised reasonable care in fulfilling the duty assumed by the State for the safety of the public. These cases demonstrate that the State is not absolutely liable for a breach of duty.

<sup>136</sup> *Id.* at 758.

<sup>137</sup> 1 Wash. App. 824, 463 P.2d 789

(1970).

<sup>138</sup> *Id.* at 792.



### Nonfeasance

In at least one jurisdiction, a department's failure to take action (nonfeasance) is not compensable. A recovery, therefore, may not be had in North Carolina<sup>139</sup> where the act complained of is the result of an *omission* by an employee of the department because the act, which provides for a separate governmental commission to hear tort claims against the State, requires, first, a negligent *act* before compensation is authorized. Thus, *Flynn v. North Carolina State Highway and Public Works Comm'n*<sup>140</sup> held that a claim of damages for injuries sustained due to failure to repair a road is not compensable. Moreover, the failure to remove a dangerous accumulation of gravel and loose stones is not actionable under the North Carolina Act.<sup>141</sup>

### HIGHWAY DEFECT STATUTES—BREACH OF STATUTORY DUTY

The action which may be brought in several States against the department, as noted, is authorized by highway defect statutes, and is not an action in negligence. For one to recover under such a statute, as exists in Connecticut<sup>142</sup> or Kansas,<sup>143</sup> the facts must demonstrate that the injury complained of is the result of a dangerous condition which constitutes a "defect" within the meaning of the statute. Although most questions of fact are to be determined by the jury, whether the defect in a highway is a defect within the meaning of the statute is a question of law to be decided by the Court.<sup>144</sup> Moreover, each case is decided on its particular facts:

The court has steadfastly adhered to 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. In the final analysis it is the policy of the Supreme Court [of Kansas] to handle each case separately and to either include it in or exclude it from the operation of the statute.<sup>145</sup>

Moreover, according to *Martin v. State Highway Comm'n*,<sup>146</sup> "while a dangerous condition in a State highway may be a defect in the highway, the dangerous condition is not *per se* a defect under the statute—one creating liability. In addition to being dangerous, a condition must also be one the legislature is deemed to have intended to fall within the statute creating liability." Regardless of the source of the defect, liability of the department may be predicated, first, on the failure to com-

<sup>139</sup> N. C. GEN. STAT. § 143-291.

<sup>140</sup> 244 N.C. 617, 94 S.E.2d 571 (1956).

<sup>141</sup> *Ayscue v. N.C. State Highway Comm'n*, 270 N.C. 100, 153 S.E.2d 823 (1967).

<sup>142</sup> CONN. GEN. STAT., tit. 13a § 144.

<sup>143</sup> KAN. STAT. ANN. § 68-419(a).

<sup>144</sup> *Douglas v. State Highway Comm'n*, 46 P.2d 890 (1935).

<sup>145</sup> *Brown v. State Highway Comm'n*, 202 Kan. 1, 444 P.2d 882 (1968).

<sup>146</sup> 213 Kan. 877, 888, 518 P.2d 437 (1974).

ply with a specific legislative mandate; for example, the failure to erect a stop sign according to the specifications contained in the manual on Uniform Traffic Control Devices for Streets and Highways adopted by the Highway Commission pursuant to a statutory requirement is a "defect" in the highway according to *Brown, supra*. Second, liability of the department may be predicated on the existence of a condition creating actual peril to persons using the highway with due care. Such liability may be found where a highway condition poses a manifest danger or is hazardous to those using the highway in the exercise of due care.<sup>147</sup>

However, the real inquiry is one of policy: whether the dangerous condition is of such a nature that the legislature intended that the department should be held liable. Generally, liability may attach to certain maintenance defects arising out of use of the highway and to built-in defects; i.e., those included at the time of design.

#### Plan or Design as Highway Defect

Where there is an alleged defect in the plan or design of the highway, the planning body is given "in the first instance" the benefit of the doubt. There is no liability unless the design is known to be manifestly dangerous. A leading case is *Hampton v. State Highway Comm'n.*<sup>148</sup>

In *Hampton*, the State appealed from an award of \$450,000 for personal injuries and loss of an automobile when plaintiff lost control of his vehicle due to an accumulation of water caused by a clogged drain in the highway and ultimately collided with an oncoming 43,000-pound tractor-low-boy rig hauling a backhoe. Plaintiff charged that the accumulation was the result in part of the faulty design of the drain and the highway. The Court held that liability could not be predicated on design defect alone because the design was adequate when the highway was built and must be judged by standards prevailing at that time. Liability could be predicated, however, on the fact, established by the evidence, that the plan or design after actual use was known to the commission to be "manifestly dangerous" to users of the highway. The following is said to be a "fair statement of the law":

The State Highway Commission of Kansas would not be liable for damages to persons or property on the sole basis of errors or defects in the original design or plan of the highway in question *unless the plan or design was known to said commission to be manifestly dangerous to users of the highway.*

However, after construction of the highway the State Highway Commission would be liable for damages resulting from a defect in the original plan where such defect is embodied in the construction work and is permitted to remain after the Highway Commissioner had notice of said defect, rendering the highway unsafe for the usage intended, for a period of five days or more.<sup>149</sup> (Emphasis added.)

<sup>147</sup> *Id.* at 441-442.

<sup>149</sup> 498 P.2d at 244.

<sup>148</sup> 209 Kan. 565, 498 P.2d 236 (1972).

Although liability may ensue where the result is actual peril to the user from a manifestly dangerous condition, a defective condition is not shown by virtue of the fact that the Commission may have later adopted different policies and practices.<sup>150</sup> Such later developments, as well as the institution of a program to upgrade portions of the highway, do not render an existing design defective.<sup>151</sup> The design must either be manifestly dangerous or prove hazardous in practice in order to constitute a defect; "changing standards and wholly laudable efforts to improve the safety of our highways does not make 'defective' that which has long been considered adequate."<sup>152</sup>

Both the ordinary negligence States, such as New York, and the highway defect statute jurisdictions provide for an initial immunity for errors in plan or design where the plan has been duly approved by an appropriate legislative or quasi-legislative body. Thus, the Kansas statute provides for an immunity for plan or design of the highway when the same was prepared in conformity with the generally recognized and prevailing standards in existence at the time of approval.<sup>153</sup>

Unless the plaintiff can bring his claim within the purview of the statute his claim will be dismissed where it rests solely on an allegation of plan or design error. For example, in *Donnelly v. Ives*<sup>154</sup> recovery was denied where allegations were grounded solely on errors in the original plan or design of construction. The Court rejected the rule urged by plaintiff that liability be imposed on the highway commissioner "for a design defect in the highway resulting from the layout and signing."<sup>155</sup> The only manner in which plaintiff could recover would be where the highway was so defective in its construction as to be totally out of repair from the very beginning,<sup>156</sup> a rule somewhat similar to that announced in *Hampton, supra*.

The rationale for the initial "benefit of the doubt" for plan or design is the belief that (1) a public authority acts in a quasi-judicial or legislative capacity in adopting a plan for the improvement or repair of the streets; (2) good administration of government requires a recognition of and respect for the expert judgment of agencies authorized by law to exercise such judgment; and (3) in the area of highway safety, the courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits; i.e., juries should not be allowed to second-guess the decisions of expert planning bodies.<sup>157</sup>

<sup>150</sup> 518 P.2d at 444-445.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Note, however, that California places a heavier burden on the State where there are changed circumstances. See text at footnotes 257 to 270, *infra*.

<sup>153</sup> KAN. STAT. ANN. § 68-419(b).

<sup>154</sup> 159 Conn. 163, 268 A.2d 406 (1970).

<sup>155</sup> *Id.* at 409.

<sup>156</sup> *Id.* at 408-409. See also *Hoyt v. Danbury*, 69 Conn. 341, 352, 37 A. 1051 (1897).

<sup>157</sup> See *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960); *Donnelly v. Ives*, 159 Conn. 163, 268 A.2d 408, 409 (1970); *Stuart-Bullock v. State*,

### Examples of Highway Defects

Where there is failure to comply with a statutory duty to follow specifications for traffic control devices<sup>158</sup> or for required guardrails,<sup>159</sup> absence of same may be held to be defects. On the other hand, the creation of a dangerous situation, such as the existence of an unmarked curve difficult to negotiate at a reasonable speed, may constitute a defect.<sup>160</sup> Clearly, however, every deviation in the highway from the ideal is not a liability-producing defect. Thus, in *Martin v. State Highway Comm'n*,<sup>161</sup> in which a car collided with a pillar supporting an overpass, the pillar being approximately 10 ft from the edge of the pavement, the absence of a guardrail was held not to be a defect. The facts of the case did not indicate noncompliance with any legislative requirement, and the area was not shown to be manifestly dangerous. In sum, the court could not believe that every exposed bridge support in the State is deemed by the legislature to be a liability-producing defect.<sup>162</sup>

Similarly, with respect to maintenance defects, the general view is that the legislature never intended to make mere irregularities, rough spots, slight depressions, or small broken places in a blacktop highway "defects" within the meaning of the statute. However, where a depression in the highway is augmented by difficult-to-locate chuckholes as much as 3½ to 8 in. deep a jury could justifiably find that the roadway was defective.<sup>163</sup>

### THE GOVERNMENTAL-PROPRIETARY TEST OF IMMUNITY

One basis of immunity from tort liability is the governmental-proprietary dichotomy, which is noted only in passing because it is a minority rule in the law of State tort liability. That is, where the department may be sued (no sovereign immunity), it may, nonetheless, be held liable only where the injury arises out of the negligence performed in the exercise of proprietary activities, as opposed to governmental functions. This dichotomy may be confusing in that the courts often refer to the State's sovereign immunity by the term governmental immunity. Ordinarily this usage is of no practical significance as the operations of the highway department are 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

38 A.D.2d 626, 326 N.Y.S.2d 909, (1971).

<sup>158</sup> *Brown v. State Highway Comm'n*, 202 Kan. 1, 444 P.2d 882 (1968).

<sup>159</sup> *Grier v. Marshall County Comm'rs*, 128 Kan. 95, 276 P. 56 (1929).

<sup>160</sup> *Snyder v. Pottawatomie County*, 120 Kan. 659, 245 P. 162 (1926).

<sup>161</sup> 518 P.2d 437 (1974).

<sup>162</sup> *Id.*

<sup>163</sup> *Shafer v. State Highway Comm'n*, 169 Kan. 264, 219 P.2d 448, 450 (1950). Compare: *Douglas v. State Highway Comm'n*, 46 P.2d 890 (Kan. 1935) (washboardy, corrugated road held to have been only a little worse than just the common ordinary graveled road in wet weather).

reason that it could not be sued, or, even if it could be sued, it would not be held liable for the exercise of governmental functions. As stated in one article:

In a large number of cases involving or referring to state liability in tort, the courts, without directly recognizing the applicability of the governmental–proprietary distinction, have used language taking some cognizance thereof. So, in formulating general statements of the rule as to state immunity from tort liability, the courts have frequently affirmatively stated that this rule is applicable to governmental functions, *without, however, going on to say that the converse was true of proprietary functions.* (Emphasis added.)<sup>164</sup>

An example of this dichotomy is *Manion v. State Highway Comm'n*,<sup>165</sup> in which the Court noted a distinction between sovereign immunity from suit and immunity from liability, the latter existing when the State was involved in 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 as to which the State could not be held liable even though immunity to suit had been waived.

