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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 11 administration, 21 facilities design
24 pavement design and performance
25 structures design and performance
40 maintenance, 70 transportation law
(01 highway transportation)

Supplement to

Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 4, Selected Studies in Highway Law, entitled "Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges," pp. 1966-N55 to 1966-N87.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new

papers and 8 supplements that have been published since the original publication in 1976, except two new papers that will be published when Volume 5 is issued in a year or so. The text now totals some 4400 pages, comprising, in addition to the original chapters, 79 papers of which 38 are published as supplements and 29 as new papers in the SSHL; additionally, 7 supplements and 5 new papers appear in the Legal Research Digest series and will be published in the SSHL in the near future. Copies of SSHL have been sent free of charge to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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Supplement To
Liability of State Highway Departments for
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SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION

This supplement pursues the outline of the original paper in dividing treatment according to the major functions of design, construction, and maintenance, following which discussion will be had of matters collateral thereto that have been the subject of consideration in recent cases.

DESIGN DEFECTS (p. 1966-N60)

Approximately half of the States have now enacted Tort Claims Acts waiving sovereign immunity to suit for claims sounding in tort, with the exception of retention of immunity for acts of government officers and employees discretionary in nature. The question of when and where discretionary immunity obtains is a difficult one; but if there is one area of highway department activity that might be thought to be generally immune under the discretionary function exception to liability, it is in the area of the design function.

The applicability of the discretionary function exception to the design of bridges was the subject of consideration in the original paper. (See p. 1966-N60, *et seq.*) Discussion centered therein on the case of *Stewart v. State*, 92 Wash.2d 285, 597 P.2d 101 (1979), wherein it was held that decision-making with respect to the design of bridges is to be accorded the protection of the discretionary function exception *only* in cases involving judgment or choice between broad policy objectives. Although no further cases have been found specifically involving the question of design immunity for bridge structures, attention is invited to cases involving design immunity for other highway facilities, wherein the same approach was adopted and the same result reached as in *Stewart v. State, supra.* These cases are fully relevant to the question of immunity for bridge design.

In *Breed v. Shaner*, 57 Haw. 656, 562 P.2d 436 (1977), plaintiff was a passenger in an automobile that failed to negotiate a curve in the roadway and turned over causing injuries to the plaintiff. The State of Hawaii was named a party defendant in an action brought to recover damages for the injuries suffered by plaintiff in the accident. Negligence was charged to the State in the design of the highway, and the evidence at trial established that a number of similar accidents had occurred previously at the locus of the curve in question. The State contended successfully at trial that the design of the highway was protected by the terms of the discretionary function exception of the Hawaii Tort Claims Act. The issue on appeal framed by the State was recited by the Supreme Court of Hawaii as follows: "The State argued that under the planning-operational distinction . . . any act or omission involving the design of a highway would always fall on the planning side of the dichotomy and thus be exempt from liability as discretionary."

In rejecting this contention, and reversing summary judgment entered below for the State, the Supreme Court of Hawaii ruled that not all aspects of the design function fall within the exempt planning stage. After noting that the purpose of the discretionary function exception is "to protect the decision-making processes of state officials and employees which require the evaluation of broad public policies," the Court went on to state:

> The effect of the circuit court's order is to hold the designing of a highway always involves the evaluation of broad policy factors. This places total emphasis on protecting the State to the exclusion of those who sustain injuries proximately caused by the negligent design of a highway. Although broad policy considerations may be a factor in certain aspects of highway design we do not think the circuit court's generalization is correct. For certain, there are decisions made by officials which require evaluation of broad policy factors by their very nature, e.g., a decision to purchase certain aircraft, a decision to activate an airbase, or a decision not to build a prison. However, we are of the opinion that the decisions made in designing a highway do not always fall in this category. A curve may be placed in a road to simply get around an obstacle. In this situation further facts must be adduced on the record to show that the decision to include the curve or other design feature involved the evaluation of broad policy factors before the court can decide that the discretionary function exception applies.
>
> The legislative policy to compensate the victims of negligent conduct by State officials and employees in the same manner and to the same extent as a private person in like circumstances weighs heavily against adopting the rule asserted by the State. The State's interest in protecting public policy decisions does not require a prophylactic rule in this case. It is sufficient to apply the exception when the record shows that broad policy factors were involved in reaching the allegedly negligent decision.

