DEFENSE AND SETTLEMENT OF CLAIMS FOR SKIDDING ACCIDENTS

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Statutes of limitation of 43 states and the District of Columbia may bar a claim against a highway design engineer. If the design engineer is not protected from claims of third parties by state statute, he or she may have no liability if the design and the structure were completed and accepted by the owner. In determining whether the design engineer may be liable to claims of third parties, that is, the traveling public, 5 questions are to be evaluated. Did the design engineer owe a duty to the public? Was the duty continuing in nature? Was there a breach of the duty? Did the breach of the duty constitute a "public nuisance"? And, did the breach of duty cause or materially contribute to the events giving rise to the claims? Should a claim be made against a design engineer as the result of a skidding accident, drawings, records, and files are the most important defense tools. He or she should always retain the owner's instructions, his or her calculations, and research into design criteria on each project because this material is the record that will determine whether he or she will be exposed to liability.

•BOTH Carlson (1) and Gartner (2) discussed sovereign immunity and the changes that have occurred over the past 10 to 15 years. There are, of course, some states such as Maryland where the sovereign is still immune. But, even if the state is not liable, the engineer could be. If an engineer is sued for damages as the result of a skidding accident, his or her attorney first will look to see if the suit is barred by a statute of limitations. Until the Wisconsin legislature passed a statute in 1961, the design professional was subject to suit for a period of time after the event occurred, even if the facility may have been designed and constructed 20, 30, 40, or more years before the incident. With the enactment in 1973 of a statute in Wyoming, 43 states and the District of Columbia have statutes of limitations for periods as short as 2 years and as long as 20 years. Eighteen states have a 10-year statute. Most of these statutes provide that legal action is barred unless the injury occurs within "X" years beginning on the date the facility was substantially complete—when it was first available for its intended use. A list of existing statutes of limitations is given in Table 1.

If action is not barred by time, the engineer's attorney will turn to case law for the state or states where the design contract was signed, the design prepared, and the construction accomplished. An attorney's steadfast wish is to find a "case on point" which will lead to a prompt decision as to whether the case should be defended or settled. There is a dearth of case law specifically discussing the liability of an engineer for defective highway design. Thus, an analysis of prospective liability that might arise out of automobile skidding accidents must proceed on a traditional "duty, breach, causation" framework in terms of related existing case law.

Initially, there is the issue of whether an engineering firm that designs a highway owes a duty to the public. The trend of authority appears to be toward imposing the same duty on the engineer as is imposed on the manufacturer of a chattel, pursuant to

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Table 1. Existing statutes of limitations.

State	Year of Passage	Statutory Period (years)
Alabama	1969	4
Alaska	1967	6
Arkansas	1967	5
California	1967	4
Colorado	1963	10
Connecticut	1969	7
Delaware	1970	6
District of Columbia	1972	10
Florida	1967	12
Georgia	1968	8
Hawaii	1969	6
Idaho	1965	6
Illinois[a]	1969	6
Indiana	1967	10
Kansas	1963	10
Kentucky	1966	5
Louisiana	1964	10
Maryland	1970	20
Massachusetts	1968	2
Michigan	1967	6
Minnesota	1965	10
Mississippi	1966	10
Montana	1971	10
Nebraska	1972	10
Nevada	1965	6
New Hampshire	1965	6
New Jersey	1967	10
New Mexico	1967	10
North Carolina	1963	6
North Dakota	1967	10
Ohio	1963	10
Oklahoma	1967	5
Oregon	1967	10
Pennsylvania	1966	12
South Carolina	1962	10
South Dakota	1966	10
Tennessee	1965	4
Texas	1969	10
Utah	1967	7
Virginia	1964	5
Washington	1967	6
Wisconsin	1961	6
Wyoming	1973	10

[a]Earlier statute of 4 years declared unconstitutional by Illinois Supreme Court in Skinner v. Anderson, 231 N.E.2d 588.

§ 398 of the Restatement of Torts, Second. In a recent article, this author commented on the area of defective highway design as encompassing a "malpractice action against the engineers themselves."[1] However, there is no case law that, on this precise question, imposes on the engineer a duty to the traveling public, although some cases have skirted the issue. In Rigsby v. Brighton Engineering Company, 464 S.W.2d 279 (Ky. 1971), an action was brought on behalf of the estates of occupants of an automobile who were killed in a crash against a bridge pier. This action was brought against the engineering consultant who designed the highway and was based on failure to recommend installation of guardrails around the bridge pier. Summary judgment for the defendant was affirmed on appeal on the ground that the state agency had adopted the criteria that were binding on the defendant consultant. Although the Court of Appeals of Kentucky cited no precise case law, it is clear from a reading of the opinion that the court felt that without such state recommendation the engineering consultant would have been held liable for defective design.