Similarly, in *Fonseca v. State*,<sup>166</sup> the Court held, in an action brought to recover damages sustained as the result of a collision with a State highway truck, that, although the State had granted permission to be sued, the department could not be held liable. The Court expressly held that the location, construction, and maintenance of State highways by the Texas Highway Department are governmental functions.<sup>167</sup> Examples of State proprietary activities are the operation of hospitals<sup>168</sup> and public parks or recreational areas.<sup>169</sup>

The governmental–proprietary dichotomy is not generally applicable to tort suits against the State. In particular, it does not appear to have been applied to the State highway department for the reason previously noted—highway functions have historically been considered to be governmental in nature. Rather, the distinction is most commonly applied to actions brought against local units of government, such as counties, and especially municipal corporations.<sup>170</sup>

With respect to the governmental–proprietary distinction:

The line between municipal operations that are proprietary, and therefore a proper subject of suits in tort, and those that are governmental, and therefore immune from such suits, is not clearly defined.

<sup>164</sup> Annot., *State's immunity from tort liability as dependent on governmental or proprietary nature of function*, 40 A.L.R. 2d 927.

<sup>165</sup> 303 Mich. 1, 5 N.W.2d 527 (1942), cert. den. 317 U.S. 677, 63 S.Ct. 159 87 L. Ed. 543, (1942).

<sup>166</sup> 297 S.W.2d 199 (Tex. Civ. App. 1957).

<sup>167</sup> *Id.* at 202.

<sup>168</sup> *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969).

<sup>169</sup> *Perkins v. State*, 252 Ind. 531, 251 N.E.2d 30 (1969).

<sup>170</sup> A few jurisdictions appear to have adopted the rule, as may be seen from the annotation in 40 A.L.R.2d 927.



Powers and functions held to be governmental or public in one jurisdiction are sometimes held to be corporate or private in another, and it has often been said that it is impossible to state a rule sufficiently exact to be of much practical value in deciding when a power is public and when it is private. The underlying test is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity. It has been variously stated that a governmental duty is one which involves the exercise of governmental power, and is assumed for the exclusive benefit of the public; that the function of a municipality is governmental when it is assumed for all the people in the community; that municipal duties are governmental when imposed by the state for the benefit of the general public; and that governmental duties are those in the discharge of which the municipal corporation owes a duty to the public. To be a municipal duty, it must relate to the local or specific interests of the municipality.<sup>171</sup>

In contrast, pecuniary benefit may be an important criterion in determining whether a function is proprietary in nature:

The rule of governmental immunity as applied to municipal corporations is frequently stated by the courts to the effect that such corporations are not liable for negligent acts or omissions for which they receive no pecuniary benefit, but which are imposed upon them as governmental agencies. When a municipal corporation undertakes to furnish a service of a commercial character, such as water or light, to individuals for a price, or engages in an undertaking the object of which is profit to itself, liability attaches for negligence in the performance of a compensated service, although such enterprises may ultimately subserve a public need.<sup>172</sup>

The foregoing are only very general principles which may be rejected or modified in some jurisdictions.<sup>173</sup> As previously noted, State cases may hold that planning, construction, and maintenance of State highways are governmental; however, "precisely the opposite result constitutes the weight of judicial authority in this country" with respect to municipal corporation law.<sup>174</sup> One source maintains that "courts in those states still employing the old 'governmental-proprietary' test typically label these activities as 'proprietary'" in referring to the liability of local governments for negligence in constructing and maintaining streets.<sup>175</sup> Although a Texas court held that the State was engaged in governmental activities in *Fonseca v. State*, *supra*, another Texas court has held that: "Cities in the building, maintenance and operation of streets are engaged in a proprietary function and are not

<sup>171</sup> 57 AM. JUR. 2d, *Municipal, School, and State Tort Liability*, § 31.

<sup>172</sup> *Id.* § 33.

<sup>173</sup> *Id.* § 34. See also 1A MUNICIPAL CORPORATION LAW (Bender) § 11.26, for

a discussion of the governmental-proprietary test.

<sup>174</sup> 34 YALE L.J. at 229.

<sup>175</sup> 1A MUNICIPAL CORPORATION LAW (Bender) § 11.128, p. 11-148.



performing a governmental function.”<sup>176</sup> Courts are not in agreement, however, and “a few courts still applying the old governmental–proprietary test label street construction as ‘governmental’ and immunize the local governments from tort liability.”<sup>177</sup>

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. The majority of jurisdictions appear to hold that local governments are immunized from tort responsibility for inadequate, defective, and unsafe streets that were negligently “planned that way.”<sup>178</sup>

It must be acknowledged, however, that a number of courts *have* immunized local governments from tort responsibility even though their personnel were negligent in planning street improvements, on theories that such activity is “governmental” or “discretionary.” Thus, a New Jersey court has ruled that the decision of a local government to omit the conventional shoulders in building a highway “falls within the area of nonactionable exercise of governmental discretion.”<sup>179</sup> (Emphasis added.)

The governmental–proprietary dichotomy as a theory of immunity may be on the wane in municipal corporation law. For example, the District of Columbia has now 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*,<sup>180</sup> the governmental–proprietary test of immunity was formally “interred” in favor of the discretionary exemption exemplified by the Federal Tort Claims Act.

With respect to the application of the doctrine to State highway operations, it has recently been nullified in one State<sup>181</sup> and adopted in another,<sup>182</sup> both by judicial decisions. In the State adopting the doctrine,

<sup>176</sup> *Houston v. Glover*, 355 S.W.2d 757, 759 (Tex. Civ. App. 1962), discussed in 1A MUNICIPAL CORPORATION LAW (Bender) § 11.128, p. 11-148.

<sup>177</sup> *Chavez v. Laramie*, 389 P.2d 23 (Wyo. 1964), discussed in 1A MUNICIPAL CORPORATION LAW (Bender) § 11.131, p. 11-150. See also, *Watson v. Kansas City*, 499 S.W.2d 515 (Mo. 1973) (holding that the local government was not liable on theory of governmental immunity for failure to warn that street terminated).

<sup>178</sup> 1A MUNICIPAL CORPORATION LAW (Bender) § 11.130, p. 11-149.

<sup>179</sup> *Id.* p. 11-150, citing *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177, 179 (1968).

<sup>180</sup> 425 F.2d 479 (1969).

<sup>181</sup> *Knotts v. State*, 274 N.E.2d 400 (Ind. 1971) had held that the State was immune from injuries suffered as a result of its negligence in failing to repair and maintain state highways (governmental functions). *Knotts* was overruled by *State v. Turner* 32 Ind. Dec. 409, 286 N.E.2d 697 (1972), holding the State liable for negligence in the exercise of governmental or proprietary duties.

<sup>182</sup> *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1969) was a consolidation of several cases. One claim for wrongful death and personal injury was predicated on the negligent acts of State highway employees. It was alleged that the portion of

the legislature apparently overruled the decision with the adoption of a tort claims act,<sup>183</sup> which provides that "every governmental entity<sup>184</sup> is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function."<sup>185</sup>

#### IMMUNITY FROM LIABILITY BASED ON DISCRETIONARY FUNCTION OR ACTIVITY

The primary defense to tort liability by the department for design, construction, and maintenance negligence is based on the theory that certain action taken by government is "discretionary" and, therefore, immune. The exemption from liability for discretionary activity is rooted in the common law, having emerged as a defense in tort suits seeking to hold officials personally liable for their negligence. The concept of certain discretionary acts being immune is "a concept of substantial historical ancestry in American law."<sup>186</sup> As noted in the earlier discussion on the historical evolution of the doctrine of sovereign immunity, inasmuch as there was no remedy against the sovereign for certain torts committed by the Crown's officers and servants, the alternative was to sue the official who was personally liable, because the doctrine of *respondeat superior* was inapplicable to the sovereign. As seen in the companion paper on personal liability, the officer or employee is not held liable for the performance of discretionary duties so long as he is acting within the scope of his employment and has not acted maliciously or committed an intentional tort. Thus, a dichotomy developed in the law on personal liability whereby one exercising discretionary functions or duties is immune from liability, but the individual engaged in the exercise of nondiscretionary, ministerial duties could be held liable for the consequences of his negligence. In modern time, this dichotomy has been extended to tort suits against governmental entities, including the State highway department, either by judicial decision or by statute.

The discretionary-ministerial dichotomy has defied any concise or satisfactory definition. Most writers are in agreement that the doctrine is a method of arriving at the result rather than of stating the rule, and

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the highway where the vehicle skidded was of relatively new construction of a composition which rendered the highway dangerous and unusually slippery when wet. Also, it was claimed that the engineering practice employed was poor since there was a turn at a point which tended to force cars to the shoulder of the road. No warning signs had been erected. Held, the State was liable: "where the governmental unit acts in a proprietary capacity, the same rules of tort law which are applicable to private indi-

viduals will now apply to the governmental units. The construction and maintenance of highways is a proprietary function and has been so held by this court." *Id.* at 944.

<sup>183</sup> IDAHO CODE § 6-901 *et seq.*

<sup>184</sup> Governmental entity here includes the State and political subdivisions. IDAHO CODE, § 6-902(3).

<sup>185</sup> IDAHO CODE § 6-903, but see exceptions to liability in § 6-904.

<sup>186</sup> *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

that it is a convenient device for extending the area of nonliability without making the reasons explicit.<sup>187</sup> Moreover, the cases that follow seem to involve not the application of a rule as much as a balancing of the equities of the particular case. Courts are inclined, in reaching the result, to evaluate certain other factors in addition to the type of activity undertaken or conducted by the government. Such factors may include: the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the action taken, and the effect of liability on the effective administration of the law.<sup>188</sup> In addition to balancing equities and policies the court must evaluate the governmental decision, duty, function, or activity in terms of the nature and degree of "discretion" actually involved. Finally, where the governmental activity is highly complex or technical, it may be beyond the reasonable technical competence or expertise of the court.<sup>189</sup> Often, information available to the responsible department could not be assimilated and analyzed adequately by a court lacking background and experience in the field. These and other reasons are only a few of the problems in formulating a precise definition and method of application of the exemption for discretionary activity.

Any activity, of course, involves the exercise of discretion,<sup>190</sup> but the term discretionary function or duty as employed herein means the power and duty to make a choice among valid alternatives; it requires a consideration of alternatives and the exercise of independent judgment in arriving at a decision or in choosing a course of action.<sup>191</sup> Discretionary acts are those in which there is no hard and fast rule as to a course of conduct that one must or must not take.<sup>192</sup> On the other hand, ministerial duties are more likely to involve clearly defined tasks not permitting the exercise of discretion. Ministerial acts are performed with minimum leeway as to personal judgment and do not require any evaluation or weighing of alternatives before undertaking the duty to be performed.<sup>193</sup>

The exemption from tort liability for negligence in the performance of, or the failure to perform, discretionary activity is applied to the States by judicial decision and by statute. The exemption is, therefore, in light of the number of jurisdictions recognizing the rule, a significant and widely used defense by the State highway departments to tort suits. Thus, although courts abrogate the defense of sovereign immunity in many States, they often hold simultaneously that the department involved could not be held liable for acts involving judgment and

<sup>187</sup> JAFFE, *supra* note 41, at 218.

