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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,  
33 construction, 40 maintenance,  
51 transportation safety, 54 operations  
and traffic control, 70 transportation  
law (01 highway transportation)**

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

*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, serving under the Special Activities Division (B) of the Board at the time this report was prepared.*

### 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 of Selected Studies in Highway Law, entitled "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," pp. 1771-1834-S14, by the original author, Larry W. Thomas. The last supplement to

this paper was published in December 1980. This supplement represents an update of the law on that topic to 1988.

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 supplements that have been published since the original publication in 1976, except two papers that will be published when Vol-

ume 5 is issued in a year or so. The text, which totals about 3000 pages, comprises 67 papers, 38 of which are published as supplements in SSHL. 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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## SUPPLEMENTARY MATERIAL

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

### INTRODUCTION (p. 1771)

The major developments since the first supplementation (in *Selected Studies in Highway Law*, p. 1834-S1, *et seq.*) of the paper entitled "Liability of State Highway Departments for Design, Construction, and Maintenance Defects" have been largely in connection with application and interpretation of the discretionary exemption.

Although the terms of the discretionary exemption will vary from State to State, it is a safe generalization to state that the great majority thereof are patterned after the language of the Federal Tort Claims Act (28 U.S.C. 2680), and, before proceeding further, it may be useful to set forth the exact language of the Federal Act which the states have, in general, followed:

28 U.S.C. 2680, establishing an exception to Federal waiver of sovereign immunity, provides as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(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 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 federal agency or an employee of the Government, whether or not the discretion involved be abused.

It is to be emphasized that in the enactment of State Tort Claims Acts the significant language "whether or not the discretion involved be abused" has in almost all instances been adopted. The editorial comment is offered that the virtually uniform approach taken by State legislatures in closely following the language of the Federal Act in enacting State legislation has in large part been due to widespread cognizance of the fact that the United States Government avoided the payment of hundreds of millions of dollars in damages for the Texas City disaster the subject of suit in the leading case of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), and the safe and secure course of adopting the language of the Federal Act was pursued in an effort to bring State legislation squarely within the purview of the protection provided by the Federal Act.

Because State legislation has so closely pursued the language of the Federal Act the natural consequence has been that State courts have in general followed the lead of the United States Supreme Court in adopting the planning and operational dichotomy, announced in *Dalehite*, as a useful tool in distinguishing between those activities that are protected by the discretionary exemption and those that are not so protected.<sup>1</sup>

The method that this supplementation paper will pursue is to set forth

in abstract form representative cases showing the not always uniform course that the courts have followed in interpreting the effect of the discretionary exemption on the design, construction, and maintenance of highways. As a preliminary matter it is to be noted that it is now settled beyond dispute that the impact of the discretionary exemption extends beyond the design, construction, and maintenance of the roadbed and traveled surface and fully encompasses signing, signaling, and other auxiliary matters essential to the provision of safety on the highways.

### APPLICATION OF DISCRETIONARY EXEMPTION TO HIGHWAY DESIGN

Since the prior supplementation paper was written cases have been decided in which the question was presented whether *all* design activities fall within the protected planning stage of the planning and operational dichotomy, or whether certain design activities can be classified as being performed at the non-protected operational stage and are therefore subject to judicial review. The significant result has been reached that certain aspects of the design function have been declared to be discretionary in nature and, hence, immune to review, while other aspects have been held to be operational in character and, therefore, subject to the scrutiny of the courts. The following cases illustrate this development.

In *Breed v. Shaner*, 57 Haw. 656, 562 P.2d 436 (1977), plaintiff was a passenger in an automobile which 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 exemption. The issue 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." (Emphasis added.)

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, concluding that certain elements of design activity are operational in nature and hence outside the scope of the protected planning stage. After noting that the purpose of the discretionary exemption is "to protect the decision-making process 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, or 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 and 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 exemption 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.

In *Stewart v. State*, 92 Wash.2d 285, 597 P.2d 101 (1979), plaintiff and her husband were traveling through a snowstorm in the night hours when they entered upon an unlighted bridge, 1,600 ft in length, which crossed the Snohomish River in the State of Washington. Because of icy conditions their vehicle skidded, spun out of control, and came to a halt in such manner as to block the left lane and part of the middle lane of the three-lane highway carried by the bridge. Prior to the skid their vehicle had, because of the dangerous conditions, been proceeding at a rate of no more than 25 to 30 miles per hour (mph). Suddenly cars in all three lanes bore down on their disabled vehicle, and a multi-car collision ensued. As a result of the crash plaintiff's husband was thrown into the river below where his body remained undiscovered for a period of months. Plaintiff received injuries of such severity as to require the amputation of one of her limbs. Multiple law suits ensued, the only one with which we are concerned being an action brought by plaintiff against the State of Washington charged negligence in the design and lighting of the bridge. Judgment was entered against the plaintiff in the trial court on the ground that the discretionary exemption precluded judicial review of decision-making in respect to the design and lighting of the bridge.

On appeal the Supreme Court of Washington stated that four factors are to be taken into consideration in determining the applicability of the discretionary exemption, as follows: (1) whether an act or decision involves a basic governmental policy; (2) whether an act or decision is essential to the accomplishment of that policy; (3) whether the act or decision in question involved basic policy evaluation on the part of the particular governmental agency involved; and (4) whether the governmental agency in question possessed the requisite authority to make the specific policy evaluation or decision under review. The Court then stated that: "Only if all four questions can be clearly and unequivocally an-

swered in the affirmative can the act, omission or decision be classified as a discretionary governmental process and nontortious."

In holding that decisions in respect to the design and lighting of the bridge did not meet all of the qualifications specified, the Court stated:

The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes—these elements involve a basic governmental policy, program or objective. However, these are not the elements which are challenged by appellant. Rather, appellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. Negligent design was not essential to the accomplishment of the policy, program or objective.

The State argues that adoption of a design involves a judgmental choice. The . . . test requires more. There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate. The issues arising from the evidence as to negligent design should have been submitted to the jury.

Thus the Court ruled in effect that absent a clear showing that basic policy considerations were involved in the design of the bridge, that matters pertaining to negligence in design were the proper subject of judicial cognizance and review.

*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 hydrastatic pressure blew the covers off manholes, allowing sewage waste, as well as accumulated rainwater, to flood and seriously damage plaintiffs' property.

Suit was brought charging negligence in the design of the new highway, and the discretionary exemption of the Utah Tort Claims Act (which contained the usual language exempting discretionary activity "whether or not the discretion is abused") 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 exemption 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 exemption.

However, as representing an apparently contrary result see *Perez v. Department of Transportation*, 435 So.2d 830 (Fla., 1983), a wrongful death action in which the facts established that a vehicle being driven at an excessive rate of speed upon reaching the steel grating on the draw portion of a bridge suddenly made an abrupt right-hand turn of nearly 90 deg, crossed three lanes of traffic, struck the restraining curb, and vaulted through the pedestrian handrail into Biscayne Bay below, where decedent, a passenger in the car, met death by drowning. Suit was brought alleging, *inter alia*, (1) negligence in the design of the bridge, and (2) negligence in failing to upgrade the bridge after it was constructed. (The specific details with respect to the alleged negligence were not set forth in the opinion.) In disposing of such charges in favor of the State the Supreme Court of Florida simply stated that "the act of designing the bridge and the failure to upgrade and improve the bridge arise at the judgmental, planning-level of government and are immune from suit under [the Florida Tort Claims Act]. . . . [B]oth the basic design of a roadway and decisions concerning whether or not to upgrade and improve a roadway are judgmental, planning-level functions."

#### APPLICATION OF DISCRETIONARY EXEMPTION TO HIGHWAY MAINTENANCE

As shown hereinbefore in the case of design, there is authority to the effect that maintenance activities (although generally deemed "ministerial" in character) can be separated under the planning and operational dichotomy into the protected planning stage and the unprotected operational stage. In other words, it has been held that it is not sufficient for the purposes of determining the applicability of the discretionary exemption to label an activity as constituting a "maintenance" function, and therefore conclude that it is "operational" rather than "planning" in character.