Somewhat to the contrary is the decision in Black v. Peter Kiewit Sons' Co., 497 P.2d 1056 (Idaho 1972). In that case a negligence action was asserted against a highway contractor on the grounds that an oil slick on the highway section constructed by the contractor caused the plaintiffs' automobile to skid and go out of control. In affirming summary judgment for the defendant, the Supreme Court of Idaho also noted that the highway was constructed in accordance with state specifications. However, the court recited the older traditional view that [497 P.2d at 1058 (65 C.J.S. Negligence § 95 at 1060-1062)]

> Where the work of an independent contractor is completed and is turned over to, and accepted by the owner, the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work; the responsibility if any, for maintaining . . . the property in its defective condition shifting to the owner.

This general notion of acceptance of the highway as releasing all prior independent contractors from responsibility was also given in Williams v. Sullivan, Long and Hagerty, Inc., 209 So.2d 618 (Miss. 1968). There, a motor scooter struck a hole in a street that had been paved by the subcontractor defendant. The court held that there was no continuing duty on the part of the defendant after the road was accepted by the county.

However, the older "acceptance" notion has not been an absolute shield to independent contractors in highway construction. The case of Henry v. Haloatt Construction

[1]Kenneth Barranger, Liability for Negligent Highway Design: The Louisiana Perspective, 20 La.B.J., 277 (1973). See also Steven J. Erlsten, Defectively Designed Highways, 16 Clev.-Mar.L.Rev. 264 (1967).

Co., 488 P.2d 1286 (Okla. 1971), contains dicta to the effect that, despite the general "acceptance" rule precluding an independent contractor's liability, in those cases in which a contractor creates a dangerous condition that he or she knows is immediately dangerous, his or her duty to the general public may continue. The dicta on continuing duty in this Oklahoma case lead us to an analysis of the Maryland law that presents a similar theory.

The case of Cumberland v. Turney, 177 Md. 297 (1939), appears to be the inaugural opinion by the Maryland Court of Appeals on defective highways and automobile accidents. In this case, an automobile skidded off the road and crashed into a pole when the driver attempted to follow a curve in the road. An injured infant passenger in the automobile brought suit against the city of Cumberland, alleging defective design in the highway and particularly contending that the smoothness of the surface of the highway constituted negligence on the part of the municipality. The Court of Appeals reserved a lower court judgment in favor of the plaintiffs, finding that there had been no negligence on the part of the municipality. The court found no evidence of negligence, "in view of the facts that the surfacing material was selected by experienced engineers."

The court did not speak to the question of any negligence of the engineers who had selected the surfacing material. But, in the case of East Coast Freight Lines, Inc. v. Consolidated Gas Company, 187 Md. 385 (1946), the Court of Appeals approached the subject of design of a street and the duties of an independent contractor in relation to that street.

The Consolidated Gas case involved an action against a trucking company and arose out of a serious automobile accident that was caused by a vehicle's left front wheel hitting the curbing around a grass plot, striking a lamppost, and colliding head-on with another vehicle. The defendant trucking company asserted a third party complaint against the gas company, alleging that the lamppost was an obstruction of the highway, and as such was a public nuisance, and that, therefore, the defendant gas company owed a duty to the public to warn of the lamppost. Because the lamppost had been purchased by the city of Baltimore, and its location had been determined by the city, the issue essentially was whether the gas company owed any duty to the traveling public. The Maryland Court of Appeals sustained the demurrer of the gas company to the third party complaint, but in important dicta recognized (187 Md. at 397) that

> A contractor, even after he had completed his work, may be held liable in damages if such work is inherently dangerous and constitutes a public nuisance.

An electric light pole was not seen to constitute such a nuisance. A few years later, the case of State v. Prince George's County, 207 Md. 91 (1954), held that the municipality would not be held liable for every irregularity in the grading of the street. Thus, at this point in the common law of Maryland, it did not seem that the surfacing of a street could constitute a nuisance.

However, this line of relevant Maryland case law appears to end with the litigation of Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959), remanded 291 F.2d 880 (4th Cir. 1961); 207 F. Supp. 143 (D. Md. 1962); aff'd 318 F.2d 718 (4th Cir. 1963). The Jennings cases involved an automobile that skidded on a patch of ice on Suitland Parkway, a Maryland road maintained by the National Park Service. Serious injuries and death ensued from the resulting collision, and suit was filed against the United States under the Federal Tort Claims Act. In the initial suit, Judge Watkins rendered judgment against the United States, finding that the government should have discovered and corrected the unsafe condition. The Fourth Circuit Court of Appeals reversed that decision, holding that proof of mere skidding did not support the judgment. The Court particularly stated (291 F.2d at 887):

> In Maryland it has been held that there is no liability for injuries caused by a design defect in a highway, but if a defect, whether of a design or not, creates a condition which would itself constitute a nuisance, and reasonable care to abate it, is not exercised and the condition is the effective cause of the injury, no reason presently appears why the agency charged with maintenance of the highway should not be responsible as for any other nuisance it unreasonably permitted to exist.