<sup>188</sup> *Id.* at 219.

<sup>189</sup> *Id.* at 236.

<sup>190</sup> *Hoy v. Capelli*, 48 N.J. 81, 222 A.2d 649, 654 (1966).

<sup>191</sup> *Burgdorf v. Funder*, 246 Cal. App. 2d 443, 54 Cal. Rptr. 805 (1966).

<sup>192</sup> *Elder v. Anderson*, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

<sup>193</sup> *Pluhowsky v. City of New Haven*, 151 Conn. 337, 197 A.2d 645 (1964); *Shearer v. Hall*, 399 S.W.2d 701 (Ky. 1965).

discretion.<sup>194</sup> A "statutory" modification was in effect written by the New York Court of Appeals in *Weiss v. Fote*,<sup>195</sup> when, in applying Section 8 of the New York Court of Claims Act, which is a general waiver of the State's immunity from suit and liability, it adopted an exception for discretionary activity. It denied to the jury or court the opportunity to second-guess the Board of Safety's determination of a proper clearance interval in a traffic light system.<sup>196</sup>

More frequently the exception or exemption for negligence in the performance or omission to perform discretionary functions has been created by statute. The following representative jurisdictions recognize some kind of discretionary exemption: Alaska, California, Hawaii, Idaho, Iowa, Nebraska, Nevada, New Jersey, Oregon, Texas, Utah, and Vermont.<sup>197</sup> Although these statutes may vary slightly, they are adapted from Section 2680 of the Federal Tort Claims Act,<sup>198</sup> which 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 regulations, whether or not such statute or regulations 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.)

The courts have had considerable difficulty in construing the italicized language, hereinafter referred to as the discretionary function exemption, as it appears in the federal act or comparable state statutes. Insofar as this paper is concerned, a tort claim may arise out of:

1. Negligent planning or design of the public highway by authorized public bodies and officials.
2. Negligence in the execution, implementation, or construction of the highway plan or design.
3. Negligence in the maintenance of the highway after construction is completed.

An analysis of Federal and State cases is presented herein in formulating general rules of immunity for these designated areas of highway operations on the basis of the application of the discretionary func-

<sup>194</sup> See, e.g., *Willis v. Dep't of Conservation and Economic Dev.*, 55 N.J. 534, 264 A.2d 34 (1970) to which the New Jersey legislature quickly responded with the New Jersey Tort Claims Act, N.J. STAT. ANN., § 59:1-1 *et seq.*, which contains the discretionary exemption; see also, *Parish v. Pitts*, 244 Ark. 195, 429 S.W.2d 45 (1968).

<sup>195</sup> 7 N.Y.S.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

<sup>196</sup> A more complete discussion of the *Weiss* case appears in the text at footnotes 126-128, 248-250, and 258-260.

<sup>197</sup> See Appendix A.

<sup>198</sup> 28 U.S.C. § 2680.

tion exemption. That is, which, if any, of the three areas are "discretionary" in nature and immune from liability, remembering that *all* acts are to some degree discretionary.

### Background of Judicial Interpretation of Discretionary Functions

This inquiry into the breadth and meaning of discretionary functions must begin with a discussion of two federal cases that constitute the foundation of the remaining case law: *Dalehite v. United States*<sup>199</sup> and *Indian Towing Co. v. United States*.<sup>200</sup> In *Dalehite*, a test case, 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 \$200,000,000. 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 three weeks, was loaded on two ships destined to 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 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 ship-board loading. The Government contended that the acts in question were protected by the discretionary function exemption of the Federal Tort Claims Act.

The Supreme Court of the United States held that the decisions pertinent to the fertilizer program were discretionary and that 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 operation. Where there is

<sup>199</sup> 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. (1954).

1427 (1953), *reh. den.* 346 U.S. 841, 880, 74 S.Ct. 13, 117, 98 L.Ed. 263, 386, 347 U.S. 924, 74 S.Ct. 511, 98 L.Ed. 1078

<sup>200</sup> 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

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.<sup>201</sup>

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;<sup>202</sup> (b) the need for any further investigation into FGAN's combustibility;<sup>203</sup> (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;<sup>204</sup> and (d) the failure of the Coast Guard to regulate and police the storage of the FGAN in some different fashion.<sup>205</sup>

The rather specific acts of negligence 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."<sup>206</sup> The Court found that the decisions were made with knowledge of the factors and risks involved, were based on previous experience with the materials, and were based on judgment requiring consideration of a vast spectrum of factors. Thus, 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 which later evolved as a widely used test in federal 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."

A dissenting opinion, written by Mr. Justice Jackson, in taking issue with the majority's construction of the term discretionary, argued that the exception is not based on who did the thinking or at what level<sup>207</sup> but on the nature of the discretionary activity. Moreover, the minority said 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. The minority's position that "a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail"<sup>208</sup> is the basis of liability in many tort suits at both the Federal and State level today, because many courts hold that once a decision protected by the exemption has been made, negligence in implementing

<sup>201</sup> 346 U.S. at 35-36.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 36-37.

<sup>204</sup> *Id.* at 38-42.

<sup>205</sup> *Id.* at 42-43.

<sup>206</sup> *Id.* at 40.

<sup>207</sup> The minority stated that it would not predicate liability on whether a decision is taken at "Cabinet level" or at any other "high-altitude."

<sup>208</sup> *Id.* at 58.



that decision is unprotected by the discretionary function exemption.<sup>209</sup> In fact, the Jackson dissenting opinion in *Dalehite* is quoted as much, if not more, than the majority opinion.

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. The test is fairly mechanistic, however, and the result seems to depend in some federal cases on whether the decisions were made at "high altitude." The minority opinion in *Dalehite* suggested that the immunity could not flow downward where there is negligence in the execution of the plan, but the majority held that "the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."<sup>210</sup> As will be seen in *Indian Towing Co. v. United States*<sup>211</sup> the minority view prevailed ultimately, but the Supreme Court has never been called upon to decide precisely whether the operational-planning level dichotomy is a valid test of Section 2680 immunity for discretionary functions or duties.

*Indian Towing*, *supra*, involved a different section of the Federal Tort Claims Act and does not purport to modify the *Dalehite* doctrine, which is labeled in Federal and State courts as the "operational-planning level" test of discretion. In *Indian Towing* the petitioners sought damages under the Federal Tort Claims Act growing out of the alleged negligent operation by the 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 which operated the light and to repair or give warning of the light's failure to operate.<sup>212</sup>

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 decision has 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*

<sup>209</sup> The 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 maintenance 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 has been rejected. See *Indian Towing Co. v. United*

*States*, 350 U.S. 61, 76 S.Ct. 122, 100 L. Ed. 48 (1955). Thus, it does not matter whether the alleged negligence, for purposes of the exemption, occurred during the performance of governmental or proprietary activity.

<sup>210</sup> 346 U.S. at 36.

<sup>211</sup> 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 1065 (1955).

<sup>212</sup> 350 U.S. at 62.

repair the light or give warning that it was not functioning.<sup>213</sup> (Emphasis added.)

A complete analysis and review of federal case law would not serve to formulate a sufficient definition of the distinction between operational and planning level acts. The outcome of cases simply cannot be predicted with certainty. In discussing the operational-planning level dichotomy one federal court explained:<sup>214</sup>

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<sup>215</sup> . . . or to change the course of the Missouri River<sup>216</sup> . . . , or to decide whether or where a post office building should be built<sup>217</sup> . . . 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<sup>218</sup> . . . , or the operation of an air traffic control tower<sup>219</sup> . . . , or whether a handrail should be installed as a safety measure at the United States Post Office in Madison, Wisconsin,<sup>220</sup> involve the exercise of discretion but not the evaluation of policy factors.

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, "looking solely to the echelon of the official rather than to the discretionary nature of his conduct, is useful as a general guide but seems unsound as a conclusive test for application of the exception."<sup>221</sup> Consequently, some circuits question the use of the operational-planning level test, suggesting that this "aid" tends to obscure the meaning of the exception, which is concerned with

<sup>213</sup> *Id.* at 69.

<sup>214</sup> *Swanson v. United States*, 229 F. Supp. 217, 219-220 (N.D. Calif. 1964).

<sup>215</sup> *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962).

<sup>216</sup> *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950).

<sup>217</sup> *American Exchange Bank of Madison, Wisconsin v. United States*, 257 F.2d 938 (7th Cir. 1958).

<sup>218</sup> *Dahlstrom v. United States* 228 F.2d 819 (8th Cir. 1956).

<sup>219</sup> *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955).

<sup>220</sup> *American Exchange Bank of Madison, Wisconsin v. United States*, 257 F.2d 938 (7th Cir. 1958).

<sup>221</sup> 2 JAYSON, HANDLING FEDERAL TORT CLAIMS, § 249.06(1) at pp. 12-70.6-12-71.

the "nature and quality of the discretion involved."<sup>222</sup> In any event, the courts are narrowing the area vested with discretion and immunity partially because of the *Indian Towing* language that, once immune discretion is exercised to perform an act, negligence thereafter in carrying out the task will result in liability.

An analysis of the numerous federal cases suggests several general rules for determining tort liability for negligence in the design, construction, and maintenance of public projects:

1. When the claim arises out of the Government's *decision* to undertake a public works project or a governmental program . . . the discretionary function exemption will apply.
2. When the claim arises out of the *execution* of the public works project or governmental program:
  - (a) if the plan or design itself dictates the specifications, schedules, or details of the operation . . . which, when carefully adhered to, give rise to the claim, the discretionary function exclusion is applicable; but
  - (b) if there is wrongful deviation from, or negligence in carrying out, the design, specifications, schedules, or other details of operation set forth in the overall plan, the discretionary function exemption is *not* applicable;
  - (c) if the overall plan is only general in terms and silent as to detail, there is a conflict of view as to whether the discretionary function exemption applies to a negligently conceived mode of execution. . . . and
3. If the claim arises out of negligence in connection with the operation and maintenance of the public works or program . . . , the discretionary function is *not* applicable.<sup>223</sup>

The following Federal and State highway cases illustrate these conclusions as to the meaning and applicability of the discretionary function exemption to negligence in the design, construction, and maintenance of highways.

#### **Application of Discretionary Function Exemption to Highway Design**

Consistent with the language in *Dalehite* that "it is not a tort for government to govern"<sup>224</sup> it is held generally that (a) the decision to build a highway and (b) the approval of a plan or design of the highway are not actionable. Both are high-level, planning-level decisions involving immune discretionary activity. Courts have been unanimous, moreover, in finding that federal activity in planning or designing public property falls within the discretionary function exemption. Several cases serve to illustrate these points.