The view has been taken that the *nature* of the particular maintenance activity must be taken into consideration, and that part of the maintenance process which represents governmental or policy decision-making is to be classified as "discretionary" and hence exempt, whereas that part of the maintenance function which constitutes merely implementation of decisions taken at the policy-making level is to be classified as "operational" in nature, and therefore subject to judicial review. The following cases illustrate.

The central question in *Costa v. Josey*, 83 N.J. 49, 415 A.2d 337 (1980), was whether alleged negligence in respect to the maintenance operation of resurfacing a highway was subject to judicial review, or excluded

therefrom, by reason of the provisions of the New Jersey Tort Claims Act, relating to discretionary immunity.

In reversing a lower court decision in favor of the State the Supreme Court of New Jersey, after first noting that virtually "all official conduct, no matter how ministerial, involves the exercise of some judgmental decision-making," went on to say:

We recognize that the resurfacing plans in this case were approved by high-level officials, the State Highway Engineer and the Commissioner of Transportation. Although the identity of the decision-maker may indicate that the decision involves basic policymaking, that conclusion does not follow. A high-level official may make operational decisions as well. Here, the record is devoid of any evidence that the Engineer's and Commissioner's approval was other than an operational determination.

Moreover, subsumed within the principle that the public entity is immune when it exercises its discretion with respect to basic policy, is the necessity for demonstrating that there has in fact been an exercise of that discretion. Here, for example, assuming that a basic policy matter was involved, there is nothing to indicate that any competing policy choices were actually considered when the resurfacing plan was made and approval given.

It is noteworthy that the Court did *not* seek to avoid the implications of the discretionary exemption by classifying resurfacing as a *maintenance* activity and, therefore, nondiscretionary in nature. As shown in the quotation above, the Court conceded that almost all activities involve some element of discretion, and rested its decision squarely on the finding that the particulars of the resurfacing operation in question were *operational* rather than *planning* in nature.

The labeling of an activity as being either a "design" or a "maintenance" function was also rejected in *Stevenson v. State, Department of Transportation*, 290 Ore. 3, 619 P.2d 247 (1980), as being an unsatisfactory test to determine whether a particular activity was immune from review under the terms of the discretionary exemption of the Oregon Tort Claims Act. Describing the design-maintenance distinction as being an "overgeneralization" as applied to the Tort Claims Act, the Supreme Court of Oregon sought to break down decision-making with respect to highways into two categories. In the first, or the immune category, the Court included decisions involving "governmental discretion or policy judgment," and gave as an example the decision whether to build a highway or a railroad. In the second, or unprotected category, it included the *design* decision whether to build a safety fence 2 instead of 3 ft high, and the *maintenance* decision whether to remove snow first from road A or road B, stating that both of these decisions "involve the use of 'discretion' in the sense that a choice must be made but they do not involve the use of 'discretion' in the sense that a policy decision is required." The Court went on to say that in determining liability under the discretionary exemption "the inquiry is whether the function in question involves the exercise of what we have described as *governmental or policy discretion*." (Emphasis added.)

The factual situation before the Court involved an intersectional col-

lision allegedly caused by the fact that a green traffic light showing on one of the two intersecting roads was also visible to drivers rounding a curve on the other of the intersecting roads—causing confusion—and that the State was negligent in failing to shield the light once it was erected so as to render the same visible on only one of the intersecting roads. Judgment of the intermediate Court of Appeals in favor of the State was reversed, and the judgment of the trial court in favor of the plaintiff reinstated without regard to whether the dangerous condition was the result of faulty design or negligent maintenance, the Court ascribing as the ground of its ruling that "there is nothing in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the *exercise of governmental discretion*." (Emphasis added.)

#### APPLICATION OF DISCRETIONARY EXEMPTION TO SIGNS AND SIGNALS

As before stated it is now settled beyond dispute that the application of the discretionary exemption extends beyond the duty of care in respect to the roadbed and traveled surface of the roadway and encompasses signing, signaling, and other auxiliary matters pertaining to safety on the highways.

There are next set forth cases illustrating the effect of the discretionary exemption on the duty of the State to erect and maintain traffic control signs and signals for the protection of the motoring public. The decisions are grouped under subheadings indicating the particular type of activity involved.

#### Traffic Lights and Electronic Signals

In the following cases involving allegations of negligence in the installation and operation of electronic traffic control devices the State and its subdivisions were held immune to suit by reason of the provisions of the discretionary exemption.

A wrongful death action was brought in *Wainscott v. State*, 642 P.2d 1355 (Alaska, 1982), charging that the demise of the decedent, killed in an intersectional motor vehicle collision, was proximately caused by the negligence of the State in installing a flashing red light on one of the intersecting roads, and a flashing yellow light on the other of the intersection roads, instead of providing a sequentially changing red, yellow, and green signal to guide the movement of traffic. The State asserted as a defense the discretionary exemption of the Alaska Tort Claims Act. In affirming summary judgment entered below for the State, the Court noted that while almost all decision-making involves some element of discretion, not all decisions fall within the discretionary ambit, and that the test applied in the courts of Alaska to separate protected from unprotected decision-making was the planning and operational test. The Court took cognizance of the fact that such test was "somewhat inexact," but stated that it "serves to protect those decisions worthy of protection without extending the cloak of immunity to an unwise extent." The Court then went on to rule that the decision to install flashing red and

yellow lights instead of a sequential traffic signal at the intersection in question was one made at the protected planning level and, therefore, immune. In reaching this decision the Court stated that:

If we were to assess the propriety of this decision, we would be engaging in just the type of judicial review that the discretionary function exception seeks to prevent. The selection of a traffic control device for the . . . intersection was not a purely ministerial decision implementing a preexisting policy, but rather a decision that called for policy judgment and the exercise of discretion. In opting to retain the red and yellow flashers, the department considered the long term development plan for the New Seward Highway, the disruptive effect that a sequential signal might have on traffic flow, and the need to address more pressing safety problems elsewhere. We therefore hold that the department's selection of the traffic control mechanism came within the ambit of the discretionary function exception, entitling the state to immunity. . . .

A similar set of facts was before the Supreme Court of Alaska in *Rapp v. State*, 648 P.2d 110 (Alaska, 1982), and the Court again ruled in favor of the State, citing as the basis of its holding the decision in *Waincott v. State*, *supra*.

Suit was brought, in *Davis v. City of Cleveland*, 709 S.W.2d 613 (Tenn.App., 1986), alleging that the injuries received by plaintiff in an intersectional collision were proximately caused by the negligence of defendants City of Cleveland and Bradley County in setting the sequential change of traffic lights at the intersection in such manner that the interval of the yellow caution light was too brief to permit clearance of traffic before the signal changed to green or red. The applicable provision of the Tennessee Governmental Tort Liability Act (T.C.A., Sec. 29-20-205) waived governmental immunity "for injury proximately caused by a negligent act or omission of any employee within the scope of his employment," except and unless the act or omission arose out of "the exercise or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." The Court ruled that the setting of the timing sequence of the traffic light by defendants' employees was a "judgment call" falling within the ambit of the discretionary exemption, and, in absolving defendant City and County from liability, stated that: "In this case, it is the acts or omissions of the employees in setting the yellow caution interval that are really claimed to be the proximate cause of plaintiff's injuries. The traffic signal itself operates properly according to the timing sequences previously set, and is itself not defective. Thus this case must be considered under T.C.A., Sec. 29-20-205. Since the acts or omissions for which the plaintiffs claim the City of Cleveland and Bradley County are liable are acts or omissions for which immunity has not been removed under T.C.A., Sec. 29-20-205, this action is barred."