The case was remanded for a finding on that issue. On remand, Judge Watkins held that the United States was liable, because inadequacy of the drainage system had caused the ice to accumulate. The court found (207 F. Supp. at 144) that

> Suitland Parkway, at the time in question, was defective, both in design and construction, and is so constructed and maintained that it constituted a nuisance.

The Fourth Circuit affirmed this finding. Thus, Maryland case law holds that an independent contractor may be liable for creating a public nuisance. Additional case law indicates that a defectively designed highway can constitute such a public nuisance.

Given the modern trend of authority, and the Maryland common law in the area of nuisance, it appears that a plaintiff in an action against an engineer for a defectively designed highway that caused an automobile to skid could establish that there was a duty owed to the public. One could first proceed under the view of a direct duty owed, and could secondly proceed on a nuisance theory, which has been recognized by the Maryland Court of Appeals and the United States District Court of the District of Maryland. On this question of duty, however, there is a subsidiary question on whether that duty is a continuing duty. Although state acceptance of a defectively designed highway will not terminate an engineer's duty as to proper design, it imposes on the state the duty of maintenance. Indeed, this duty was commented on in the Jennings decision. In the decision of Baldwin v. State, 491 P. 2d 1121 (Cal. 1972), the state was held not to be immune from suit for defective highway design in which it failed to construct a left-turn lane. The California court found that, when a governmental entity has notice of the dangerous condition of a highway, it must act to alleviate such a condition. Nevertheless, it should be noted that the case of Rush v. Pierson Contracting Co., 310 F. Supp. 1389 (E.D Mich. S.D. 1970), reached a contrary result. In that case, the motorist was deemed to have a cause of action for damages against the dependent contractor 5 years after the work had been accepted by the state.

The distinction between an initial duty owed and a continuing duty becomes significant when we turn to law that might determine whether there has been any breach of duty in a skidding accident. There does not seem to be any case law that discusses the particular breach of a duty by an engineer concerning road surfacing and skidding accidents. Thus, an analysis must be of those cases that initially have held that a governmental entity was not immune from suit, and subsequently met the question of whether there was liability for defective highway design, which resulted in a slick surface causing the skidding of an automobile. In Carthay v. County of Ulster, 168 N.Y.S.2d 714 (1957), an action was brought against the county for injuries sustained in an automobile accident when the automobile skidded on a wet road at a point where there was a sharp right curve in the road. The trial court rendered judgment against the county, and, on appeal, a New York appellate court affirmed by holding that the evidence sustained a finding that the road was negligently maintained. A contrary result was in the New York case of Lidell v. State, 236 N.Y.S. 2d 1005 (1963), which also involved a similar action against the state arising from a skidding accident. Again, the issue was that of maintenance by the state, and the court found that the state of New York had done "all that it could" to protect the public. A similar situation with a sharp curve and skidding accident was in Clary v. Polk County, 372 P.2d 524 (Ore. 1962). An alleged defect in the road was the existence of a slick oil surface. Liability was imposed on the county for such a defect pursuant to an applicable Oregon statute. This case did not specifically employ the concept of maintenance, but the court cited related cases, all of which dealt with the question of negligent maintenance by state authorities.[2]

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[2]See also Foley v. State, 203 N.Y.S.2d 196, 214 N.Y.S.2d 665 (1960) (variation in banking on the curve, failure to maintain adequate warning signs); LeBoeuf v. State, 11 N.Y.S.2d 640 (1938) (slippery surface due to maintenance of macadam surface); Lusk v. State Highway Department, 186 S.E.786 (S.C. 1936) (loose sand on surface, inadequate warning signs); Rubell v. Santa Clara County, 80 P.2d 1023 (Cal. 1938) (loose gravel on road, failure to warn); Sporborg v. State, 234 N.Y.S. 476 (1929) (skidding of automobile, negligence of state in not having warning devices on the premises).