<sup>222</sup> *Smith v. U.S.*, 375 F.2d 243, 246 (5th Cir. 1967), *cert. den.* 389 U.S. 841 (1967).

<sup>223</sup> 2 JAYSON, HANDLING FEDERAL TORT

CLAIMS, § 249.06(1) at pp. 12-70.6-12-71.  
<sup>224</sup> 346 U.S. at 57.

### *Approval of Defective Plan or Design*

In *Mahler v. United States*<sup>225</sup> the Court held that federal participation in formulating the plans and approving, after giving due consideration to federal statutory requirements, the design and specifications of a federally aided State highway fell within the discretionary exemption of the Federal Tort Claims Act. Citing the planning-operational dichotomy, the Court wrote that:

The determination by the Secretary of Commerce to approve the plans and specifications for the Penn-Lincoln project, the decision which invited the Federal Government's financial participation, was obviously a policy judgment of the type most important to the success of the federal-aid highway program. It is administrative action requiring the conscious weighing of such factors as location and anticipation of future traffic flow. The same must be said of federal guidance during the pre-approval design stage. As such, we think that these discussions fall on the planning side of the planning-operational distinction drawn in the *Dalehite* case. . . .<sup>226</sup>

Similarly, in *Daniel v. United States*,<sup>227</sup> the federal approval of highway plans and specifications, which included a concrete traffic separator alleged to be of inadequate design, did not constitute operational level negligence. No federal acts aside from design approval were cited by the plaintiffs-appellants. The *Mahler* case was followed also in *Delgadillo v. Elledge*,<sup>228</sup> where the plaintiffs contended that the United States failed to fulfill its duty by failing to provide for and make inspections in connection with adequate signs at an interchange on Interstate 40 after construction was completed.<sup>229</sup> The Court held, however, that the approval of designs and specifications was discretionary and, therefore, immune.

The series of cases concerning federal approval of plans and specifications rely on *Dalehite* and specifically reject the contention that *Indian Towing* nullifies the operational-planning dichotomy.<sup>230</sup> Inasmuch as it was the "exercise of discretion" which was at issue in these cases, it is not clear how the holding in *Indian Towing* would aid the plaintiffs. There were no allegations of federal negligence once the decisions were made approving the plans and specifications. Because the projects

<sup>225</sup> 306 F.2d 713 (3d Cir. 1962). The *Mahler* Court disposed of several other issues before reaching the question presented by the discretionary function exemption.

<sup>226</sup> *Id.* at 723; see also, *In re Silver Bridge Disaster Litigation*, 381 F.Supp. 931 (S.D. W. Va. 1974).

<sup>227</sup> 426 F.2d 281 (5th Cir. 1970).

<sup>228</sup> 337 F.Supp. 827 (E.D. Ark. 1972).

<sup>229</sup> In *Mahler* and *Elledge*, *supra*, the Courts concluded that the federal-aid high-

way acts impose no duty on the federal agencies "to make sure that a member of the traveling public, a user of a federal-aid highway, was not injured because of negligence in carrying out these provisions. The concern of Congress was to make sure that federal funds were effectively employed and not wasted." 306 F.2d at 721. See also, *Meyers v. Pennsylvania*, 94 S.Ct. 1956 (1974), (J. Douglas dissenting).

<sup>230</sup> 306 F.2d at 723; 337 F.Supp. at 833.

appear to have been built in accordance with the approved plan, the cases fall squarely under the *Dalehite* holding that discretionary immunity attaches where the specifications are implemented as directed. Clearly, the decision to undertake action, such as the location and building of a project, is discretionary.<sup>231</sup> Government must be able to govern and to do so public officials must have the freedom to make initial decisions concerning the extent and quality of service to be furnished.<sup>232</sup>

### *Errors or Defects in Plan or Design*

It is not clear, of course, where discretion ends once a highway program is initiated. Where a plan or design contains defects and the road is constructed according to specifications which give rise to injuries, the courts have held that the negligent plan or design is within the discretionary function exemption. In *Sisley v. United States*<sup>233</sup> the plaintiffs charged that a highway had been negligently constructed because of improper grade and the omission of necessary culverts, thereby causing water damage to plaintiffs' property. The Court held that the grading and surfacing of the roadway in strict conformity with the Chief Engineer's design were acts within the discretionary exemption.

Clearly the acts here complained of relating to the planning of the construction of the grade and culverts in the improvement of the Glenn Highway are not negligent acts committed by a Government employee on the "operational level" but are acts calling for the exercise of judgment and discretion in the planning of the highway. Errors in judgment, if such may be found, are not negligence in construction. These plans were the result of policy judgment and decision and as we have noted, where there is room for such there is discretion. This view conforms to what is believed to be the true intent of this important exception. Otherwise the Government would be liable to a property owner for every error of judgment in the planning and construction of public roads.<sup>234</sup>

The *Sisley* holding is consistent with other decisions, though not involving a statutory exemption for discretionary action, that errors or defects in highway design are not actionable. Thus, before the enactment of the New Jersey Tort Claims Act,<sup>235</sup> the New Jersey courts had held that errors of judgment in the plan or design of the highway or the omission of some feature in the plan or design itself were not actionable. It was held, for example, that the decision to omit emergency shoulders on a highway fell within the area of nonactionable discretion,<sup>236</sup> as was

<sup>231</sup>American Exchange Bank of Madison v. United States, 257 F.2d 938, 941 (7th Cir. 1958). See cases cited in 2 JAYSON, HANDLING FEDERAL TORT CLAIMS, § 249.06 (2).

<sup>232</sup>Amelchenko v. Freehold Borough, 42

N.J. 541, 201 A.2d 726, 730 (1964).

<sup>233</sup>202 F.Supp. 273 (D. Alaska 1962).

<sup>234</sup>*Id.* at 275.

<sup>235</sup>N.J. STAT. ANN. tit. 59, § 1 *et seq.*

<sup>236</sup>Hughes v. County of Burlington, 99 N.J. Super. 409, 240 A.2d 177 (1968).

the decision by the State not to design its overpasses with wire fences.<sup>237</sup> In New York the decision as to the proper clearance interval in a traffic light system was held to be discretionary governmental planning or quasi-legislative activity.<sup>238</sup>

A contrary view is stated in *State v. Webster*<sup>239</sup> where a motorist struck a horse that had escaped from a pasture located near an unguarded entrance to the highway. The State claimed immunity on the ground that the failure to install a cattle guard at the point where the highway joined the controlled-access freeway was an act of discretion. The Court held, however, that once the State exercises its discretion to build the highway, it is obligated to use due care to make certain that the freeway meets standards of reasonable safety. The State can be held liable if the plan or design decision is viewed as an operational level instead of a planning level act. There is no discussion in the case as to the person or level of State government charged with the responsibility of planning an intersection such as this one. Nor did the Court discuss the nature of the decision and whether there were policy matters considered in the omission of this cattle guard. Although the Nevada Court stated that the omission "is the type of operational function of government not exempt from liability," the decision appears to rest more squarely on the holding in *Indian Towing* that once immune discretion is exercised, negligence thereafter will result in liability.<sup>240</sup>

### *Design Immunity Statutes*

States, in addition to adopting a discretionary function exemption, have sought to give further impetus to the rule that the preparation and approval of the plan or design of the highway is not actionable for injuries resulting therefrom. For instance, California's governmental immunity act embraces plan or design immunity. A public entity is immune from liability for an injury caused by the plan or design of a public project where it was approved in advance by a public body or employee exercising discretionary authority to give approval if there is any substantial evidence upon which a reasonable employee or public body could have approved the plan or design.<sup>241</sup> The New Jersey plan or design immunity statute<sup>242</sup> 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

<sup>237</sup> *Fitzgerald v. Palmer*, 47 N.J. 106, 219 A.2d 512 (1966).

<sup>238</sup> *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

<sup>239</sup> 504 P.2d 1316 (Nev. 1972).

<sup>240</sup> *Id.* at 1319.

<sup>241</sup> See CAL GOV'T CODE § 830.6.

<sup>242</sup> N.J. STAT. ANN. tit. 59, § 4-6.



authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

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 counterpart simply requires approval by one exercising discretionary authority to give such approval.

The design immunity statutes are based either on the prevailing, pre-existing common law of the jurisdiction or on what is thought to be the rule in other jurisdictions. For example, the New Jersey design immunity statute is founded, first, on the proposition that in New Jersey "approval of plans or designs is peculiarly a function of the executive or legislative branch of government and is an example of the type of highly discretionary governmental activity which the courts have recognized should not be subject to the threat of tort liability,"<sup>243</sup> and, second, on similar immunity provided by judicial decision in New York<sup>244</sup> or by statute in California.<sup>245</sup> Moreover, the discretionary function exemption in the New Jersey Tort Claims Act recognizes the operational-planning-level dichotomy in immunizing high-level decisions calling for the exercise of official judgment or discretion.<sup>246</sup> But the comment recognizes as well that there are exceptions to immunity where the determination of priorities is "palpably unreasonable" or where a public entity, in choosing to act, does so "in a manner short of ordinary prudence";<sup>247</sup> however, these exceptions are not exceptions stated in the statute, which requires only that there be advance approval by one exercising discretionary authority.

Because the State statutes are based on judicial decisions regarding the discretionary activities of government, it is possible to suggest future exceptions to immunity from liability for errors in the plan or design of highways. For example, since many States have design immunity comparable to that granted by *Weiss v. Fote*,<sup>248</sup> the plan or design immunity granted may not be as complete as desired. *Weiss* suggests that the public entity will not be immunized for negligence in the plan or design of the highway (1) where the plan or design has not been duly considered; (2) where there is no evidence that due care was exercised in the preparation of the design; (3) where no reasonable official could have adopted the plan; or (4) where approval of the plan was arbitrary.<sup>249</sup> Thus, any design immunity statute, unless legislative intent is clearly stated, could be judicially embellished with the fore-

<sup>243</sup> See Comment, N.J. STAT. ANN. tit. 59, § 4-6, citing *Fitzgerald v. Palmer*, 47 N.J. 106, 110, 219 A.2d 512 (1966) and *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177 (1968).

<sup>244</sup> *Id.*, citing *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960).

<sup>245</sup> *Id.*, citing CAL. GOV'T CODE § 830.6.

<sup>246</sup> See Comment, N.J. STAT. ANN., tit. 59, § 2-3.

<sup>247</sup> *Id.*

<sup>248</sup> 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960).

<sup>249</sup> *Id.* at 66.

going exceptions to immunity. Finally, a fifth exception might be annexed to a statute purporting to adopt the rule in *Weiss v. Fote*: the duty to continually review the plan or design once it is in actual operation.<sup>250</sup>

Another exception to design immunity is presented where the highway in actual use has a design feature that was not approved in the over-all plan or design of the highway. In *Cameron v. State*,<sup>251</sup> plaintiff's automobile went out of control on an S-curve, which the Court found to be a dangerous condition because of the uneven superelevation. It was held that the California design immunity statute, although proper approval was demonstrated, did not immunize the State even though it claimed that the uneven superelevation was part of a duly approved design or plan of the highway.<sup>252</sup> 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 section 830.6."<sup>253</sup> Other exceptions to the general view that planning and designing of highways are immune could exist (1) where either the defect is so great or so manifest that it might be held to be dangerous as a matter of law,<sup>254</sup> or (2) where the highway is defective from the outset or the defect originates shortly after project completion.<sup>255</sup> The basis of the latter exception, however, appears to be that the plan was negligently executed or implemented although in accordance with the plan.<sup>256</sup>

### *Duty to Improve 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.<sup>257</sup> A question arises, however, as to the duty of the State to improve or change an existing highway where actual use or changed circumstances some time later indicate that the highway design is no longer satisfactory. That is, is the design immunity discussed previously perpetual? Already some exceptions to design immunity have been shown, such as where the design creates peril from

<sup>250</sup> *Id.* at 67.