In *Bjorkquist v. City of Robbinsdale*, 352 N.W.2d 817 (Minn., 1984), it was charged by plaintiff bicyclist, injured in an intersectional accident, that the timing of the clearance interval between change of traffic lights from red to green was unduly brief, and that the improper timing of the light change was the proximate cause of his being struck down by

an automobile at the intersection. The case is interesting in that plaintiff conceded that the decision whether or not to install a traffic control device at the intersection was discretionary in nature and hence exempt under the Minnesota Tort Claims Act, the plaintiff's contention being restricted to the argument that the timing of the change of lights was based on a decision made at the operational level and was, therefore, not immune to review under the Act. The Court rejected this contention and ruled that the decision in respect to the length of the clearance interval was part and parcel of the planning process, and hence constituted a discretionary decision protected by the terms of the Act.

#### STOP Signs as Traffic Control Devices

It has been held that the decision whether or not to install a STOP sign as a traffic control device falls within the protected "planning" stage of the planning and operational dichotomy and is, therefore, beyond the scope of judicial review.

*Gonzales v. Hollins*, 386 N.W.2d 842 (Minn.App., 1986), involved an automobile collision which took place at an intersection where traffic was controlled by a stop sign. Prior to the accident, movement of traffic at the intersection had been regulated by electronically operated semaphores, the latter having been eliminated by defendant municipality as a cost-cutting measure. The question before the Court was whether the action of the City in changing the traffic control devices from semaphores to a static stop sign was a discretionary activity rendered immune by the provisions of the Minnesota Tort Claims Act, exempting from liability municipal activities "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." In holding that "the City's decision to replace the traffic control devices was discretionary," the Court relied upon the planning and operational dichotomy, ruling that the decision with respect to the change in traffic control devices was "planning" in nature.

The action in *City of Tell City v. Noble*, 489 N.E.2d 958 (Ind.App., 1st Dist., 1986), arose out of an intersectional collision, negligence being charged to the City of Tell City by plaintiff, seriously injured in the accident, in failing to have erected a stop sign, or any other form of traffic control device at the intersection in question. The principal question on appeal was whether the decision of defendant City not to install a stop sign or other form of traffic control at the intersection was a discretionary decision rendered immune by the provisions of the Indiana Tort Claims Act. In holding that such decision was protected by the Act and absolving the City of liability, the Court stated that in enacting the Tort Claims Act "it was not the intent of the legislature to permit a lay jury to second guess the acts of local authorities."

However, a different result was reached in *Alexander v. Eldred*, 63 N.Y.2d 460, 483 N.Y.S.2d 168, 472 N.E.2d 996 (1984), wherein the New York Court of Appeals applied its previously announced rule that the discretionary exemption does not have application to a situation where it can be shown that decision-making was grounded on (a) inadequate study, or (b) lacked a reasonable basis.<sup>2</sup> In this case plaintiff was injured

in a collision between the motorcycle he was operating and another vehicle when he entered upon a public street of defendant City of Ithaca from a private road on which he was traveling. There was no stop or other sign posted on the private road giving warning of the road juncture. The City's Traffic Engineer testified at trial that he never considered installing a sign on the private road because he believed that he was without authority so to do. Such belief was shown to be erroneous in light of the fact that he was expressly empowered by the provisions of the New York State Vehicle and Traffic Law to install signs on "private roads open to public motor vehicle traffic." The Court of Appeals ruled that such ignorance of the law reflected (1) inadequate study, and (2) lack of reasonable basis for the decision of the Traffic Engineer not to install signing warning of the road intersection. Because inadequate study and lack of reasonable basis were denoted in the leading case of *Weiss v. Fote, supra*, footnote 2, as being grounds for avoidance of the application of the discretionary exemption, the Court upheld the actions of the Court of Claims and Supreme Court Appellate Division in awarding judgment for plaintiff, based on a finding of negligence on the part of the City in failing to erect a stop or other signing giving adequate warning of the dangerous intersection.

#### *Maintenance of STOP Sign*

However, it has been held that although the decision whether or not to install a stop sign falls within the ambit of the protected planning stage, once the decision is made and the sign erected, matters pertaining to maintenance of the sign in good working order are operational in character and hence not protected by the discretionary exemption.

*Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla. 1979), involved a vehicle collision allegedly due to the failure to replace a downed stop sign at an intersection, coupled with negligent failure to repaint the obliterated word stop on the pavement at the entrance to the intersection. Defendants were the Counties of Dade and Indian River and the Florida Department of Transportation.

The question before the Supreme Court of Florida was the interpretation of the Florida statute waiving tort immunity for the State and its subdivisions. Such statute differed from the Federal Tort Claims Act, and the many State statutes patterned thereon, in that it contained no exception for discretionary acts. The contention was urged upon the Court that because of this omission sovereign immunity was waived in all tort cases. In rejecting this contention the Court reviewed the statutory law of other jurisdictions that similarly waived immunity without the discretionary exception (specifically, the States of New York and Washington) and followed the lead of those jurisdictions in engrafting the discretionary exception on the language of the Florida statute.

However, in so doing it adopted the planning and operational dichotomy and, in ruling against the defendant State and its subdivisions, held that the failure to replace the stop sign, coupled with failure to repaint the word stop on the pavement surface, were matters within the operational sphere of activity, and hence the governmental defendants were not immune to suit under the Florida statutory waiver of immunity.

In an effort to clarify its ruling in *Commercial Carrier, supra*, and eliminate lower court conflict in interpretation, the Supreme Court of Florida, in *Department of Transportation v. Neilson*, 419 So.2d 1071 (Fla., 1982), after first stating that it rejected "suggestions that we should modify our *Commercial Carrier* decision because of decisions in other jurisdictions on the subject matter," announced the rule that although decisions with respect to the installation and placement of traffic control devices are exempt planning level decisions that the failure to maintain traffic control devices in proper working order once installed constitutes negligence at the unprotected operational level.

#### **Effect of Posting Speed Limit Signs**

It has been held that the posting of a speed limit sign is an activity conducted at the protected planning level rather than a function classifiable as part of the unprotected operational stage of activity.

*Kolitch v. Lindedahl*, 100 N.J. 485, 497 A.2d 183 (1985), involved the question whether the State can be held liable for tortious conduct in posting a speed limit which, although lower than the statutorily authorized statewide speed limit, was nevertheless alleged to be excessive and inconsistent with safe driving on a particularly dangerous portion of highway. The facts were as follows.

The instant suit was heard on the appeal of consolidated wrongful death actions growing out of a nighttime automobile collision between two vehicles on a segment of road known as a "vertical sag curve." The Supreme Court of New Jersey defined such term as meaning "a design in which, as applied to a roadway, a downgrade is followed by an upgrade, and the road surface between the two itself contains a curve along the horizontal plane." Such inherently dangerous condition was alleged to have been complicated by obscurant foliage at the scene of the accident and poor lighting during the nighttime hours. The posted speed limit for the vertical sag curve was 50 mph.

Suit was brought under a New Jersey statute providing for liability of public entities for maintaining their properties in a hazardous condition. The State asserted as a defense the discretionary exemption language of the New Jersey State Tort Claims Act. Expert testimony was offered at trial to the effect that any speed limit greater than 30 mph at the scene of the accident was excessive and unsafe. The argument was made that the posted speed limit of 50 mph was tantamount to active deception of the traveling public and, as such, might have directly contributed to the fatal accident.

In ruling for the State, the majority opinion applied the planning and operational dichotomy and concluded that the posting of the speed limit was a planning level decision protected by the discretionary exemption.

#### **Signs Warning of Dangerous Curves**

Although the decision whether or not a curve is sufficiently dangerous as to require the posting of a warning sign might appear to be discretionary in nature, it has been held that the question whether such decision has exempt status under the discretionary exemption is one for jury



determination rather than for the court to decide. Illustrative are the following cases.