Thus, the Court announced the rule that only those aspects of design activity that involve decision-making in respect to broad policy considerations are clearly within the ambit of the protected planning stage of the planning/operational dichotomy.

Japan Air Lines Co., Ltd. v. State, 628 P.2d 934 (Alaska, 1981), involved the question whether the State of Alaska could be held liable under the discretionary function exception of the State Tort Claims Act for alleged negligence in the design of a taxiway, i.e., design in such manner as to allow "black ice" to form, causing the crash of a plane. In holding that the taxiway design was not protected by the discretionary exemption the Court stated:

> The purpose of the discretionary function exception is to preserve the separation of powers inherent to our form of government by recognizing that it is the function of the state, and not the courts or private citizens, to govern. Essentially, it seeks to ensure that private citizens do not interfere with or inhibit the governing process by challenging through private tort actions basic governmental policy decisions.... It is well-

settled, however, that not all decisions or acts of state employees fall within the exception. Rather, the exception applies, and immunity therefore attaches, only "[w]here there is room for *policy* judgment and decision...." *Dalehite v. United States,* 346 U.S. 15, 36, 73 S.Ct. 956, 968, 97 L.Ed. 1427, 1441 (1953) (emphasis added). Under the "planning-operational" test adopted by this court, and applied by the superior court, decisions that rise to the level of planning or policy formulation will be considered discretionary acts which are immune from tort liability, whereas decisions that are merely operational in nature, thereby implementing policy decisions, will not be considered discretionary and therefore will not be shielded from liability.... In other words, the key distinction is between basic policy formulation, which is immune, and the execution or implementation of that basic policy, which is not immune....

A design decision which does not require evaluation of broad policy factors does not come within the discretionary function exception....

In summary, the state may be held liable for injuries which result from negligent designs. The issue, as always, is whether the design decision in question involved a basic policy formulation which, under separation of powers concepts, should be immune to judicial review in a tort action, or whether the design decision at issue was merely part of the implementation or execution of a basic policy decision, and therefore not immune.

In the present case, the design decisions made in the taxiway plans by the state's engineers were operational decisions which merely implemented the basic policy formulation decision to build a taxiway suitable for use by wide-body jets such as the Boeing 747. Once the basic policy decision to build such a taxiway at Anchorage International Airport was made, the state was obligated to use due care to make certain that the taxiway met the standard of reasonable safety for its users.

Thus, the Court ruled that the design function can be broken down into planning and operational stages, and only that part of the design activity which involved policy formulation (i.e., the decision to build a taxiway suitable for wide-bodied jets such as the Boeing 747) was part of the protected planning stage of design. Once the decision was made to build such a taxiway the construction thereof must meet standards of reasonable care for the safety of users, and such duty was held to be part of the operational or unprotected phase of design.

Andrus v. State, 541 P.2d 1117 (Utah, 1975), was an action brought by property owners to recover for flooding caused by the construction of a new roadway. The highway in question was laid out to run on a descending grade and at one point a "grade sag," or depression in the roadway, operated as a catch basin for runoff waters from higher elevations. A severe rainstorm took place prior to the completion of construction and the installation of curbing, which might have provided aid in water control. In addition, gratings had not been installed to connect with storm sewer laterals, and hydrostatic pressure blew the covers off manholes, allowing sewage waste, as well as accumulated rain water, to flood and seriously damage plaintiffs' properties.

Suit was brought charging negligence in the design of the new highway, and the discretionary function exception of the Utah Tort Claims Act was asserted as a defense. In holding that the discretionary exemption of the Act did not extend to negligence in design, the Supreme Court of Utah stated:

The record supports the proposition that the State created a dangerous condition by its design of the highway project which allowed large quantities of rain water to accumulate in the basin, the banks of which eroded and washed away causing the water collected to be cascaded upon the properties of the plaintiffs and without taking proper steps to provide for proper and adequate drainage of the surplus water. The State by its design and specifications for the highway which was being constructed under the supervision of the Highway Department resulted in diverting the water from former channels which had previously carried it to points beyond the plaintiffs' properties....

....

... The decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions.

Thus, the Court went so far as to limit the coverage of the discretionary function exception to the decision to build the new highway and the selection of its location, matters pertaining to design, including the drawing of plans and specifications, being excluded from the protection of the exception.