<sup>251</sup> 102 Cal. Rptr. 305, 497 P.2d 777 (1972).

<sup>252</sup> *Id.* at 781.

<sup>253</sup> *Id.* at 782. Even had the State not been liable because of § 830.6, liability could still be imposed for failure to provide warning signs as required by CAL. GOV'T CODE § 830.8. *Id.* at 783.

<sup>254</sup> *Swain v. Nashville*, 92 S.W.2d 405 (Tenn. 1936); *Fitzgerald v. Palmer*, 47 N.J. 106, 219 A.2d 512 (1966).

<sup>255</sup> *Perrotti v. Bennett*, 94 Conn. 533, 109 A. 890, 892 (1920).

<sup>256</sup> *Id.*

<sup>257</sup> *Kaufman v. State*, 27 A.D.2d 587, 275 N.Y.S.2d 757 (1966).

the very beginning, where there is some manifest danger in the design which becomes known to the State, or where the design lacked any reasonable basis or was not prepared with due care.

The rule is not clear whether the State has a continuing duty to review the plan or design in the light of actual operation. The principal case relied upon in many jurisdictions including New York against perpetuity of design immunity is *Weiss v. Fote*.<sup>258</sup> The *Weiss* Court seemed to recognize a rule, although the issue was not squarely presented, that the State, once having adopted and implemented a highway plan or design, was under a continuing duty to review the plan in the light of its actual operation.<sup>259</sup> However, no ruling on that point was required in *Weiss*, because there was no proof either of changed conditions or of accidents at the intersection which required the city to modify the traffic light "clearance interval."<sup>260</sup>

The *Weiss* dictum was ultimately applied in California in the case of *Baldwin v. State*,<sup>261</sup> which emasculated the design immunity protection afforded by Section 830.6 of the California Government Code. That statute, as noted, provides for design immunity where a court determines that the approval of the plan or design was reasonable at the time of approval. Relying on *Weiss*, *Baldwin* held that the omission of a left-turn lane, which the State later knew was dangerous in actual practice, was not immunized by Section 830.6. 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, although initial immunity could have attached because the plan was reasonable and duly approved, that 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 blueprints, 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.<sup>262</sup>

<sup>258</sup> 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960). In *Weiss* the issue was the reasonableness of the clearance interval in a traffic light that had been approved by the Board of Safety after ample study and traffic checks. The Court held that the State's general waiver of immunity did not extend to areas of lawfully authorized planning and that it would be improper to submit to a jury the reasonableness of the plan approved by an expert body. The only circumstances that would permit the matter to go to the jury would be where due care was not exercised in the

preparation of the design or if it appeared that no reasonable official could have adopted it. *Id.* at 66.

<sup>259</sup> *Id.* at 67.

<sup>260</sup> *Id.* citing *Eastman v. State of New York*, 303 N.E.2d 56 (1951).

<sup>261</sup> 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (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).

<sup>262</sup> 491 P.2d at 1127.

The Court concluded that permitting a jury to consider the question of perpetuity 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 were the jury allowed to pass upon the reasonableness of the original plan or design.<sup>263</sup> It may be noted that the mere passage of time is insufficient to constitute a change in conditions.<sup>264</sup>

The rule of other jurisdictions is that the plan or design is to be judged by standards existing at the time of the approval of the plan or design, unless there was a manifest danger present in the design at the time of its execution or implementation.<sup>265</sup> Where, however, a thruway was built in accordance with plans and specifications and good engineering practices at the time and supported a large volume of traffic with a relatively small number of accidents thereon, the Court concluded that the State had complied with its obligation to provide a reasonably safe roadway.<sup>266</sup> The change in circumstances must be such that the failure of the State to act is not reasonable under the circumstances. Thus, in *Kaufman v. State*,<sup>267</sup> the Court stated that where the road complied with standards applicable when the road was built in 1921, the State was not required to rebuild the road at the alleged point of negligent construction unless the curve could not be negotiated at a moderate speed. Moreover, a decision, after recommendations and restudy of an original design by the authorized body in the light of expert opinion then available, not to erect barriers is not actionable negligence. "Error of judgment alone does not carry liability with it, for error of judgment alone is consistent with reasonable care."<sup>268</sup>

Finally, in New Jersey the legislature has stated that plan or design immunity is perpetual. The design immunity statute does not invite the court's determination whether the approval of the plan or design was reasonable, but provides for immunity where the plan or design has been previously approved by some public body or employee "exercising discretionary authority."<sup>269</sup> According to a Comment appended to the section:

It is intended that the plan or design immunity provided in this section be perpetual. That is, once the immunity attaches no subsequent event or change of conditions shall render a public entity liable on the theory that the existing plan or design of public property constitutes a dangerous condition. After several years of difficulty with this immunity in California, the California Supreme Court adopted a contrary approach

<sup>263</sup> *Id.* at 1128.

<sup>264</sup> *Cameron v. State*, 102 Cal. Rptr. 305, 497 P.2d 777, 782, Note 10 (1972).

<sup>265</sup> *Hampton v. State*, 209 Kan. 565, 498 P.2d 236 (1972); see text at footnotes 148-157, *supra*.

<sup>266</sup> *Warda v. State*, 45 Misc. 2d 385, 256

N.Y.S.2d 1007 (1964).

<sup>267</sup> 27 A.D.2d 587, 275 N.Y.S.2d 757 (1966).

<sup>268</sup> *Natina v. Westchester County Park Comm'n*, 49 Misc. 2d 573, 268 N.Y.S.2d 414 (1966).

<sup>269</sup> N.J. STAT. ANN., tit. 59, § 4-6.

and concluded that plan or design immunity was not perpetual in California. After consideration, this approach has been specifically rejected as unrealistic with the thesis of discretionary immunity—that a coordinate branch of government should not be second-guessed by the judiciary for high-level policy decisions.<sup>270</sup>

Thus, the New Jersey position appears to be that (1) plan or design immunity does not lapse when changed circumstances surrounding the original plan or design result in a dangerous condition and (2) that any governmental response to said known change in circumstances is itself an exercise of discretion. One can only speculate whether New Jersey courts, in spite of the foregoing Comments, will construe the design immunity statute to have the same requirements for immunity as provided in New York by *Weiss v. Fote*; e.g., the requirement of reasonableness and the duty to continually review the plan or design once it is in operation.

#### **Application of Discretionary Function Exemption to Construction and Maintenance of State Highways**

##### *Construction*

The negligent construction of State highways, or the negligent execution of the plan or design of the highway under the *Dalehite* rule, where the plan or design specifies minute details of the project that are carefully adhered to, would be protected by a discretionary function exemption. However, a project executed in a manner that deviates from the specifications would not be immunized under the rule in *Indian Towing*. If the plan or design did not specify a certain detail which is, nonetheless, implemented and done so negligently, probably the court will decide the case on the basis of whether or not the decision involved was a planning or an operational-level decision.<sup>271</sup> Thus, in *United States v. Hunsucker*<sup>272</sup> a high-level decision was made by the United States Air Force to activate and make certain improvements to an air base, but the directive authorizing construction on the base did not specifically authorize the acts and omissions that caused the damage to the plaintiffs' land. The negligence in implementing the overall, general plan was, therefore, committed on the operational level and not immunized by the discretionary function exemption.

The negligent execution of a policy-level decision was not immunized by the discretionary function exemption in the Alaska Tort Claims

<sup>270</sup> See Comment—1974, N.J. STAT. ANN. tit. 59, § 4-6.

<sup>271</sup> See the discussion of federal cases in 2 JAYSON, HANDLING FEDERAL TORT CLAIMS, § 249.06 (5).

<sup>272</sup> 314 F.2d 98 (9th Cir. 1962). *Com-*

*pare*, Dalphin Gardens v. United States, 243 F.Supp. 824 (D. Conn. 1965) in which the Court saw no difference between the decision to dredge, clearly discretionary, and the decision as to where to deposit the silt inasmuch as time was of the essence.

Act<sup>273</sup> in the case of *State v. Abbott*.<sup>274</sup> Plaintiff alleged that the State was negligent in the design, construction, and maintenance of a State highway. Plaintiff was severely injured when the car in which she was riding skidded out of control on a sharp curve and struck an oncoming truck. The road at the time was covered with ice, was very slippery, and according to testimony at trial, had not been properly sanded in accordance with the State's standard operating procedures.

After reviewing the history of the similar discretionary function exemption in the Federal Tort Claims Act and concluding that *Dalehite* has been restricted in meaning by *Indian Towing*, the Court decided that the State's negligence was not immunized by the Alaska discretionary function exemption.<sup>275</sup> The Court held that once the State made the decision to provide winter maintenance, the program could not be implemented negligently.

Once the initial policy determination is made to maintain the highway through the winter by melting, sanding, and plowing it, 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.<sup>276</sup>

The *Abbott* decision rests not only on the basis (1) that there was negligence in implementing the initial policy decision to provide winter maintenance but also on the basis (2) that the failure to follow standard operating procedures was negligence at the maintenance, or operational, level.<sup>277</sup>

The *Abbott* case, in discussing the federal precedents, recognized that the day-to-day "housekeeping" functions (ministerial duties) are generally not discretionary,<sup>278</sup> that immunity obtains only where there is a deliberate choice in formulation of policy wherein factors of financial, economic, and social effects of a given plan are evaluated,<sup>279</sup> and that highway maintenance is generally not within the discretionary exemption. Most importantly, the Court accepted *Indian Towing's* more liberal view of the Federal Tort Claims Act, that once discretion is exercised to perform a function, there is no discretion to perform it negligently.<sup>280</sup> Also, the Court reasoned that the holding in *Indian*

<sup>273</sup> ALASKA STAT. § 09.50.250.

<sup>274</sup> 498 P.2d 712 (Alaska 1972).

<sup>275</sup> *Id.* at 717 to 722.

<sup>276</sup> *Id.* at 722.

<sup>277</sup> *Id.* Note 30.