*Peavler v. Board of Commissioners of Monroe County*, 492 N.E.2d 1086 (Ind.App., 1st Dist., 1986), was an action to recover damages for injuries suffered by plaintiff when the vehicle in which he was a passenger failed to negotiate a sharp curve and crashed into a tree. The Indiana Appellate Court reversed the action of the trial judge in instructing that the decision of defendant Monroe County not to erect signs warning of the dangerous curve was discretionary in nature, and therefore protected under the Indiana Tort Claims Act. However, in so doing the Court specifically declined to rule on whether the county's decision not to erect signing warning of the dangerous curve was discretionary, stating that whether the decision was discretionary (and hence protected) or ministerial (and hence unprotected) was an issue for the jury to decide, and the case was remanded for jury determination with respect to this issue.

The question before the Court in *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982), was whether the decision by highway officials not to post warning signs at a curve where the vehicle in which plaintiff was riding as a passenger left the road and crashed into an embankment was an exercise of discretion protected under the terms of the Kansas State Tort Claims Act. In approaching the problem the Court took the position that a distinction existed between the exercise of "governmental discretion" and the exercise of "professional judgment" by highway engineers working within guidelines relating to signing provided by the *Uniform Manual on Traffic Control Devices*, stating that the "question becomes whether those employees are exercising discretion within the meaning of the KTCA [Kansas Tort Claims Act] or merely exercising professional judgment within established guidelines." The Court ruled that the determination of this issue was a jury question, and, in reversing summary judgment entered below for the State, remanded for jury resolution the question whether the decision not to post warning signs was within the umbrage of protected "governmental discretion," or the ambit of unprotected exercise of "professional judgment."<sup>3</sup>

#### Signs Warning of Deer Crossing Points on Highways

Signs warning of known deer crossing points along the public highways are common throughout the country, and provide important protection to motorists because of the severity of the consequences frequently ensuing from a collision between a fast moving vehicle and such animals moving abruptly in the face of traffic. In the following cases divergent results were reached in respect to the application of the discretionary exemption to deer warning signs.

*Metier v. Cooper Transport Co., Inc.*, 378 N.W.2d 907 (Iowa, 1985), involved the question whether the decision to place a deer warning sign at a particular location on a highway was a discretionary decision protected by the discretionary function exemption of the Iowa State Tort Claims Act. It was conceded that the State had adopted a general policy of placing deer warning signs on its highways by reason of the fact that

the *Uniform Manual for Traffic Control Devices*, which contained specifications for deer warning signs, had been adopted by the Iowa Department of Transportation.

Plaintiff was injured in a motor vehicle accident caused by the fact that she swerved from the lane in which she was operating her vehicle in order to avoid a deer on the highway, and collided with an oncoming vehicle in the opposite lane of travel. In holding that plaintiff had stated a valid cause of action against the State in a suit brought to recover for injuries sustained in the collision, allegedly the direct result of the State's failure to post a deer warning sign at the locus of the accident, the Court distinguished between the broad decision to place deer warning signs on the State's highways, and the decision whether or not to post a warning sign at a particular location on the highways. The former was described as being planning in nature, and the latter as operational in character. Stating that although the "initial decision to place warning signs at deer crossing sites on the State's highways was a planning and not an operational decision," the Court continued that it was nonetheless clear that "the failure to carry out this policy by placing such signs at this particular crossing was operational in character. The failure was not an implementation of a discretionary function."

In *Ufnal v. Cattaraugus County*, 93 A.D.2d 521, 463 N.Y.S.2d 342 (1983), plaintiff's decedent was killed when the motorcycle he was operating struck a deer on the highway. Although evidence was offered by plaintiff at trial to the effect that deer were plentiful in defendant County and consequently there were numerous known deer crossing points along the highways, defendant County countered with negative evidence to show that the locus of the accident had never been reported or identified as a deer crossing. In the instant wrongful death action brought by plaintiff, in which negligence was charged to the County in failing to have posted the scene of the accident as a deer crossing, defendant County asserted as a defense that the decision not to post such warning at the particular location was immune as a protected discretionary decision. The Court of Claims accepted the latter argument and the Appellate Division affirmed, ruling that the decision not to erect deer warning signs based on negative evidence tending to show a lack of need therefor at the particular location was the "very sort of discretionary governmental decision" to which the discretionary exemption was intended to apply.

#### Traffic Control Devices for the Protection of Pedestrians

It has been held that the decision not to install any form of traffic control device for the protection of pedestrians at an intersection was a decision made at the operational level and thus outside the protection of the discretionary exemption.

*Foley v. City of Reno*, 680 P.2d 975 (Nev., 1984), was an action brought by a pedestrian to recover for injuries sustained when he was struck by an automobile while negotiating the crosswalk at a street intersection in the City of Reno. Negligence was charged to the City in failing to install such traffic control devices as were adequate for the

protection of pedestrians. The City pleaded as a defense the discretionary exemption of the Nevada Tort Claims Act. In rejecting this defense the Supreme Court of Nevada ruled that discretion was exhausted with the decision to construct the intersection and install the crosswalk. It stated: "The decision to construct the intersection and to install the crosswalk may have been a discretionary decision, but once that decision was made the City was obligated to use due care to make certain that the intersection met the standard of reasonable safety for those who chose to use it. The City was not immune from liability under the [Tort Claims Act]."

#### Publication of State Driver's Manual as Exempt Activity

*Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn.App., 1984), involved a head-on collision between two motor vehicles proceeding in opposite directions on a three-lane highway, the two westbound lanes of travel being separated from the single eastbound lane by a double yellow line. Negligence was charged to the State, *inter alia*, in failing adequately to explain in the Minnesota Driver's Manual the meaning of a double yellow line. Immunity was asserted by the State on the ground of the discretionary exemption contained in the State Tort Claims Act, and the Court ruled that the determination of the State as to what to include in and what to exclude from the provisions of the Driver's Manual was a protected discretionary decision within the meaning of the Tort Claims Act.

#### Waiver of Immunity Upon Procurement of Liability Insurance

A number of State statutes provide for the waiver of discretionary immunity upon procurement by a governmental entity of liability insurance. The inevitable consequence of waiver of immunity is that tort cases brought against governmental bodies that have obtained such insurance are heard and decided on common law negligence grounds. The following cases illustrate:

*Hintz v. Jamison*, 743 F.2d 535 (C.A. 7, 1984), involved the construction of two sections of an Illinois statute, the one according township officials immunity for discretionary acts, and the other providing for mandatory waiver of immunity upon procurement by townships of insurance covering the tortious conduct of their employees. The facts giving rise to the interpretation of the two statutory provisions were that plaintiff, a passenger in a motor vehicle, brought a diversity action charging negligence on the part of defendant township and its road commissioner, in failing to erect adequate signing warning of a "T" intersection, the plaintiff having sustained serious injuries as the result of the fact that the vehicle in which she was riding plunged into a ditch, allegedly because of the absence of proper signing. Plaintiff conceded that the commissioner's actions in failing to post adequate warning signs were immune under the language of the statutory discretionary exemption, but contended that because immunity was waived upon the procurement of insurance, defendant township and its commissioner were liable on ordinary negligence grounds for failure to post adequate warning signs.

Such position was upheld by the trial court and affirmed on review by the Federal Court of Appeals.

The facts in *Nunley v. Village of Cahokia*, 115 Ill.App.3d 208, 70 Ill.Dec. 890, 450 N.E.2d 363 (1983), a wrongful death action, were as follows: Plaintiff's decedent was attempting to cross an intersection on foot when he was struck and killed by a motorcycle entering the intersection. It was uncontroverted that at the time of the fatal accident the traffic light, installed and maintained at the intersection by defendant Village, was not operating in the usual red-amber-green sequential order, by reason of having been struck by an automobile. The blow to the signal caused it automatically to begin flashing only the amber light on one of the intersecting roads, and flashing only the red light on the other of the intersecting roads.