The courts in these cases have thus clearly rejected the argument that design activities are necessarily discretionary in nature. In reaching this result the courts have premised their holdings on the reasoning that only such design decisions as are based on broad policy considerations are entitled to the immunity contemplated by the discretionary function exception.

It would appear to be clear beyond the shadow of doubt that the rules announced in these cases pertaining to the applicability of the discretionary function exception to design activities in general are fully and completely applicable to the design of bridges. Hence, it may be stated that these cases reinforce the conclusion reached in the original paper that immunity for the design of bridges extends only to situations wherein it is shown that decision-making with respect to design was based on an evaluation of broad policy considerations.

Effect of "Known Dangerous Conditions"

A further limitation on design immunity is found in cases involving the factor of "known dangerous conditions." In addition to the refusal of the courts to extend immunity to nonpolicy-making decisions, there appears to be general agreement that immunity cannot serve to protect the State in the situation where the State has actual or is charged with constructive notice of a "dangerous condition." This rule has been adopted and applied in a number of cases not involving bridges, which included the following: *City of St. Petersburg v. Collom,* 419 So.2d 1082 (Fla., 1982); *Department of Transportation v. Webb,* 438 So.2d 780 (Fla., 1983); *Palm Beach County Board of County Commissioners v. Salas,* 511 So.2d 544 (Fla., 1987); *Gavica v. Hanson,* 101 Idaho 58, 608 P.2d 861 (1980); *McClure v. Nampa Highway District,* 102 Idaho 197, 628 P.2d 228 (1981); *Carlson v. State,* 598 P.2d 969 (Alaska, 1979); *Peavler v. Board of Commissioners of Monroe County,* 492 N.E.2d

1086 (Ind.App., 1986); and *Shuttleworth v. Conti Construction Co., Inc.,* 193 N.J.Super. 469, 475 A.2d 48 (1984).

The application of this rule specifically to bridge structures finds expression in *Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983), involving a motor vehicle collision on a bridge, wherein it was held that neither the provisions of the discretionary function exception of the Idaho Tort Claims Act, nor the provisions of the Idaho design immunity statute, protected the State against a claim for damages based on the failure of the State to post signing warning of the "known dangerous condition" created by the fact that the bridge in question was 2 ft more narrow in width than the width of the highway approaches thereto. The Supreme Court of Idaho stated it to be "clear that the State is not immunized from liability when, with respect to a public highway, the State maintains a *known dangerous condition* on the highway and fails to properly warn motorists of such a condition." (Emphasis added.)

See, also, *Perez v. Department of Transportation,* 435 So.2d 830 (Fla., 1983), involving a skidding accident on a bridge, wherein it was held that the scope of discretionary immunity did not, under Florida law, extend to the failure of the State to warn of a "known dangerous condition" (in the instant case the slippery condition of the steel grating on the bridge) the Supreme Court of Florida stating (by way of quote from a prior decision) that: "'[W]hen a governmental entity creates a *known dangerous condition,* which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.'" (Emphasis added.)

See, further, *Seaton v. Scott County,* 404 N.W.2d 396 (Minn.App., 1987), standing for the proposition that discretionary function immunity does not extend to a situation involving a "known dangerous condition" of a bridge structure.

The position taken in these cases appears to be that the State has no "discretion" to create or permit a "known dangerous condition," and, hence, when such condition is found to exist, it will be classified as operational and unprotected in nature, rather than planning and protected in character. (For a discussion of the operative effect of the planning/operational test, widely adopted and used to separate discretionary from nondiscretionary activities, see the paper in *Selected Studies in Highway Law,* entitled "Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments," Vol. ——, p. ——.)

However, the application of the dangerous condition exception to immunity may be limited to the situation where the dangerous condition, actually or constructively known to the State, consists of a hidden trap, or a hazard not readily apparent to the motoring public. Such interpretation finds support in *Masters v. Wright,* 508 So.2d 1299 (Fla.App., 1987), a wrongful death action brought to recover for the demise of an individual killed while walking on a bridge designed to accommodate motor vehicle traffic only, wherein the Court rejected the argument that the State breached its duty to warn of the dangerous condition of the bridge to pedestrians, stating that: "With respect to the failure to warn, this Court finds that the danger of pedestrians being struck by a motor vehicle on the Roosevelt Bridge is readily apparent to persons utilizing said bridge as pedestrians, and therefore there is no duty to warn of this open and obvious hazard."