<sup>278</sup> *Id.* at 720.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 719. The *Abbott* court rejected the State's argument that it should not be liable for injuries resulting from



*Towing* limited the language in *Dalehite* because immunity does not extend to subordinates negligently executing policies formulated by officials exercising discretion at the planning level.<sup>281</sup>

### *Maintenance*

The *Abbott* case may be considered a negligent maintenance case as well as one of negligent execution of policy. It assumes that the day-to-day operations of government are ministerial in nature and on the operational level; that is, "housekeeping" functions which are not protected by the discretionary function exemption. One authority states that the "application of the discretionary function exclusion to a claim based on the negligent operation or maintenance of a public works project like a dam or reservoir or building of a highway depends in the last analysis upon whether the immune discretion exercised in having it built has been exhausted."<sup>282</sup> This general rule is based on the holding in *Indian Towing* noted previously. The *Abbott* ruling could be said to rest on a similar concept because the Court held that once the discretion had been exercised to sand icy roads no discretion remained to perform the program negligently.

The only cases located which involve the construction of a discretionary function exemption in the context of alleged highway maintenance do not raise any point regarding the exhaustion of residual discretion. Rather, the cases assume that maintenance decisions of whatever kind are low-level operational decisions.

*Road Signs and Center-Line Striping.*—In *Rogers v. State*,<sup>283</sup> plaintiff was misled into thinking that the main highway went to the left because of the surface appearance of the roads, center-line stripings, road signs, and route numbers as he approached the intersection. In particular, it was alleged that the pavement's coloration, the leftward curve of the center-line stripings, and the placement of three signs too near the intersection were the proximate cause of the accident.

The State argued that its negligence in locating the road signs and restriping the center line was not actionable under the discretionary function exemption of the Hawaii Tort Claims Act:<sup>284</sup>

The State's position in connection with its contention is that discretion on the part of a state employee is involved in the placement of road signs and restriping of pavements in that road signs are placed after the district maintenance engineer has made a visual inspection and has determined where and how they are to be placed, and center lines are restriped after the engineer has taken into consideration such factors as the geo-

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natural accumulation of ice and snow and held that the State would be subject to the ordinary negligence standard of reasonable care under the circumstances.

<sup>281</sup> *Id.*

<sup>282</sup> 2 JAYSON, HANDLING FEDERAL TORT CLAIMS, § 349.06(5), p. 12-83, and cases cited therein.

<sup>283</sup> 459 P.2d 378 (Ha. 1969).

<sup>284</sup> HAWAII REV. STAT. § 662-15(1).

graphical area involved, the amount of rain, and the volume of traffic in the area.<sup>285</sup>

The Court held that the foregoing decisions were not immunized and that they were operational-level acts concerning routine, everyday matters, not requiring the evaluation of broad policy factors.<sup>286</sup> These decisions, involving the implementation of decisions "made in everyday operation of governmental affairs," did not fall within the meaning of the discretionary function exemption.<sup>287</sup>

*Culverts.*—In *Rodriques v. State*,<sup>288</sup> the plaintiffs' property was damaged as the result of a clogged culvert found to have been negligently maintained by the State highway department. In holding that the maintenance of a culvert was not discretionary because it was an operational-level governmental operation, the Court distinguished other cases on the basis that they held that the design of a culvert was a planning-level decision.<sup>289</sup>

*Barriers.*—In *Carroll v. State*,<sup>290</sup> earthen berms or barriers, without other warning, had been used to block a portion of an old road from which culverts had been removed. These berms had "disappeared" by the time of the accident. The Court held that the maintenance supervisor's decision to use berms rather than signs was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective, but should be "characterized as one at the operational level of decision making."<sup>291</sup>

*Snow and Ice Removal.*—*State v. Abbott*, *supra*, holds that decisions concerning the implementation of snow and ice removal procedures involving the allocation of men and materials were operational-level, routine governmental decisions and that negligence in performing same is not immunized by a discretionary function exemption.

### *Maintenance Planning*

The foregoing cases hold that decisions, although an exercise of some discretion, are not in the planning-level category either, because they are made at the operational level or because they do not involve an evaluation of policies. The companion paper on personal liability (Vol. 3, Ch. VIII, p. 1835 *infra*) demonstrates that at common law maintenance activity requiring planning and decision making as to the allocation of time, materials, or personnel may be held discretionary; however, once maintenance planning decisions are made, and consequent affirmative acts are undertaken negligently, routine performance of maintenance requirements is not discretionary.

<sup>285</sup> 459 P.2d at 380.

<sup>286</sup> *Id.* at 381.

<sup>287</sup> *Id.* at 381-382.

<sup>288</sup> 472 P.2d 509 (Ha. 1970).

<sup>289</sup> *Compare* Valley Cattle Co. v. United States, 258 F.Supp. 12 (D. Ha. 1966).

<sup>290</sup> 27 Utah 2d 384, 496 P.2d 888 (1972).

<sup>291</sup> *Id.* at 891-892.

No support for any exemption for maintenance planning has been found where the courts were applying a statutory discretionary function exemption. Nevertheless, the defense attorney will want to consider the cases discussed in the companion paper on personal liability in developing an argument that maintenance planning is discretionary. In addition, there are several nonhighway cases that demonstrate discretionary acts performed at the operational level.<sup>292</sup>

Certainly, in *Spillway Marina, Inc. v. United States*<sup>293</sup> the decisions made at the operational level were not high-level policy decisions, yet the acts in question were still immunized. The marina was damaged by the drawdown of the water level of a reservoir in Kansas, a project of the Army Corps of Engineers. In order to make additional improvements to the reservoir, the already low water level was lowered further, causing damage to the marina. The Government contended that the decision to draw down the reservoir was discretionary, and the Court agreed. Interestingly, the Court noted that the "duty to repair, or to give warning, when a directional light fails is within the concept of negligence at the operational level."<sup>294</sup> However, the Court held:

The case at bar presents a different situation. 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.<sup>295</sup>

Moreover, the Court noted as a matter of common knowledge that the drawdown decision depends on a great number of variable factors, such as navigation conditions and needs, irrigation requirements, and rainfall.<sup>296</sup>

Only one statute has been located which could be construed to recognize a distinction between maintenance planning and the routine performance of maintenance duties. The recently enacted New Jersey Tort Claims Act<sup>297</sup> provides

. . . that 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

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<sup>292</sup> See, e.g., *Lauterbach v. United States*, 95 F. Supp. 479 (N.D. Wash. 1951); *Olson v. United States*, 93 F.Supp. 150 (D. N.D. 1950); *Konecny v. United States*, 388 F.2d 59 (8th Cir. 1967); and *Toledo v. United States*, 95 F.Supp. 838 (D. P. R. 1951).

<sup>293</sup> 445 F.2d 876 (10th Cir. 1971).

<sup>294</sup> *Id.* at 878.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> N.J. STAT. ANN., § 59:1 *et seq.*

or omissions of its employees in carrying out their ministerial functions.<sup>298</sup>

It is an open question whether this statute immunizes decisions at the operational level allocating men, material, and equipment. Although the section on discretionary exemptions appears aimed at immunizing "high-level" decisions, the last sentence of subsection (d) of the New Jersey Tort Claims Act suggests that liability may attach to allocation decisions only (1) where they were "palpably unreasonable" or (2) where negligence is committed in the performance of a ministerial duty. Thus, this section could be read to immunize decisions allocating men and materials, whether exercised at the planning or operational level, unless palpably unreasonable. Said immunity would attach until the discretion is exhausted, leaving only a clearly defined task (ministerial duty) for which liability could be imposed for negligence.

The defense attorney, when confronted with a claim arising out of maintenance-level activity, may want to argue that planning at the operational level is directly related to the planning objectives chosen at the planning level, that these operational-level decisions call for an evaluation of many factors, and that maintenance planning is distinguishable from maintenance undertaken in actual repair or erection of warning devices which are strictly ministerial functions.<sup>299</sup>

## CONCLUSION

The matter of tort liability of State highway departments for design, construction, and maintenance negligence has received varying treatment by the courts. In some jurisdictions the State cannot be sued without its consent; in others suit may be instituted only in the manner prescribed by statute, often before a special tribunal; and in still others suit may be authorized only where the highway negligence falls within the ambit of some special highway statute creating liability for breach of duty.

Although the laws of some jurisdictions permit tort suits of this nature based on general negligence principles as if the State were a private person or corporation, the prevailing trend is to authorize suit only as set forth by the legislature in a tort claims act. These acts typically include an exemption from liability for negligence in the performance, or failure to perform, discretionary activities. Where highway operations are at issue, the question often becomes whether the activity or decision involved falls within the exemption from liability for discretionary functions or duties.

<sup>298</sup> *Id.*, § 59:2-3(d).

<sup>299</sup> See cases and discussion on maintenance planning in the companion paper

on personal liability (Vol. 3, Ch. VIII, p. 1835 *infra*).

The cases are fairly uniform in holding that the design of a highway is discretionary because it involves high-level planning activity with the evaluation of policies and factors. This conclusion, moreover, is supported further by the decisions, not concerned directly with a discretionary function exemption, which, nonetheless, hold that design functions are quasi-legislative in nature and must be protected from "second guessing" by the courts, which are inexperienced at making such decisions. Design immunity statutes represent a further effort by legislatures to immunize governmental bodies and employees from liability arising out of negligence or errors in a plan or design where the same was duly approved under current standards of reasonable safety.

The courts have noted exceptions to design immunity: (1) where the approval of a plan or design was arbitrary, unreasonable, or made without adequate consideration; (2) where a plan or design was prepared without adequate care; (3) where it contained an inherent, manifestly dangerous defect or was defective from the very beginning of actual use; or (4) where changed conditions demonstrate the need for additional or remedial State action.

Negligent construction is not likely to be immunized by reason of the discretionary function exemption, particularly where the construction deviates from the approved plan or design or there is negligence in implementing the plan or design, such as by introducing a feature never considered in the design phase. Construction negligence might be immunized where the plan or design specifies in elaborate detail how a feature is to be completed.

Negligent maintenance is least likely to be immune from liability. Courts are prone to consider this phase of highway operations as involving routine housekeeping functions necessary in the performance of normal day-to-day government administration. Maintenance of highways is exercised at the operational level, and even though discretion to some extent is involved, the discretionary decisions to be made are not policy-oriented.

These conclusions are based on the available relevant highway cases as well as cases in related fields. Nevertheless, there are exceptions to all rules, and the answer to any given situation depends on the application of legal principles, which have been discussed herein, to the facts of the individual case.

## APPENDIX A

STATE TORT LIABILITY ACCORDING TO CONSTITUTIONAL OR  
STATUTORY PROVISIONS OR JUDICIAL DECISIONS

The material cited and quoted herein is meant to be illustrative only. Other important exceptions, limitations, or court decisions may be pertinent to an individual case.

## ALABAMA

ALA. CONST., art. 1, § 14 provides that "the State of Alabama shall never be made a defendant in any court of law or equity." This provision embraces the State highway department. *Barlowe v. Employers Ins. Co.*, 237 Ala. 665, 188 So. 896 (1939); *Employers Insurance Co. v. Harrison*, 250 Ala. 116, 33 So. 2d 264 (1947). However, a Board of Adjustment is created in CODE OF ALA., Tit. 12 § 333 *et seq.* which has the duty of hearing and considering all claims for damages to the person or property growing out of any injury done to either the person or property by the State of Alabama or any of its agencies, commissions, or boards. CODE OF ALA., Tit. 55, § 334.