An analysis of this case law indicates that in all those situations where liability was imposed on the state there was a breach of the continuing duty of maintenance. The governmental body was under some duty to maintain the road as constructed and warn of dangerous areas. None of these skidding cases discusses any initial liability for the road surface used in the original construction. Even the decision in Clary v. Polk County, supra, does not discuss initial duty as such. In terms of existing case law, it seems that duty must be of a continuing nature for a breach to be found. Although the plaintiff in such a skidding action can proceed on the "nuisance" theory, it should be noted that the Jennings litigation also was based on the defective maintenance of Suitland Parkway. On this distinction between initial duty and continuing duty, Judge Northrop's opinion in Mondshour v. General Motors Corporation, 298 F. Supp. 111 (D. Md. 1969), should be noted. A child was injured when trapped under the right rear wheel of a bus leaving a curb. Because the bus did not have a right rearview mirror, the plaintiff brought action against the manufacturer of the bus, alleging that the bus was defectively designed. Judge Northrop noted that, even if General Motors had been negligent in its original design, the negligence of the Baltimore Transit Company in failing to maintain its equipment to meet changing conditions "would be a superseding intervening cause" (298 F. Supp. at 114). The skidding cases that have resulted in state liability have done so in terms of a breach of a duty to maintain the highways in light of changing conditions. This duty would seem to be incumbent on the state and not the designing engineer.

It might be argued that the engineer shares part of this continuing duty of maintenance with respect to keeping the state advised on possibilities for redesign. Thus, such a continuing duty would bring the engineer within many of the skidding cases discussed above. Only 1 relevant case has been found for this argument. The case of Natina v. Westchester County Park Commission, 158 N.Y.S.2d 414 (1966), involved a "cross over", head-on automobile accident. There are dicta in that opinion to the effect that recommendations made for highway redesign are not matters of maintenance.

After the initial hurdles of establishing a duty, and then a continuing duty, and finding a breach thereof, the plaintiff in a skidding case will obviously have to establish proximate cause. On this question, there are 2 recent New York cases that indicate the problems a plaintiff must face in this area. In Cruz v. State, 327 N.Y.S.2d 889 (1972), the automobile went off the paved portion of the highway and crashed into a blockhouse apparently 4 ft off the paved portion of the road. One of the alleged defects was improper grading of the road. The trial court dismissed the case, holding that any negligence of the state was not the proximate cause of the accident. On appeal, the New York appellate court affirmed, holding that (327 N.Y.S. 2d at 891)

> [W]here there are several possible causes of an accident, for one or more of which the State is not responsible, the claimant can not recover without proving that the injury was sustained wholy or in part by a cause for which the State was responsible.

The case of Stuart-Bullock v. State, 326 N.Y.S.2d 909 (1971), involved similar facts; it was alleged that parts of the road surface could have caused the decedent's car to veer off the road. A judgment in favor of the claimant was reversed, and the appellate court noted that "the trial court (had) engaged in pure speculation" (326 N.Y.S.2d at 911). The court held that the claimant had simply failed to establish proximate cause.

As was indicated initially, there is not a wealth of case law on the liability of an engineer for defective highway design with respect to skidding accidents. Yet, analysis of the reported cases on state liability and duties owed by independent contractors indicates several "roadblocks" in the path of a plaintiff who sues on the basis of such a defect. Although an initial duty on the part of an engineer can be established, unless the highway is designed so defectively as to initially constitute a public nuisance, the plaintiff must establish that there was a continuing duty owed to establish any breach by the engineer. This is certainly the tenor of the cases that have imposed liability on governmental authorities. Further, proximate cause in skidding accidents might prove more difficult to establish than in cases that proceed on the basis of absence of barriers. Certainly, the 2 recent New York decisions indicate the difficult burden on the plaintiff.

In short, in any suit against an engineer alleging defective highway design that has caused the skidding of an automobile, the plaintiff may find the road to recovery difficult to travel.

In considering this road to recover damages against an engineer, the attorney must decide at an early time whether the claim should be defended or settled out of court. If a claim is timely, it may be that an early appraisal of the facts will dictate the good sense of a prompt settlement. Frequently "good sense" has a hard time emerging from the barrier of "pride of design," which sometimes leads to the conclusion that "not only is my design without fault, but our firm is insured and we expect our insurance company to protect us."

No specification has been written for the successful defense of every claim resulting from a skidding accident. There are a number of steps to be taken and things to be done by the engineer and his attorney. First and most importantly, keep the files and drawings on each job until you are sure that you are protected by statutes of limitations in every jurisdiction that might apply. Second, refuse to depart from a design that you can defend unless you have a written order by the owner. Third, do not try to be the contractor. (I should add a fourth, keep your insurance premiums paid.)

And, trust the attorney defending the case and give him or her your time and cooperation, even if the demands appear to be burdensome to the point of exasperation.

REFERENCES

1. Carlson, R. F. A Review of Case Law Relating to Liability for Skidding Accidents. Paper in this Record.
2. Gartner, W., Jr. Engineering and Administrative Considerations in Constructing, Maintaining, and Testing Skid-Resistant Pavements. Paper in this Record.