LEGAL IMPLICATIONS OF REGULATIONS AIMED AT REDUCING WET-WEATHER SKIDDING ACCIDENTS ON HIGHWAYS

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This paper analyzes the legal implications of regulations aimed at reducing wet-weather skidding accidents, including adoption of uniform minimum standards for skid resistant highways; pavement design, mix and selection; resurfacing or grooving; erection of warning signs; accident data collection; and establishment of general inventories of highways to set priorities for rehabilitation and repairs. The thrust of the paper is to identify those areas of state action in skid reduction that may either be immune from liability, or, conversely, subject to liability, for injuries or property damage arising out of motorists' accidents on highways with low or inadequate skid resistance. The admissibility into evidence and use of the skid reduction regulations at trial are discussed also. The paper is documented with references to federal and state statutes, case law, articles, and, in particular, FHWA skid reduction program regulations.

One problem of highway safety that is receiving increased attention by federal and state authorities is the high frequency of skidding accidents. An alarming three million highway accidents occur each year on wet pavements resulting in an estimated 7,500 fatalities and 250,000 injuries. Testimony, records, and films before the Congress have documented both the severity of the highway skidding problem and the success of new measures to improve skid resistance of highways having a high number of wet-weather skidding accidents.

Several methods are being considered to alleviate the highway skid problem. Among the alternatives are (1) the promulgation of minimum skid numbers with the requirements that states upgrade pavements with skid resistance below minimum acceptable standards, (2) the collection and use of accident data to identify hazardous locations, (3) the inventorying of locations designated for corrective measures, and (4) the systematic measurement of the skid resistance of pavements to locate unsafe areas.

It is because of the anticipated programs aimed at reducing the number of wet weather skidding accidents that there is a need for research on the question of state liability for the failure to exercise reasonable care in (1) the design, construction, and maintenance of highway pavements to achieve acceptable skid resistance; (2) selection of the appropriate method to reduce skidding accidents; (3) inventorying of hazardous skidding locations; (4) collection of accident data; and (5) standardization of skid measurement practices and procedures. Of interest are the discretionary nature of several of these objectives and the admissibility into evidence and use at trial of any skid regulations.

States are being encouraged to see that pavement surfaces are constructed and maintained for the best possible skid resistance and that inadequate pavements are identified and corrected. Following the enacement of the Highway Safety Act of 1966, skid resistance has received increased attention. The paper sets forth the background of federal policy in some detail, with referenced publications or regulations included in the Appendix.

Current skid resistance policy and procedures are set forth in Volume 12 of the Highway Safety Program Manual on Highway Design, Construction, and Maintenance. Regulations published February 3,1976 in the Federal Register urge the states to adopt a systematic skid reduction plan having three basic activities: evaluation of pavements to insure that good skid-resistant qualities are present, detection of wet-weather high accident locations by using the state accident record system, and the analysis of skid resistance for all roads with a speed limit of 40 m.p.h. or greater.

The paper analyzes the legal implications of wet-weather skid reduction objectives or methods, beginning briefly with discussion of the suability and liability of the state highway departments. Because of tort claims acts or court decisions in many states, state highway departments are more vulnerable to tort suits. As a result of the erosion of traditional sovereign immunity or

governmental immunity, there has been a significant increase in tort litigation involving the departments.

A number of states have enacted tort claims legislation setting forth procedures for filing negligence actions against government agencies. Representative states having a tort claims act are: Alaska, California, Colorado, Hawaii, Idaho, Iowa, Nebraska, Nevada, New Jersey, Utah, and Vermont. Other states have state claims commissions to hear claims against the state agencies. Among the states that have established such boards or commissions are Arkansas, Georgia, North Carolina, Tennessee, and West Virginia.

The remaining states have differing approaches to the suability of agencies such as the Highway department. New York enacted a general waiver of immunity in 1920, while other states may provide for an insurance fund, or have special statutes permitting suit for "defective highways." Nevertheless, several states retain state immunity; among them are Delaware, Maine, Maryland, Mississippi, Missouri, New Hampshire, Ohio, Oklahoma, New Mexico, Pennsylvania, South Dakota, Virginia, Wisconsin, and Wyoming.

Although general rules are difficult to formulate, the state highway departments, in those states where they may be held liable for negligence, may have a duty to guard against or give adequate warning of slippery road conditions. Although the state has no duty to guard against accidents caused by mere natural conditions, it does have a duty to act where some feature of the highway construction, perhaps aggravated by wet-weather conditions, is a proximate cause of the skidding accident. For example, it has been held that where a highway is so constructed that a wet surface becomes very slippery and dangerous, and the public authority is on notice, there may be liability for a skidding accident.

Ordinarily, the duty of the state to correct dangerous conditions arises only when it has notice, either actual or constructive, of the hazard. Notice periods may be prescribed also by statute. Moreover, notice may be deemed to exist where the condition has been present for such a time and is of such a nature that the state should have discovered the hazard by the exercise of reasonable diligence.

The basic aspects of wet-weather skid reduction objectives or requirements must be analyzed in order to determine those for which the state might be held liable for negligence. An important legal defense is this: if the department is able to show that a decision is an exercise of discretion, then it may be immune from liability for any negligence in the performance or failure to perform a duty owed to the public.