## ALASKA

ALASKA STAT. § 09.50.250 provides that:

A person or corporation having a . . . tort claim against the state may bring an action against the state. . . . However, no action may be brought under this section if the claim (1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.

## ARIZONA

*Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963) abolished the immunity of the State from suit and liability for tortious conduct of its officers and employees. Apparently, the Arizona legislature has reinstituted immunity only to a partial extent in ARIZ. REV. STAT., tit. 26, § 314 for discretionary acts in carrying out matters of civil defense.

## ARKANSAS

ARK. CONST., art. 5 § 20 provides that the "State of Arkansas shall never be made a defendant in any of her courts." The State Highway Commission cannot be sued, and this immunity cannot be waived even by the legislature. See *Bryant v. Arkansas State Highway Comm'n*, 233 Ark. 41, 342 S.W.2d 415 (1961). A State Claims Commission is created in ARK. STAT. ANN., § 13-1401 *et seq.* which has "exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments and institutions." In *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968) it was held that municipalities did not partake of the State's constitutionally granted immunity, yet no action would lie for acts involving judgment and discretion.

## CALIFORNIA

CALIF. GOV'T CODE §§ 810-996.6 is an exhaustive statute setting forth the rights and remedies for claims against public entities and employees. According to § 815, "except as otherwise provided by statute, (a) A public entity is not liable for an injury, whether



such injury arises out of an act or omission of the public entity or a public employee or any other person. (b) The liability of a public entity established by this part is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." Thus, immunity is the rule and the court must look to the statute for exceptions in determining liability. *Sava v. Fuller*, 249 Calif. App. 2d 281, 57 Cal. Rptr. 312 (1967).

Sections 815.2 and 820.2 should be read together. Section 815.2(a) provides that: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against the employee or his personal representative." Section 815.2(b) provides that: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." An exception also is contained in § 820.2 where it states that: "Except as otherwise provided by statute, 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." According to the decisions, the classification of the act of a public employee as "discretionary" will not produce immunity under CALIF. GOV'T CODE § 820.2, if the injury to another results not from the employee's exercise of "discretion vested in him" to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so. See *McCorkle v. Los Angeles*, 70 Calif. 2d 252, 74 Cal. Rptr. 389, 449 P.2d 453 (1969).

CALIF. GOV'T CODE, § 830 *et seq.* provides for liability for "dangerous conditions" with certain exceptions, among others, for minor, trivial, or insubstantial risks, and failure to provide traffic control signals or signs.

The Code contains in § 830.6 a measure of immunity for the plan or design of public construction or improvements: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or Appellate Court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

## COLORADO

COLO. REV. STAT. § 24-10-106(d) provides that sovereign immunity will not be asserted as a defense by a public entity in an action for damages for injuries resulting from:

A dangerous condition which interferes with the movement of traffic on the traveled portion and shoulders or curbs of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any paved highway which is a part of the federal secondary highway system, or of any paved highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon.

## CONNECTICUT

CONN. GEN. STAT. tit. 13a, § 144 provides that: "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. . . ."

#### DELAWARE

DEL. CONST. art. 1, § 9 provides: "Suits may be brought against the State, according to such regulations as shall be made by law." It has been held that the courts cannot alter the doctrine of immunity rooted in the Delaware Constitution, which can be waived only by the legislature. See *Pipkin v. Dep't of Highways*, 316 A.2d 236 (Del. Super. 1974). See 18 DEL. CODE ANN. § 6501 *et seq.* entitled "Insurance for the Protection of the State." Section 6511 provides that "the defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance program. . . ." It is implicit that there will be no waiver until there is a program. *Raughley v. Dep't of Health & Social Services*, 274 A.2d 702 (Del. Super. Ct. 1971). On immunity for discretionary action undertaken by the State Highway Department in Delaware, see *High v. State Highway Dep't*, 307 A.2d 799 (Del. 1973).

#### FLORIDA

FLA. CONST., art. 10, § 13. "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

FLA. STAT. ANN. § 768.28, effective January 1, 1975, provides for a waiver of "immunity for liability for torts, but only to the extent specified in the Act." The Act provides that there may be liability generally for the acts of employees within the scope of their employment to the same extent as if the State were a private person, but there is a monetary limit on recoveries.

#### GEORGIA

*Trice v. Wilson*, 113 Ga. App. 715, 149 S.E.2d 530, *cert. den.* 113 Ga. App. 888 (1966), held that the State of Georgia has never renounced its sovereign immunity from liability for the negligent or other tortious acts or conduct of its officers, agents or employees. However, GA. CONST., art. VI, § II, par. X authorizes the legislature to create a State Court of Claims "with jurisdiction to try and dispose of cases involving claims for injury or damage, except the taking of private property for public purposes, against the State of Georgia, its agencies or political subdivisions, as the General Assembly may provide by law."

#### HAWAII

HAWAII REV. STAT., State Tort Liability Act, § 662-1 *et seq.* Section 662-2 provides: "The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual. . . ." The discretionary duty or function exemption, similar to the Federal Tort Claims Act, is set forth in § 662-15.

#### IDAHO

IDAHO CODE, Tort Claims Against Government Entities, § 6-901, applies to the State and its agencies (§ 6-902) and contains an exception to liability where a claim is based on an employee's exercise or failure to exercise a discretionary duty or function (§ 6-904).

#### ILLINOIS

The Illinois Court of Claims hears claims against the State and applies general rules of negligence law. See ILL. ANN. STAT., Ch. 37, § 439.1 *et seq.* § 439.8 provides: "The court shall have exclusive jurisdiction to hear and determine the following matters:

(d) all claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation."

#### INDIANA

IND. CONST., art. 4, § 24 provides: "Provision may be made, by general law, for bringing suit against the state, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

However, *Perkins v. State*, 252 Ind. 531, 18 Ind. Dec. 555, 251 N.E.2d 9 (1969), held that this section of the State Constitution does not provide that the state is immune from suit, but rather that the doctrine of such immunity is based on the English common law which can change; thus, the State may be held liable for injuries resulting from proprietary functions. Then, *State v. Daley*, 32 Ind. Dec. 595, 287 N.E.2d 552 (1972) held that the State of Indiana was no longer immune from liability with respect to tort liability in the area of maintenance and repair of State highways. According to *State v. Turner*, 32 Ind. Dec. 409, 286 N.E.2d 697 (1972) (overruling *Knott v. State*, 27 Ind. Dec. 425, 274 N.E.2d 400), since the common law doctrine of sovereign immunity is no longer in force in Indiana, the State is liable and may be sued for its torts committed in the exercise of either governmental or proprietary functions. *Turner* held that the State was therefore not immune from liability for damages caused by negligent operation of a State highway truck that collided with plaintiff's vehicle.

#### IOWA

IOWA CODE ANN. § 25A. 1 *et seq.* sets forth the State Tort Claims Act with a discretionary function exemption contained in § 25 A. 14.

#### KANSAS

KAN. STAT. ANN. § 68-419 provides:

(a) Any person who shall without negligence on his part sustain damage by reason of any defective bridge or culvert on, or defect in a state highway, not within an incorporated city, may recover such damages from the state. . . .

(b) Neither the state or the state highway commission or any member thereof, or any officer or employee of the state or the state highway commission, shall be liable to any person for any injury or damage caused by the plan or design of any highway, bridge, or culvert or of any addition or improvement thereto, where such plan or design, including the signings or markings of said highway, bridge or culvert, or of any addition or improvement thereto, was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared.

#### KENTUCKY

KY. REV. STAT. § 44.070 (1) creates a Board of Claims which is vested with "full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its departments or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its departments or agencies. . . ." The board has exclusive jurisdiction over tort claims against the Commonwealth. See, e.g., *Derry v. Roadway Express*, 248 F. Supp. 843 (E.D. Ky. 1965).

#### LOUISIANA

The State Highway Department has waived immunity from suit and liability for all actions. *Bazanac v. State, Dep't of Highways*, 231 So.2d 373, 255 La. 418 (1970). The

Highway Department, which by LA. CODE ANN.—REV. STAT., 48:22 had authority to “sue and be sued, implead and be impleaded” did not enjoy governmental immunity from suit.

Louisiana abolished sovereign immunity for State agencies in *Board of Comm’rs v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973); see discussion in *Governmental Immunity: The End of “King’s X,”* 34 LOUISIANA L. REV. 69 (1973).

## MAINE

ME. REV. STAT. ANN. 23 § 1451 limits liability of the State to reimbursement of counties and towns where held liable for defects pertaining to State aided highways. See ME. REV. STAT. ANN., 23 § 3655 regarding liability for “defect or want of repair.” *Nelson v. Maine Turnpike Authority*, 157 Me. 174, 170 A.2d 687 (1961), held that sovereign immunity from State tort liability is still the rule in Maine. For a discussion of State tort liability in Maine, see 16 MAINE L. REV. 209 (1964).

## MARYLAND

Doctrine of sovereign immunity prevails as at common law. See *Jekofsky v. State Roads Comm’n*, 264 Md. 471, 287 A.2d 40 (1972), in which claim was that the State Roads Commission had improperly planned and constructed Interstate 495 in Montgomery County, thereby causing plaintiff’s car to go out of control and strike a steel pole on the side of the road. The doctrine of sovereign immunity was reaffirmed by the Court.

## MASSACHUSETTS

ANN. L. MASS. Ch. 81, § 18:

The Commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions, and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four, except that the Commonwealth shall not be liable for injury sustained because of the want of a railing in or upon any state highway, or for injury sustained upon the sidewalk of a state highway or during the construction, reconstruction, or repair of such highway. . . .

## MICHIGAN

MICH. STAT. ANN. § 3.996 (101) *et seq.* § 3.996(102) provides:

Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed for vehicular travel. . . .

## MINNESOTA

MINN. STAT. § 3.66 *et seq.* creates a State Claims Commission. Section 466.91 deals with tort liability of political subdivisions, but liability is not imposed where a claim is based on a discretionary function or duty. *Johnson v. Callisto*, 176 N.W.2d 754 (Minn. 1970) held that the doctrine of sovereign immunity still applies to the State highway department.

**MISSISSIPPI**

State of Mississippi and its governmental agencies are not subject to suit in absence of statutory authority. See *Lowndes County v. State Highway Comm'n*, 220 So. 2d 349 (1969); *Curtis v. State Highway Comm'n*, 195 So. 2d 497 (1967); and *Horne v. State Building Comm'n*, 233 Miss. 810, 103 So. 2d 373 (1958). Compare MISS. CODE ANN. §§ 11-45-1 and 65-1-91 wherein tort suit against the State has not been sanctioned.

**MISSOURI**

The State Highway Commission is not liable in an action in tort. *Luttrell v. State Highway Comm'n*, 379 S.W.2d 137 (1964).

**MONTANA**

MONT. CONST., art. II, § 18 provides: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit from injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973." REV. CODE OF MONT., § 82-4301 *et seq.* establishes a State Insurance Plan and Tort Claims Act, which provides in part that every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function. See § 82-4310.