In the absence, however, of a situation involving a hazard so open and notorious as not to require warning thereof, the law appears to be quite clearly settled that the defense of discretionary immunity does not serve to protect the State against defects that fall into the category of "known dangerous conditions."

New York Rule Relating to Immunity

It was pointed out in the original paper (p. 1966-N61, *et seq.*) that the New York rule relating to discretionary immunity (first announced in *Weiss v. Fote,* 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960)) differs from the discretionary function exception of the various State Tort Claims Acts in that under New York law judicial review may be had of discretionary decisions that reflect either (a) lack of adequate study, or (b) lack of a reasonable basis. (By way of contrast, the usual State Tort Claims Act contains the language, modeled on that of the Federal Tort Claims Act, according immunity, "whether or not the discretion involved be abused.") The New York rule, with its distinctive qualifications, has been given application in the following cases relating to bridges.

Sanford v. State, 94 A.D.2d 857, 463 N.Y.S.2d 595 (1983), was a suit to recover for injuries suffered by pedestrians in the use of an allegedly defectively designed walkway on a bridge and the approaches thereto. The defense of discretionary immunity was rejected on the ground that the design of the walkway reflected lack of adequate study and a reasonable basis, the Court stating: "Neither are we able to accept the State's argument that the governmental planning doctrine . . . insulates the State from liability here. . . . Review of the testimony leads inescapably to the conclusion that there was inadequate study of the plan finally executed and no reasonable basis therefor."

Van Son v. State, 116 A.D.2d 1013, 498 N.Y.S.2d 938 (1986), was a wrongful death action to recover for the demise of an individual killed when the car in which she was riding as a passenger struck a guardrail on a bridge and plunged through the railing into a river below. Testimony was adduced at trial to the effect that the railing was made of extruded aluminum secured to bridge posts of cast aluminum; that the same exhibited a "brittle fracture characteristic" and would break easily upon impact; and that it was well known throughout the engineering community that aluminum guardrails were dangerous and unsuitable for bridge use. In granting judgment for plaintiff the Court rejected the argument of design immunity on the ground that the plan to use the aluminum railings was made "without adequate prior study" and "lacked a reasonable basis."

Of further interest, see *Friedman v. State,* 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986). This case involved the design and

use of median barriers on a bridge, wherein the New York Court of Appeals announced the rule that original planning for the installation and use of such structures on bridges (and highways generally) must be periodically reviewed by administrative agencies to determine if they are safe in actual operation, or, if because of changed conditions, have become unsafe, and ruled that, where a dangerous condition is found on review to exist, the duty arises to take remedial action with respect thereto, within a reasonable period of time after discovery of the dangerous condition.

This concludes review of the recent cases relating to defects in bridge design. It can be stated that they appear to affirm the conclusion reached in the original paper (at p. 1966-N86) that there is no blanket immunity for the design function.

CONSTRUCTION DEFECTS (p. 1966-N69)

There appears to be an absence of recent case law dealing squarely with the question whether construction, as such, constitutes an activity protected or unprotected under the discretionary function exception of the State Tort Claims Acts. (This is probably because most bridge construction takes place pursuant to contracts entered into with independent contractors.) The applicable rules would appear, however, to be the same as those in respect to design. Which is to say, that if the activity is squarely based on policy considerations it will be exempt, but absent a showing that the activity grows directly out of such considerations, it will be treated as nonexempt. In the case of departure from an immunized plan or design, nonimmunization would appear clearly to follow.

MAINTENANCE DEFECTS (p. 1966-N71)

It was pointed out in the original paper (at p. 1966-N71) that maintenance functions are generally classified as nondiscretionary, or operational level activities. However, this is *not* for the reason that they are classifiable as "maintenance" activities, but rather for the reason that most maintenance activity is not based on policy decision-making, and for the further reason that once highway facilities are constructed, erected, or installed, discretion is said to be exhausted, and the nondiscretionary duty arises to keep the same in good working order.