The defense of immunity under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (ILL.REV.STAT., ch. 85, para. 1-101, *et seq.* (1981)) was unavailable to defendant Village of Cahokia by reason of the fact that it had procured liability insurance and hence waived the immunity defense. The case was hence heard on ordinary negligence grounds, and in affirming judgment rendered below for defendant Village the Court ruled that because warning lights were flashing on each of the intersecting roads that "the traffic lights were operational and created no danger at the intersection."

#### Exception to Immunity for Known Dangerous Condition

A number of States have enacted, in addition to legislation providing for discretionary immunity, statutes imposing liability on governmental entities for maintaining public property in a "dangerous condition," and in construing such statutes *in pari materia*, it has generally been held that discretionary immunity does not accord protection in a situation where a "dangerous condition" of public property is shown. In addition, it has been held by judicial fiat, in the absence of the enactment of a "dangerous condition" statute, that discretionary immunity does not have application to a fact situation involving a "known dangerous condition" of public property.

*Liefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983), involved a vehicle collision on a bridge, in which plaintiffs, the driver of a truck, and his wife, a passenger therein, were both injured. The other vehicle involved in the accident was a truck pulling a low-boy trailer with a Caterpillar bulldozer loaded thereon. In crossing the bridge the blade of the bulldozer caught on a bridge girder causing the bulldozer to be displaced into the path of plaintiffs' oncoming vehicle. In bringing suit to recovery for the injuries sustained in the head-on crash, allegation was made that the bridge was sub-standard in design, being, *inter alia*, 20 ft in width, whereas the approaches to the bridge were 22 ft wide. The State asserted as a defense the Idaho design immunity statute (I.C., Sec. 6-904(8)), which accorded immunity for claims arising out of a "plan or design for construction or improvement to highways, roads, streets, bridges . . . where such plan or design is prepared in conformity with standards in effect at the time of construction or improvement."

In holding that such statute did not absolve the State from liability for failure to warn of the dangerous condition of the bridge the Court stated that it was "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.)

The action in *Wyke v. Ward*, 474 A.2d 375 (Pa.Comm.w., 1984), arose out of an intersectional collision allegedly caused by the fact that a vehicle was stopped, for purposes of making a left turn at the intersection, in the left lane of a high speed two-directional four-lane highway, which contained no separate left-turn lane at the point of intersection. Negligence was charged to the Pennsylvania Department of Transportation in maintaining a "dangerous condition" at the intersection, jurisdiction being asserted under a Pennsylvania statute (42 Pa.C.S., Sec. 5110(a)(4)) waiving sovereign immunity in the case of "a dangerous condition of . . . highways under the jurisdiction of Commonwealth agencies." The trial court excluded plaintiff's proffered evidence that there had been 177 accidents at the intersection in question and that the Pennsylvania Secretary of Transportation had acknowledged in writing that the intersection was unsafe and required a separate left-turn lane. In holding that error was committed in the exclusion of plaintiff's evidence, and reversing judgment below in favor of the Commonwealth, the Court ruled that: "Where . . . it is alleged that a dangerous condition has developed and individuals are injured as a result thereof, DOT may not plead its discretion as an absolute defense against liability."

In *Nusbaum v. County of Blue Earth*, 411 N.W.2d 917 (Minn.App., 1987), the facts established that plaintiff was driving during the night hours on a section of roadway posted as a reduced speed zone. The termination of such zones was indicated with a sign reading END 45 M.P.H. SPEED. Upon passing this point plaintiff resumed the lawful speed of 55 mph, and shortly thereafter entered a sharp curve which he failed to negotiate and resultantly crashed into a ditch causing injuries of such severity as to render him a paraplegic. Negligence was charged to the State in having signed the roadway in such manner as to cause plaintiff to believe that the area beyond the reduced speed zone was safe for travel at a speed of 55 mph. The trial court granted the State's motion for summary judgment on the ground that the posting of speed limits was a discretionary rather than an operational activity, thus rendering the State immune to suit under the applicable provisions of the State Tort Claims Act (MINN.STAT., Sec 3.736, subdivision 3(b)).

The Court of Appeals reversed on the ground that the discretionary exemption did not apply to a known dangerous condition, and remanded for trial "to determine whether the state created a dangerous condition giving rise to a duty to warn."

A like result was reached in *Holmquist v. State*, 409 N.W.2d 243 (Minn.App., 1987). The issue in this case was whether the State was under a duty to give warning of the fact that the shoulders of a roadway narrowed sharply from their width at the entrance of a bridge to their width at the exit of the bridge, where plaintiff was injured when in

driving his truck onto the narrow shoulder at the bridge exit the vehicle was precipitated over the edge of a steep embankment. Summary judgment in favor of the State granted by the lower court was reversed by the Court of Appeals, which ruled that the discretionary exemption was not applicable to a dangerous condition created by the State, and the cause was remanded for factual determination as to whether the narrowing of the shoulder at the exit of the bridge "constituted a pitfall, trap, or snare . . . giving rise to a duty to install appropriate warning signs."

#### MISCELLANEOUS

The common denominator of the cases that follow next, relating to signing and signaling, is that the discretionary exemption was not the subject of consideration and played no part in the result reached. In other words, these cases relate solely to negligence predicated on common law grounds.

#### Duty to Warn of Preferential Icing on Bridges

The duty of care in respect to the meteorological phenomenon of 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 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 1,000 ft from the entrance to the bridge, each reading WATCH FOR ICE ON BRIDGE. The trial judge granted judgment to 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 held that the signs were adequate to warn of the potential danger for the reason 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 ruling that the signing involved met and satisfied the technology available at the time.

#### Failure to Make Timely Repair

In the following cases the governmental body was found guilty of negligence in failing to make timely repair of defective signing and signaling after receipt of notice, actual or constructive, that such protective devices were not in proper working order.

*Wood v. State*, 112 A.D.2d 612, 492 N.Y.S.2d 481 (1985), was a wrongful death action in which the facts disclosed that the driver of a vehicle

and his wife, a passenger therein, were both killed as the result of an intersectional collision, when their vehicle entered the intersection from a roadway on which the red light of the green-amber-red sequential traffic control signal was not functioning. Evidence was introduced to show that the light had been non-functioning for a period of several days prior to the accident, and that the State Police were made aware on the day before the accident that the red light was inoperative. The discretionary exemption was not asserted as a defense and the case was heard at trial on ordinary negligence grounds. Judgment of negligence on the part of the Department of Transportation rendered at trial was affirmed by the Supreme Court, Appellate Division, on the ground that on the facts the New York Department of Transportation was guilty of negligence in failing to take timely action to repair the defective signal.

The facts in *Stephen v. City and County of Denver*, 659 P.2d 666 (Colo., 1983), were as follows: Defendant City and County of Denver had caused a stop sign to be erected on one of two intersecting streets to regulate movement of traffic at the intersection, the other street containing no regulatory signing and thus permitting the free movement of traffic thereon at the road juncture. It appeared that unknown third persons caused the position of the stop sign to be reversed and that plaintiff motorist, in reliance on the mischief, collided with another vehicle at the intersection. In an action brought to recover damages for personal injuries suffered, plaintiff alleged in her complaint that defendant had actual notice several days prior to the accident of the incorrect position of the sign, and failed to take corrective action with respect thereto. The trial court found that the defendant had both actual and constructive notice and failed to take remedial action within a reasonable time after receipt of such notice. Judgment was entered at trial in behalf of plaintiff. In affirming the action of the lower court the Supreme Court of Colorado noted that "stop signs are integral parts of roads and highways" and stated that the "necessity of stop signs to regulate traffic flow in the interest of public safety needs no elaboration."