This exemption for liability for negligence committed in the exercise or performance, or the failure to exercise or perform, a discretionary activity or duty has its roots in the common law of personal liability of public officials and employees. More recently, the exclusion for discretionary, as opposed to ministerial, functions extends to tort suits against government entities, and may be set forth in a tort claims act.

A long line of judicial decisions hold that certain areas of lawfully authorized planning or decision-making by the executive branch of the government are immune from liability. The paper discusses these cases, as well as others that have further confined the immunity of the highway departments to decisions that are both discretionary in nature and occur at the "planning level." That is, decisions requiring the exercise of discretion that are made at the operational-level are not protected by the immunity for discretionary action.

It is often difficult to distinguish between discretionary and nondiscretionary action. It appears that the defense is available if an injury is the result of a deliberate choice in the formulation of policy, or if the planning activity involves an evaluation of certain policy factors, such as the financial, political, economic, and social efforts of a given plan or policy. Some courts tend to look at the level of government where the decision was made, whereas others will grant immunity only to the initial policy decision, and not to decisions that, although discretionary in nature, only serve to implement the basic decision.

An analysis of the case law that may pertain to the specific objectives or requirements of a skid reduction program, results in the following general conclusions.

The first step, of course, is the initiation, after study and consideration, of a wet-weather skid reduction program. Probably no action could be maintained for the initiation of the program, the issuance of regulations, or the approval of any overall plan, any of which may have a defective feature. Moreover, the decisions of when and how to upgrade highways appear to be protected, for the same reason: it is not a tort to govern and government agencies may undertake public works or other such projects.

In addition, should wet-weather skid reduction programs contain errors or mistakes of judgment, or if regulations are predicated on reasonable, but faulty assumptions, or there are unexpected, hazardous results, probably no action could be maintained successfully. The reason is that all of these areas involve high-level planning requiring the consideration of many factors and the application of special expertise.

To the extent that there is involved any federal approval of a defective plan or program of a state highway department, several cases have held that the federal participation in the review and approval of state plans do not subject the federal agencies to liability. Such approval is discretionary in nature and protected. Moreover, it is improbable that federal agencies would be liable for any negligence of the states in implementing any federal skid program or regulations, unless the federal agency was a participant in the negligent act.

Furthermore, the Highway Safety Act of 1966 has been held not to create any duty on the part of the states owing to any person who is injured on a state highway failing to meet the requirements of the Act. A claimant's cause of action in tort must arise on the basis of state law, and, should state law not afford him a remedy for negligence arising out of highway operations, the fact that the state

is not in compliance with the Highway Safety Act or regulations issued pursuant thereto does not improve the claimant's position.

For claims arising out of wet-weather skidding accidents on highways with low skid resistance, it appears that the departments would not be held liable for those aspects of a wet-weather skid reduction program that are discretionary in nature, such as the design and selection of pavements. Because of the expertise that is required and the numerous factors that must be considered in selecting the proper pavement for certain highway conditions, it seems that the highway authority is vested with immune discretion to choose the proper or appropriate pavement surface.

One case holds that a government entity does not have to apply a rougher surface, where the original surface, alleged to have been extremely slippery, was selected by experienced engineers as the most suitable manterial for the involved location. It appears that there is no general duty to pave with a particular material or in a particular way, to have uniformity of construction on all streets, or to reconstruct streets immediately where there is a change or unexpected use. The materials discussed in the paper, and included in the Appendix, suggest strongly that pavement design, mix, and selection are discretionary in nature.

There may be exceptions to this immunity, for obvious, manifest dangers or for unreasonable approval of a design without adequate consideration. Moreover, in a few states there may be a duty to review approved designs where highway hazards result from known "changed conditions."

In the maintenance of highways, states are generally required to correct wet-weather skidding hazards of which they have notice or knowledge. Maintenance is regarded as an operational-level activity, and the discretionary defense has been held to be inapplicable. The cases hold the state to a continuing duty to maintain the highways in a safe condition. This statement is no less true when a claim involves the negligent failure to maintain highways reasonably free of slipperiness.

States have been held liable for failure to maintain or apply highway surfacing materials properly or for failing to apply materials to counteract slippery conditions. States may be held liable for failure to correct highway defects that result in low pavement skid resistance. Where a highway becomes slippery when wet because of wear and the effect of weather, the state may have a duty to maintain and repair it. In sum, states may have a duty to correct known wet-weather skid hazards, or at least to provide adequate warning.

Aside from the basic questions of liability, it appears that accident data prior to an accident that identifies locations prone to wet-weather skidding accidents would be admissible on the issues of the state's notice and of the hazardous nature of the highway.

Regulations setting forth the requirements of a wet-weather skid reduction program would be admissible at trial, particularly where the regulations have the force of law. If the regulations are general and discretionary in nature, they would constitute some evidence of negligence if they were not followed. However, where there was a failure to comply with a specific mandatory requirement, the violation of the regulation could be held to constitute negligence per se.

Finally, a general inventory of hazardous wet-weather skid locations, aside from being admissible on the questions of notice and nature of the hazardous condition, could be a basis for a claim that any highway not in compliance was ipso facto hazardous and that the state has an immediate duty to correct the condition. Cases suggest, however, that the state's decision on which highways to correct first is discretionary, and, that, moreover, to impose such a rigid duty to repair all roads at once is unreasonable.