That the duty to maintain highway facilities once installed in proper working order constitutes an operational level duty is illustrated (in the case of bridges) by the decision in *Saracco v. Multnomah County,* 50 Ore.App. 145, 622 P.2d 1118 (1981). This was an action to recover for injuries sustained in a skidding accident on a bridge owned and maintained by defendant Multnomah County, wherein negligence was charged to the County in, among other things, failing to keep the bridge in a state of good repair by allowing the steel grating to become worn and slippery. The County countered with evidence that some 500,000 steel studs had been welded to the bridge deck in order to improve traction, and that it was the County's policy to replace worn studs whenever it became necessary to do so.

In denying the applicability of the provisions of the discretionary function exception of the Oregon Tort Claims Act, asserted by the County as a complete defense, the Court took the position that even if the decisions made with respect to the use of steel studs to improve skid resistance "were policy decisions which would not be grounds for tort liability, the alleged negligent performance by defendant's employees in failing to inspect, maintain and repair the steel grid surface, thereby rendering it slippery and dangerous, would not be policy decisions or discretionary acts immune from tort liability." The Court went on to draw a distinction between decision-making that involves broad policy considerations, and decisions that require the exercise of mere technical expertise, stating: "The fact that the decision as to when to replace studs, and where to place them on the grid, may require technical expertise does not render the decision immune."

Thus, the decision, in this case relating to maintenance, pursues the same reasoning as in the cases relating to design, i.e., that the immunity accorded by the discretionary function exception extends only to decision-making that involves judgment or choice between broad policy objectives, decisions involving mere technical expertise being excluded.

Special Problems Arising Out of Weather Conditions

Although the duty of care in respect to bridges is, generally speaking, the same as in regard to other highway facilities, there are at least two fact situations in which problems peculiar to bridges are presented.

The first is in connection with the fact that icing takes place on the surface of bridges before icing occurs on other highway surfaces. Because the meteorological phenomenon of preferential icing on bridges is largely, if not wholly, unpredictable, a serious hazard to the motoring public is thereby presented.

The second is in connection with the mounding of snow against guardrails that takes place during the usual course of snow clearing operations on bridges. It is a known fact that when the snow so mounded becomes hardpacked, the guardrail will be instantly converted into a catapulting rather than restraining device. That this circumstance presents grave danger to motorists in the case of a bridge that spans deep gullies or gorges, or open water, needs no statement.

Duty to Warn of Preferential Icing on Bridges

The duty of care in respect to preferential icing on bridges was the subject of consideration in *Salvati v. Department of State Highways,* 415 Mich. 708, 330 N.W.2d 64 (1982). The action in this case was one for wrongful death, the undisputed facts being that the vehicle plaintiff's decedent was operating skidded on entering upon an icy bridge in the early morning of a day when the air was clear and dry, and collided with a tractor-trailer which had earlier jackknifed on the bridge, causing the instant death of plaintiff's decedent. Warning of the meteorological phenomenon of preferential icing on bridges was provided by two reflectorized signs, erected on either side of the road 1,000 ft from the entrance

to the bridge, each reading WATCH FOR ICE ON BRIDGE. The trial judge granted judgment for the plaintiff in the amount of $175,000.00, based on the finding that the signs in question did not adequately warn of the intermittent and unpredictable nature of preferential icing. In reversing the finding of negligence below, the Supreme Court of Michigan ruled that the signs were adequate to warn of the potential danger, for the reason (*inter alia*) that the technology available at the time of the accident was not advanced to such point as would permit the installation of a flashing sign which would be automatically activated upon the actual appearance of ice on the bridge, and, hence, the signing involved met and satisfied the technology available at the time.

However, where no signing has been posted, the State has been held guilty of negligence in failing to give warning of possible ice formation on a bridge. It appeared in *Moraus v. State, Department of Transportation & Development,* 396 So.2d 596 (La.App., 1981), that a district supervisor of the Louisiana Department of Transportation & Development had been instructed by his superior to display all ICE ON BRIDGE signs available in the district because of a predicted freeze the following morning. The supervisor failed to carry out these instructions, and the Department was found guilty of negligence in failing to take all such reasonable precautions as were necessary to prevent the skidding accident that occurred the next day on the iced-over bridge.