*Rohweller v. State*, 90 A.D.2d 650, 456 N.Y.S.2d 262 (1982), was an action to recover for injuries suffered when a motorist overran a "T" intersection during the hours of nighttime. It appeared that 18 hours prior to the accident a sign indicating a "T" intersection ahead had been knocked down by an errant vehicle, and the remaining signing, while denoting a road juncture, did not indicate that forward progress on the roadway led to a dead-end. In affirming judgment for plaintiff entered below the Court ruled that the failure of the State Police or the Department of Transportation, during the aforesaid 18-hour lapse of time, to take some form of corrective action to establish the presence of a "T" intersection ahead, constituted actionable negligence on the part of the State of New York.

This concludes the review of representative cases dealing with the duty of care in respect to signing and signaling, and the effect of the discretionary exemption thereupon. Next for consideration are cases relating to the duty of care in respect to the erection and maintenance of guardrails and barriers, and the impact of the discretionary exemption on such duty.

## APPLICATION OF DISCRETIONARY EXEMPTION TO GUARDRAILS AND BARRIERS

The discretionary exemption has received wide application in cases dealing with the duty of the State to erect and maintain guardrails and barriers for the protection of the motoring public. The results in these cases have been mixed. In the majority of the cases decided to date the result has been reached that decision-making with respect to the installation of guardrails and barriers falls within the planning stage, and is, therefore, immune to judicial review; but the opposite result has been arrived at in a minority of the cases wherein the position has been taken that such activity is operational in nature and hence liability may be predicated on ordinary negligence grounds.

### Decision-Making Held Discretionary and Immune to Judicial Review

In the following cases decision-making with respect to guardrails and barriers was held to be within the purview of the discretionary exemption and immune to review by the courts.

In *Payne v. Palm Beach County*, 395 So.2d 1267 (Fla.App., 1981), the driver of a vehicle ran through a "T" intersection into a canal beyond, causing the death by drowning of two of the occupants of the vehicle. The facts established that warning of the "T" intersection was provided by three separate signs, all of which met the minimal requirements of the State *Manual for Traffic Control Devices*. Suit was brought by the personal representative of the decedents charging negligence on the part of the County in failing to extend the pavement of the roadway for a safe distance beyond the intersection, and, in failing to erect a guardrail to protect against the eventuality that an inattentive motor vehicle operator might fail to see or heed the warning signs and consequently continue into the dangerous waters of the canal beyond. In rejecting both of these contentions the Court said: "Whether to extend a road or build a guard rail are classic examples of the type of planning level policy decisions which remain in the protected sphere of sovereign immunity."

In *State, Department of Transportation v. Vega*, 414 So.2d 559 (Fla.App., 1982), it appeared that a vehicle went out of control on an expressway, jumped the curb, and plunged down an embankment onto the porch of plaintiff's home, pinning her under the wreckage. Suit was brought against the Florida Department of Transportation charging negligence in having failed to erect a guardrail along the expressway. In ruling in favor of the DOT the Court stated that the "decision as to whether to erect a guardrail as a barrier on the expressway was a planning level decision," and described such decision as a classic example of the type of administrative decision that is protected by the discretionary exemption.

*District of Columbia v. Pace*, 498 A.2d 226 (D.C.App., 1985), involved an accident on an elevated freeway in the District of Columbia, in which the vehicle in which plaintiffs were riding was struck by another car, causing plaintiffs' automobile to crash into a guardrail, vault over the same, and plunge a distance of 40 ft to the street below. Negligence was charged to the District in designing the guardrail in such manner as to

cause the "vaulting" of vehicles on impact. Suit was defended on the ground of immunity under the discretionary exemption. In ruling for the District the Court declined to consider the allegation of negligence in guardrail design for the reason that "freeway planning and design are discretionary functions" and as such exempt from judicial review.

*Industrial Indemnity Company v. State*, 669 P.2d 561 (Alaska, 1983), involved an automobile accident in which the driver was killed when the vehicle that he was operating ran off the road on which he was traveling, and suit was brought against the State of Alaska charging negligence in failing to have installed a guardrail at the scene of the accident. The evidence established that in the original design of the highway, plans were developed for guardrails at various points along the road, but that certain of these were excluded from the final plans because of budgetary constraints. The State defended on the ground that the decision not to erect a guardrail at the locus of the accident was a protected discretionary decision within the meaning of the State Tort Claims Act excluding from waiver of sovereign immunity "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."

In ruling for the State the Court drew a distinction between "decisions involving the formulation of basic policy, entitled to immunity, and decisions regarding only the execution of implementation of that policy, not entitled to immunity." Stressing that, in the instant case, the decision not to erect a guardrail was based on constraints in the allocation of limited financial resources, the Court concluded that: "We would be engaging in precisely the type of policy evaluation that the discretionary function exception is designed to foreclose if we were to inquire into the wisdom of the state's guardrail policy in this case."

*Patrazza v. Commonwealth*, 398 Mass. 464, 497 N.E.2d 271 (1986), was a wrongful death action to recover for the demise of decedent who was killed when the automobile she was operating veered from the paved surface of the highway and struck the blunt unburied end of a guardrail, which penetrated the vehicle and killed the driver. The evidence established that the Massachusetts Department of Public Works had two separate policies in respect to burying the ends of guardrails. The policy in respect to limited access highways was to bury guardrail ends, and the policy in respect to all other roads in the State highway system was to leave the ends of guardrails unburied. The difference in policies was never explained in the opinion other than by way of statement that the "decision to favor one form of guardrail over another was based upon the types of accidents to which drivers upon limited access highways were susceptible." It was undisputed that the accident occurred on a conventional or unlimited access roadway, and that the exposure of the blunt end of the guardrail above the surface of the ground was fully consistent with established policy.

Suit was brought on the theory of negligence on the part of the Commonwealth in adopting the policy of not burying the ends of guardrails on conventional roads. The ruling at trial was in favor of the Common-

wealth, and the Supreme Judicial Court of Massachusetts took the case on its own motion. At issue on appeal was the effect of the discretionary exemption of the Massachusetts Tort Claims Act (GEN. L., ch. 258, § 10(b)). This provision, which closely followed the language of the Federal Tort Claims Act, exempted from liability "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." The Court took particular note of the fact that abuse of discretion was expressly excused, stating: "Whether the adoption of the policy was an abuse of discretion is irrelevant. G.L., C. 258, Sec. 10(b). Thus, even if the adoption of the policy was not prudent or reasonable, G.L., C. 258, Sec. 10(b), would bar this action."

In ruling in favor of the Commonwealth, the Supreme Judicial Court of Massachusetts stated: "The claim in this case is not that the department or its employees failed to follow the policy as adopted by the department. At issue is the choice by the department to employ the policy of using unburied guardrail ends on unlimited access highways. The decision to adopt and implement that policy is precisely the kind of discretionary function which G.L., C. 258, Sec. 10(b), was designed to protect."

The foregoing cases have dealt with decision-making in respect to the installation of guardrails and barriers as part and parcel of the original plan or design of the highway. In the following cases decision-making with respect to the installation of guardrails or barriers on *existing* roads was also held to be within the purview of the discretionary exemption.

#### *Installation of Guardrails or Barriers on Existing Roads*

In *Burnett v. Texas Highway Department*, 694 S.W.2d 210 (Tex.App., 1985), a truck-tractor veered off the road and struck a metal beam guard fence located in the median strip, and, continuing across the median into the path of oncoming traffic, collided with an oncoming automobile, injuring plaintiffs, who were the driver and a passenger therein. The portion of the highway where the accident occurred was completed in 1961, and the accident took place 12 years later, in 1973. In the meantime the Texas Highway Department had sought Federal funds to replace the metal beam guard fence with a rigid barrier, but the funds were not forthcoming and the guard fence was not replaced until the date of the accident. However, plaintiffs, charging negligence in failing to replace the fence with a rigid barrier before the date of the accident, argued that the entire replacement process was a maintenance activity at the operational level, and therefore outside the purview of the Texas Tort Claims Act. In rejecting this contention and affirming summary judgment entered below for the Department, the Court said: "The decision to change the median barrier is a discretionary matter which is exempted from liability under Section 14(7) of the [Tort Claims] Act."