**NEBRASKA**

NEB. REV. STAT. § 81-8,209 *et seq.*, which creates a State Claims Board—Tort Claims Act, provides: "The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state or any state agency on any tort claim except to the extent, and only to the extent, provided by this act . . . procedures provided by this act shall be used to the exclusion of all others."

The Act generally provides that the State is liable to the same extent as though it were a private person. However, § 81-8,219 (1) (a) states that the provisions of the Act shall not apply to claims based upon an "act or omission of an employee of the State, 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 state agency or an employee of the state, whether or not the discretion be abused. . . ."

NEB. REV. STAT., § 81-8,219 (2) provides: "With respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system, it is the intent of the legislature to waive the state's immunity from suit and liability to the same extent that liability has been imposed upon counties pursuant to § 24-2410, and only to that extent. . . ."

**NEVADA**

NEV. REV. STAT. § 41.031 waives the state's "immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise provided [in this chapter]." The discretionary function exemption is set forth in § 41.032 (2). In addition, § 41.033 provides that no action will lie for failure "to inspect the construction of any street, public highway, or other public work to determine any hazards, [or] deficiencies . . ."

**NEW HAMPSHIRE**

Sovereign immunity remains the rule in New Hampshire except where the legislature consents to suit. See *Opinion of the Justices*, 101 N.H. 546, 134 A.2d 279 (1957). The provisions of N.H. REV. STAT. ANN., § 491:8 do not authorize actions against the State

for personal injury caused by the negligence of State employees. See *Krzyszstalowski v. Fortin*, 108 N.H. 187, 230 A.2d 750 (1967).

## NEW JERSEY

N.J. STAT. ANN., tit. 59:1 *et seq.* sets forth the Tort Claims Act.

§ 59:2-1 (a) provides:

Except as otherwise provided by this Act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

Although a "public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances," a series of exemptions for discretionary activities are included in § 59:2-3:

a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;

b. A public entity is not liable for legislative or judicial action or inaction or administrative action or inaction of a legislative or judicial nature;

c. A public entity is not liable for the exercise of discretion in determining whether or (*sic*) 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.

See § 59-4-6 on plan or design immunity.

## NEW MEXICO

N. MEX. STAT. ANN. § 5-6-18 states:

The purpose of this act (5-6-18—5-6-22) shall be to provide a means for recovery of damages for death, personal injury or property damage, resulting from employer's or employee's negligence, which occur during the course of employment for state, county, city, school district, district, state institution, public agency or public corporation, its officers, deputies, assistants, agents and employees.

Furthermore according to § 5-6-20:

Suits may be maintained against the state, county, city, school district, district, state institution, public agency, or public corporation of the state, and the persons involved for the negligence of officers, deputies, assistants, agents or such employees in the course of employment; provided, however, no judgment shall run against the state, county, city, school district, district, state institution, public agency, or public corporation of the state unless there be liability insurance to cover the amount and cost of such judgment.

## NEW YORK

McKINNEY'S CONSOL. LAWS OF N.Y. ANN., Court of Claims Act § 8 (1920) sets forth a blanket waiver of immunity:

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with



the same rules of law as applied to actions in the Supreme Court against individuals or corporations, provided the claimant complies with the limitations of this article. . . .

#### **NORTH CAROLINA**

GEN. STAT. N.C. § 143-291 provides for a North Carolina Industrial Commission to hear tort claims against the Board of Transportation, and all other departments, institutions and agencies of the State arising out of negligent acts and to assess damages; provides further that in no event shall the amount of damages awarded exceed the sum of thirty thousand dollars (\$30,000).

#### **NORTH DAKOTA**

N.D. CONST. § 22 states: "... Suits may be brought against the state in such manner in such courts, and in such cases, as the legislative assembly may, by law, direct."

*Wright v. State*, 189 N.W.2d 675 (1971), held that the immunity of the State from suit is not waived by its purchase of liability insurance covering employees under § 39-01-08 where it does not also purchase insurance covering itself.

#### **OHIO**

OHIO CONST., art. 1, § 16 provides that "... Suits may be brought against the state, in such courts and in such manner, as may be provided by law." It was ultimately held that this constitutional section is not self-executing and that statutory consent is a prerequisite to such suit. *Krause v. State*, 31 OS 2d 132, 285 N.E.2d 736 (1972).

#### **OKLAHOMA**

OKLA. STAT. ANN., tit. 47, § 157.1:

The State Highway Department . . . [is] hereby authorized to carry insurance on vehicles, motorized machinery, or equipment owned and operated by the State Highway Department . . . . An action for damages may be brought against such department or state agency, but the governmental immunity of such department or state agency shall be waived only to the extent of the amount of insurance purchased. . . .

#### **OREGON**

OREG. REV. STAT. § 30.260 *et seq.*

§ 30.265 (1) subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. As used in this section and in OREG. REV. STAT. § 30.285, "tort" includes any violation of 42 U.S.C. § 1983.

(2) Every public body is immune from liability for:

(d) Any claim based upon the performance of or the failure to exercise or perform a discretionary function of duty, whether or not the discretion is abused.

Certain limitations on liability are contained also in § 30.270.

#### **PENNSYLVANIA**

PA. CONST., art. 1, § 10 is the basis of sovereign immunity in Pennsylvania, and was upheld in *Sweigard v. Dep't of Transp.*, 309 A.2d 374, 454 Pa. 32 (1973). See also, *Brown v. Commonwealth*, 453 Pa. 566, 305 A.2d 868 (1973); *Ayala v. Philadelphia Board of Education*, 453 Pa. 584, 305 A.2d 877 (1973); *Specter v. Commonwealth of Pa.*, 341 A.2d 481 (Pa. 1975) held that Pennsylvania Turnpike Comm'n did not have immunity from suit.

**RHODE ISLAND**

GEN. LAWS R.I. § 9-31-1 provides:

The State of Rhode Island and any political subdivision thereof, including all cities and towns, shall, subject to the period of limitations set forth in § 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation, provided however that any recovery in any such action shall not exceed the monetary limitations thereby set forth in this Chapter.

Section 9-31-2 provides that tort recoveries against the State are limited to \$50,000; however, there is no limit where the activity complained of involved a proprietary function of the State.

**SOUTH CAROLINA**

S.C. CODE § 33-229 provides:

Any person who may suffer injury to his person or damage to his property by reason of (a) a defect in any state highway or (b) the negligent repair of any state highway may bring suit against the Department for the actual amount of such injury or damage, not to exceed in case of property damage the sum of three thousand dollars and in case of personal injury or death the sum of eight thousand dollars. . . .

**SOUTH DAKOTA**

S.D. CONST., art. III, § 27: "The legislature shall direct by law in what manner and in what courts suits may be brought against the State."

The State is immune from suit and liability for tort committed by an officer or employee in the performance of his duties. *Conway v. Humbert*, 82 S.D. 317, 145 N.W.2d 524 (1966).

**TENNESSEE**

TENN. CODE ANN. § 20-1702 provides:

No Court in the State shall have any power, jurisdiction or authority to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits shall be dismissed as to the State or such officers, on motion, plea, or demurrer of the law officer of the State, or counsel employed for the State.

However, § 9-801-817 creates a Board of Claims. Pursuant to § 9-812 the Board is "vested with full power and authority to hear and determine all claims against the State for personal injuries or property damages caused by negligence in the construction and/or maintenance of State highways or other State buildings and properties and/or by negligence of State officials and employees of all departments or divisions in the operation of State-owned motor vehicle[s] or other State-owned equipment while in the line of duty. . . ."

The recently enacted Tennessee Governmental Tort Liability Act, TENN. CODE ANN., § 23-3301, appears to apply only to local governmental entities and subdivisions, and not to the State, its agencies, or departments.

**TEXAS**

TEX. CIV. STAT., art. 6252-19:

*Liability of governmental units*

Sec. 3. Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by

the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to \$100,000 per person and \$300,00 for any single occurrence for bodily injury or death and to \$10,000 for any single occurrence for injury to or destruction of property.

Sec. 4. To the extent of such liability created by section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Sec. 14. The provisions of this Act shall not apply to:

(7) Any claim based upon the failure of a unit of government to perform any act which said unit of government is not required by law to perform. If the law leaves the performance or nonperformance of an act to the discretion of the unit of government, its decision not to do the act, or its failure to make a decision thereof, shall not form the basis for a claim under this Act.

(12) Any claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device unless such absence, condition, or malfunction shall not be corrected by the governmental unit responsible within a reasonable time after notice, or any claim arising from the removal or destruction of such signs, signals, or devices by third parties except on failure of the unit of government to correct the same within such reasonable time, after actual notice. Nothing herein shall give rise to liability arising from the failure of any unit of government to initially place any of the above signs, signals, or devices when such failure is the result of discretionary actions of said government unit. The signs, signals, and warning devices innumeraed [sic] above are those used in connection with hazards normally connected with the use of the roadway, and this section shall not apply to the duty to warn of special defects such as excavations or roadway obstructions.

## UTAH

UTAH CODE ANN. § 63-30-1, Governmental Immunity Act, is applicable to the State. Section 63-30-3 provides: "Except as may be otherwise provided in this Act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function." However, pursuant to § 63-30-8, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Furthermore under § 83-30-10 immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except where the injury: "(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused . . ."

**VERMONT**

VT. STAT. ANN. § 5601 *et seq.* provides:

The state of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of his office or employment after October 1, 1961, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the state to satisfy any judgment. . . . The maximum liability of the state of Vermont hereunder shall be \$75,000.00 to any one person and \$300,000.00 to all persons arising out of each negligent or wrongful act or omission. . . .

Section 5602 (1) contains an exception to liability where the acts or omissions complained of involved a discretionary function or duty.

**VIRGINIA**

There is no statute in Virginia granting a right to sue the State for torts. See *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 117 S.E.2d 685 (1961). CODE OF VA., § 8-752 authorizing recovery of claims against the State does not apparently authorize a suit for damages arising out of state torts.

**WASHINGTON**

WASH. REV. CODE § 4.92.010 *et seq.*

Section 4.92.090 provides that the State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

**WEST VIRGINIA**

W.VA. CONST., art. 6, § 35 provides for sovereign immunity; however, tort claims may be made against the State pursuant to W.VA. CODE § 14-2-1 *et seq.*

**WISCONSIN**

The State has not given any statutory consent to tort suit. *Cords v. State*, 214 N.W.2d 405 (1974).

**WYOMING**

WYO. CONST., art. 1, § 8 provides:

. . . Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.

It appears that Wyoming has never given its consent that it or the State Highway Commission might be sued for a tort. *Price v. State Highway Comm'n*, 62 Wyo. 385, 167 P.2d 309 (1946). See 7 LAND AND WATER L. REV. 229, 235-240 (1972) for discussion of State immunity in Wyoming.

**DISTRICT OF COLUMBIA**

The District of Columbia has by court decision adopted a rule comparable to the discretionary function exemption as exists by statute in many states and has discarded the proprietary-governmental distinction so firmly entrenched in municipal corporation tort law. See *Spencer v. General Hospital of D.C.*, 138 U.S. App. D.C. 48, 425 F.2d 479 (1969). See also D.C. CODE, § 1-902.

## APPENDIX B

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