Duty to Remove Snow Plowed Against Bridge Guardrails

The question of the duty to remove snow from bridge guardrails was before the New York Court of Appeals in *Gomez v. New York State Thruway Authority,* 73 N.Y.2d 724, 535 N.Y.S.2d 587, 532 N.E.2d 93 (1988). This was a personal injury action involving an automobile that skidded on an icy bridge maintained by the New York State Thruway Authority, and traveled up a pile of snow that, during the course of snow removal operations, had been plowed against the bridge guardrail by the Authority, causing the vehicle to vault over rather than be restrained by the guardrail. In a brief memorandum decision the Court of Appeals affirmed the actions of the Court of Claims and the Supreme Court in finding that the conversion of the guardrail into a propelling rather than restraining device constituted actionable negligence on the part of the Thruway Authority, entitling the injured plaintiff to judgment.

The same fact situation, as in *Gomez, supra* (vaulting of vehicles over snow-packed bridge guardrails), was before the Minnesota Court of Appeals in the cases of *Hennes v. Patterson,* 443 N.W.2d 198 (Minn.App., 1989), and *Gorecki v. County of Hennepin,* 443 N.W.2d 236 (Minn.App., 1989). Different results were reached in these cases for the following reasons.

The State of Minnesota was party defendant in *Hennes,* and the evidence established that the State had adopted a two-stage *policy* in respect to snow removal. The first stage prioritized the removal of snow from main traveled ways, and the second stage was reserved, *inter alia,* for the removal of snow from the edges of main traveled ways. At the time of the accident in *Hennes* the second stage of snow removal operations had not been entered into. The Court ruled in *Hennes* that the State was immune to suit under the terms of the discretionary function exception of the State Tort Claims Act, because a policy of prioritization in snow removal operations by the State was shown by the evidence.

The County of Hennepin was party defendant in *Gorecki,* and the evidence in this case failed to establish that the County had adopted a policy of prioritization in respect to snow removal operations. In ruling that the County was not protected by the discretionary function exception, the Court stated: "When the governmental entity fails to present any evidence that the negligent conduct complained of resulted from a broad policy decision or involved a balancing of policy objectives, the plaintiff's challenge will not be barred by the discretionary function exception."

In the later case of *Schaeffer v. State,* 444 N.W.2d 876 (1989), the Minnesota Court of Appeals distinguished its prior holdings in *Hennes* and *Gorecki* on the ground that in *Gorecki* the "decision not to remove snow from edge of bridge was not policy-making decision because governmental unit did not present any evidence, such as established policy of prioritization shown in *Hennes,* explaining why snow was removed from other areas but not from edges of bridges."

Statutes According Immunity for Weather Conditions

Some States have statutes according limited immunity for injury or damage caused by weather conditions. One type of such statute provides for immunity except in the case of "affirmative" negligence on the part of government officers or employees. The construction of such type of statute was before the Supreme Court of Kansas in *Taylor v. Reno County, Kansas,* 242 Kan. 307, 747 P.2d 100 (1987). This was a wrongful death and personal injury action arising out of an automobile accident occasioned by skidding on a bridge covered with a sheet of ice when the highway approaches thereto were free and clear of any ice accumulation. Negligence was charged to Reno County in failing to warn of, or take corrective action with respect to, the icy condition of the bridge. Defendant County asserted as a defense the provisions of K.S.A. 75-6104, reading as follows:

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
> ....
> (k) snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity.

In holding that defendant County was rendered immune from liability by the provisions of the above statute, the Court stressed that the governmental negligence, if any, was in the failure or omission to act, and ruled that inaction on the part of the County could not be interpreted to mean such "affirmative" course of conduct as was contemplated by

the statute to constitute an exception to the immunity for weather conditions accorded thereby.

This concludes the review of recent appellate court cases that, although limited in number, are deemed to yield a measure of instruction with respect to liability for the design, construction, and maintenance of bridges.

RELATED MATTERS

Attention is now turned to cases involving matters of collateral interest to highway agencies having jurisdiction and control over bridges.

Liability for Acts of Third Persons

The question sometimes arises whether a governmental entity having jurisdiction and control over bridges can be held liable for the conduct of third persons in throwing dangerous objects from bridge structures onto roadways running thereunder. This question was before the Court in *Stallings v. North Carolina Department of Transportation,* 92 N.C.App. 346, 374 S.E.2d 469 (1988), involving a suit to recover for injuries suffered by an automobile operator who was struck in the face and head by a heavy object dropped or thrown from an overhead bridge by a third person. In holding that the North Carolina DOT, which had jurisdiction and control over the bridge, could not be held liable for the actions of third persons unless it had actual or constructive knowledge of a prior pattern of similar conduct, the Court emphasized that no such prior conduct as would render the incident in question foreseeable was shown by the evidence.