*Hyde v. Florida Department of Transportation*, 452 So.2d 1109 (Fla.App., 1984), involved a roadside body of water located on land owned by a private developer and lying adjacent to a public roadway. Plaintiff was driving her automobile along this highway when she was suddenly rear-ended by another vehicle and catapulted into the water, causing the death by drowning of her infant daughter, who was riding as a passenger in the car. Suit was brought against the Florida Department of Transportation charging negligence in failing to have erected a barrier or other protective device on or along the existing road to guard against the hazard of the adjacent water. In holding that the Department was not liable under the Florida Tort Claims Act, the Court stated: "Plaintiff first attempts to hold DOT liable for failing to add a guardrail or similar protective device to an existing roadway. The decision to upgrade an existing road is a planning level function to which absolute immunity attaches to city, county and DOT... Whether to build a guardrail on an *existing road* is, we believe, a classic example of the type of planning level policy decisions which remain in the protected sphere of sovereign immunity... Thus, the claimed failure by DOT to install a guardrail or other protective device to the *existing road* involved a planning level decision and therefore is not actionable." (Emphasis added.)

**Cases Construing Discretionary Exemption as Not Precluding Judicial Review**

In the cases that follow the courts reached a contrary result and declined to extend the protection of the discretionary exemption to the erection and maintenance of guardrails and barriers.

In *Butler v. State*, 336 N.W.2d 416 (Iowa, 1983), plaintiffs were eight members of a family traveling in a mobile home on I-80, who were injured, with varying degrees of severity, when because of high winds their mobile home was forced onto the shoulder of the road, where it struck the end of a guardrail which penetrated their vehicle. Suit was instituted against the State of Iowa charging negligence in the design and placement of the guardrail. The State defended on the ground that the decisions with respect thereto were immunized by the provisions of the Iowa Tort Claims Act, which, in language paralleling the Federal Tort Claims Act, excluded from waiver of governmental immunity claims 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."

In holding that the State's decisions in respect to the design and placement of the guardrail were not immunized under the above-quoted provisions of the Iowa Tort Claims Act, the Court took the position that discretion was exhausted with the decision to build I-80, and that all subsequent decisions were made at the operational level in implementation of that basic policy decision. Decisions with respect to the guardrail in question were characterized as being "necessary to implement the policy decision to construct I-80." The Court upheld the trial court's action in hearing the case on ordinary negligence grounds, and sustained

its finding that on the facts there had been no negligence in the design, placement, maintenance and upkeep of the guardrail. Expressly stating that it adopted the planning and operational dichotomy announced in *Dalehite*, the Court separated all decisions with respect to the guardrail from the planning sphere of activity and cast them in the operational mold.

A similar result was reached in *State v. Webster*, 88 Nev. 690, 504 P.2d 1316 (1972), which, however, involved the protective device of a cattle guard rather than a guardrail. In this case several horses wandered from a pasture contiguous with a frontage road, and escaped therefrom, through an unguarded entrance, onto the paved surface of a newly constructed limited access highway. During the hours of nighttime the automobile being operated by plaintiff's decedent struck one of these horses causing his death as a result of injuries sustained in the collision. Suit was brought on the theory of negligence on the part of the State in failing to have constructed a cattle guard at the entrance to the controlled access highway. In affirming the action of the lower court (sitting without a jury), in rendering judgment in favor of the plaintiff, the Supreme Court of Nevada stated:

The State claims total immunity from suit, on the ground that the failure to install a cattle guard at the point where U.S. Highway 395 joined the controlled-access freeway was an act of discretion for which the State was exempted from liability. The citizens of the State of Nevada, acting through the Legislature, have conditionally waived sovereign immunity, NRS 41.031. Such immunity, however, was not waived if the act complained of was a discretionary function of government... Here the governmental function to be considered was the *construction* of a controlled-access freeway. It was not mandatory upon the State to construct the freeway... Whether or not, for the convenience of the traveling public, the State would construct a controlled-access freeway... was an exercise of discretion based upon policy. Its decision to do so was a discretionary act. *Once the decision was made to construct a controlled-access freeway*... the State was obligated to use due care to make certain that the freeway met the standard of reasonable safety for the traveling public. This is the type of *operational* function of government not exempt from liability... To accept the State's position would effectively restore sovereign immunity. (Emphasis added.)

Thus, the Court took the position that discretion was exhausted with the decision to construct the controlled access highway, and that decisions subject thereto fell within the operational sphere of activity.

In *Johnson v. County of Nicollet*, 387 N.W.2d 209 (Minn.App., 1986), plaintiffs, husband and wife, were traveling in an automobile along a roadway made slippery by reason of snowfall. Their vehicle skidded off the paved surface and ran down an embankment crashing into a tree. Suit was brought against defendant County alleging negligence in failing to have erected a guardrail at the scene of the accident. Judgment was rendered in the lower court in favor of the County on the ground that the administrative determination not to erect a guardrail was an immunized discretionary decision.

The Court of Appeals reversed. In so doing it relied on *Butler v. State, supra*, stating that "decisions made concerning the design and placement of [a] guardrail are not discretionary." However, in this case the Court extended the limits of discretionary activity beyond the decision to construct the highway (as in *Butler v. State* and *State v. Webster, supra*), terminating the same with the "policy decision to permit public use of the road." Decisions beyond this point, including the decision not to erect a guardrail at a particular location, were held to fall within the unprotected operational field of activity, rather than the protected planning stage, the Court ruling that the "county is not entitled to discretionary act immunity in this action."

Thus, these cases stand for the proposition that discretion is exhausted with either (a) the decision to build a new highway, or (b) the decision to open the new highway for public use, and all decisions subsequent thereto, including decisions with respect to the installation of guardrails and barriers, are treated as being within the ambit of the operational stage of activity, and hence are not immunized by the discretionary exemption.

#### New York Cases

The New York cases require separate treatment because the application of the discretionary exemption in that State is qualified by certain exceptions that are wholly outside the scope of the language of the Federal Tort Claims Act and the many State Tort Claims Acts patterned thereon. The Federal and State Acts expressly excuse abuse of discretion, but under New York law, as announced in the leading case of *Weiss v. Fote, supra*, footnote 2, the exercise of discretion may, as previously stated, be inquired into, and if shown to be either (a) lacking in reasonable basis, or (b) grounded on inadequate study, may be cancelled, set aside and held for naught by the courts. This exception to discretionary immunity has had important consequences with respect to the liability of the State for negligence in the erection and maintenance of guardrails and barriers. The following cases are exemplary.

#### *Avoidance of Discretionary Exemption on Grounds of Inadequate Study or Lack of Reasonable Basis for Decision-Making*

*Zalewski v. State*, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976), involved an accident in which an automobile traveling on a bridge spanning a river collided with a truck and struck a guardrail, and after shearing off five bridge posts, plunged into the water below, causing the death of a passenger in the car. Decedent's administratrix brought suit charging negligence in the design and construction of the guardrail. The trial court admitted evidence to the effect that the posts were made of highly brittle cast aluminum alloy and that the discontinuous rails used could not absorb and distribute vehicle impact. On appeal from judgment rendered by the trial court in favor of the plaintiff, it was contended by the State that the design of the guardrail was not a proper subject of inquiry by reason of the discretionary exemption. In rejecting this con-

tention and holding that the facts fell within the exception to the discretionary exemption announced in *Weiss v. Fote, supra*, the Court stated: "The State contends that at the time the bridge was designed and built, it was constructed in accordance with good engineering practice and, therefore, the correctness of design is not subject to review by the courts. . . . The immunity from review established by *Weiss* . . . does not apply, however, where it can be shown that the plans of the bridge were approved without *adequate prior study or lacked a reasonable basis*." (Emphasis added.)