Jurisdictional Problems Relating to Interstate Bridges

It is evident that questions of jurisdiction may be presented in the case of an interstate bridge that spans the territorial limits of separate States. The case of *Fernandez v. State, ex rel. Department of Highways,* 49 Wash.App. 28, 741 P.2d 1010 (1987), is interesting in that the question of jurisdiction was decided on principles of comity.

This was an action to recover for injuries sustained by a pedestrian on a bridge crossing the Columbia River between the States of Washington and Oregon. It appeared that the bridge was constructed pursuant to an agreement arrived at between Washington and Oregon by the terms of which responsibility for the design and maintenance of the bridge was divided between the two States. The suit was one charging negligence in the design and maintenance of the bridge, and both the States of Washington and Oregon were named as party defendants. Suit was instituted in Clark County, Washington, and the Superior Court of that County declined to assume jurisdiction over the State of Oregon on principles of comity. One of the questions presented on appeal was whether the lower court committed error in so doing. In upholding the action of the lower court the Washington Court of Appeals ruled that, although it was within the power of the trial judge to assert jurisdiction over the State of Oregon, it was within his prerogative to decline to do so on principles of comity. It stated with respect thereto: "Notwithstanding the existence of jurisdiction, principles of comity allow states to decline jurisdiction over another state in order to promote friendly relations and a mutual desire to do justice.... Here, we believe that the trial court properly applied principles of comity in declining to assume jurisdiction. The bridge was constructed as a cooperative effort between the states.... Subjecting Oregon to Washington jurisdiction ... does not appear to promote cooperative endeavors between the two states."

Recovery Under Inverse Law for Bridge Construction

Finally, the recent decision of the Supreme Court of Montana in the case of *Adams v. Department of Highways of the State of Montana,* 753 P.2d 846 (Mont., 1988), is of interest in that it deals with the question whether recovery may be had, under inverse law, for the diminution in value of neighboring properties brought about by the construction of a new bridge. The complaint, in this case, alleged that upon opening of the bridge there was an immediate increase in traffic, accompanied by noise, dust, and pollution, all of which caused a decrease in the value of the adjacent residential properties owned by plaintiffs. In denying recovery the Court ruled that injuries shared in common by the general public are *damnum absque injuria* and that there was no showing of damage special or peculiar to the affected landowners. It stated: "Any property that is adjacent to an improved roadway is going to suffer the adverse consequences of traffic increase. To allow recovery for the Landowners in this case would open a Pandora's Box which would, as the State, County and Amicus Curiae have argued, make development or improvement of highways and roadways in the State of Montana cost-prohibitive.... The Landowners have not shown that their situation is any different from any other property owner who suffers the effects of living adjacent to a roadway with increased traffic."

CONCLUSION

In concluding this review of recent case law, it should be pointed out there are numerous papers in *Selected Studies in Highway Law* that deal with the question of what constitutes the required standard of reasonable care with respect to the various constituent elements of the highway systems, and that the material found in certain of these papers is directly relevant to the standard of care required in the case of bridge structures. Particular attention is invited to the following papers, which yield information squarely in point as relating to bridges: "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," Vol. 4, p. 1771; "Duty of the State to Erect and Maintain Guardrails, Barriers, and Similar Protective Devices," Vol. 4, p. 1966-N157; "Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings," Vol. 4, p. 1943; "Liability of State

and Local Governments for Snow and Ice Control," Vol. 4, p. 1869; "Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed to Reducing Such Accidents on Highways," Vol. 4, p. 1889; and "Liability of the State for Injury-Producing Defects in Highway Surface," Vol. 4, p. 1966-N33.

It is obvious that the duty of care in respect to guardrails, signs and signals, snow and ice control, defects in the pavement surface, wet-weather skidding accidents, and so on, discussed in these papers, is fully relevant to the duty of care in respect to bridges and their appurtenances, and reference is here made to the foregoing papers, and the supplements thereto, for a discussion of case law yielding pertinent instruction in the premises.

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APPLICATIONS

The foregoing research should prove helpful to attorneys involved in defending tort claims. Design, construction and maintenance engineers will also benefit by being better informed about the consequences of actions which could cause liability for the highway agency.

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