Thus, in affirming the action of the lower court in hearing the case on ordinary negligence grounds, the Court based its decision on the exception to the discretionary exemption announced in *Weiss*.

A like result was reached in *Van Son v. State*, 116 A.D.2d 1013, 498 N.Y.S.2d 938 (1986), involving a fact situation similar to that in *Zalewski, supra*. In this case decedent suffered death by drowning when the car in which she was riding as a passenger broke through a guardrail on the Inner Loop Bridge in the City of Rochester and fell into the Genesee River below. Negligence was charged to the State (as in *Zalewski*) in the use of brittle cast aluminum posts. Quoting from *Zalewski* the Court pointed out that the design immunity does not exist under the New York rule where it can be shown that the plan or design was based on inadequate study or lacked a reasonable basis. In affirming judgment against the State entered below, the Court emphasized that "[T]he record indicates that the State failed to conduct any testing prior to adopting the standards for aluminum rails. Had they done so they would have found that the bridge rails were inadequate when they were installed."

See to the same effect *Lattanzi v. State*, 74 A.D.2d 378, 428 N.Y.S.2d 331 (1980), wherein the court declined to apply the discretionary exemption and held the State liable for the installation of a defective wooden guardrail.

Thus, it is clear that the New York rule differs from the Federal Tort Claims Act and the many State Tort Claims Acts modeled thereon, in that, under specified circumstances evidence may be introduced to show abuse of discretion, and where abuse of discretion is established, the State may be held liable on ordinary negligence grounds.

#### *Duty of Review*

There remains for consideration one further important qualification to the discretionary exemption that obtains in New York and is not found in the language of the Federal Tort Claims Act or State Tort Claims Acts modeled thereon. The Court of Appeals, in *Weiss v. Fote, supra*, announced the rule that original planning for and design of highways must be periodically reviewed by administrative agencies to determine if safe in actual operation, or because of changed conditions rendered unsafe, and where a dangerous condition is found on review to exist, administrative agencies are under a duty to take corrective action.<sup>4</sup>

The duty to review was the subject of consideration in the significant case of *Friedman v. State*, 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d

893 (1986). This case involved consolidated appeals from three separate lower court decisions, leading to a somewhat complicated factual situation. The three cases involved will, for convenience sake, hereinafter be referred to by the short titles of *Catalpo*, *Muller*, and *Friedman*. The first two cases involved accidents on the Tappan Zee Bridge, which crosses the Hudson River for a distance of some 3 miles between Nyack and Tarrytown, and the third case involved an accident on the Roslyn Viaduct, an elevated portion of the Northern Boulevard on Long Island. *Catalpo* and *Muller* will be first for consideration.

For purposes of factual description the Court divided the lengthy bridge into three sections, termed the "east section," the "west section," and a middle part designated the "tangent section." It is the latter with which we are principally concerned.

Construction of the bridge was completed in 1955. The original plan called for no median barriers. The first review of this decision (made pursuant to the duty to review announced in *Weiss v. Fote*) was completed in February 1962. The review concluded that median barriers were undesirable along the overall length of the bridge because of the tendency of such barriers to bounce cars back into the lane of travel causing rear-end collisions and "pile-up" accidents. A second report was issued in July 1962, which again questioned the overall use of barriers, but recommended that a barrier be erected on the curve at the westerly end of the bridge because of the high incidence of crossover accidents thereon, and a barrier was duly installed in this area of the bridge. No further comprehensive review as undertaken until 10 years later, in 1972, when a report was made by one Manning, a traffic and safety engineer, which acknowledged that crossover accidents had been virtually eliminated on the westerly curve of the bridge since the installation of a barrier thereon, but recommended against the use of barriers on the easterly and tangent sections of the bridge for the same reasons expressed in the two 1962 reports.

In 1973, the year following the Manning report, plaintiff *Catalpo* was traveling in a westerly direction on the unguarded tangent section of the bridge, when a car swerved from the easterly lane of travel, and a collision took place which caused devastating injuries to the plaintiff. Suit was brought charging the New York State Thruway Authority and the State of New York with negligence in failing to have installed a median barrier on the tangent section of the bridge. The Court of Claims ruled in favor of the plaintiff, which action was reversed by the Supreme Court, Appellate Division. The Court of Appeals sustained the reversal by the Appellate Division.

The Court ruled that the case fell within the discretionary exemption, rather than the exception thereto announced in *Weiss v. Fote*, for the reason that the 1962 and 1972 reports recommending that there be no change in design were grounded on (a) *adequate study* and (b) showed *reasonable basis*, and hence were outside the purview of the *Weiss* exception. It stated: "The authority fulfilled its duty [to make review] by studying the dangerous condition, determining that design changes were not advisable and later reaching the same conclusions upon reevaluation of its decision."

A different result was reached in *Muller*, however. The facts in *Muller* were the same as in *Catalpo* up to the point of the 1972 Manning report. Subsequent to such report, in September 1974, the Thruway Authority's Chairman and its Board decided that median barriers should be installed on the entire length of the bridge. Approximately 3 years later, in December 1977, plaintiff *Muller* was driving eastbound on the as yet unguarded tangent section of the bridge, when a crossover accident took place, and plaintiff was severely injured. Suit was brought charging the Authority and the State with negligence in having failed, for a period of more than 3 years, to implement the decision made by the Authority to erect a barrier on the tangent section of the bridge. The Court of Claims found for the plaintiff. The Appellate Division reversed. The Court of Appeals set aside the order of the Appellate Division and reinstated the judgment of the Court of Claims in favor of the plaintiff.

The Court of Appeals stated that it was addressing, *for the first time*, the question of how soon a decision, made in pursuance of the *Weiss* duty to review, must be implemented when the decision calls for a change in the original plan or design in order to protect and promote public safety. It answered that the change in the original plan or design must be implemented within a *reasonable* time, or the State may be held liable in damages for the delay. The Court concluded that the 3-year delay in carrying out the decision to erect a median barrier on the tangent section of the bridge was unreasonable and, hence, that the State was accountable in damages for the unwarranted delay in implementation.

A like result was reached in *Friedman*, the facts in which were as follows: In March 1978 plaintiff was traveling along the Roslyn Viaduct, an elevated portion of the Northern Boulevard on Long Island, when the vehicle that she was operating was struck by another car attempting to pass, and plaintiff's automobile was propelled across the median into the oncoming lane of traffic where another collision took place, forcing plaintiff's vehicle into a 50-ft drop to a ravine below. Plaintiff was severely injured and brought suit charging negligence on the part of the New York State Department of Transportation in failing to have erected a median barrier on the Viaduct in order to prevent crossover accidents. It developed at trial, in the Court of Claims, that 5 years earlier, in February 1973, the New York DOT had recognized, based on the proliferation of crossover accidents, the need for a median barrier on the Roslyn Viaduct. Although a project which was to include the installation of a barrier on the Viaduct was proposed in August 1974, no work had commenced on the project by the time of the *Friedman* accident in March 1978. The State attributed its delay to necessary work on other projects and to the need for the setting of funding priorities. The Court of Claims found plaintiff and the State each 50 percent liable, and on cross appeals the Appellate Division affirmed, rejecting the State's claim of immunity because "the State's own experts had recommended that barriers be installed immediately on the viaduct and the State failed to show that the delay in remedying the known hazardous condition resulted from a discretionary decision concerning funding priorities."

The Court of Appeals affirmed, finding that the 5-year delay in carrying



out the decision to install a median barrier was *unreasonable*. It stated: "In *Friedman* there is evidence to support the . . . finding that the State unreasonably delayed its remedial action. The State failed to demonstrate at trial either that the five-year delay between DOT's recognition of the hazardous condition on the viaduct and its project proposal and the *Friedman* accident was necessary . . . or that the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding."

Thus, the decision of the New York Court of Appeals in *Muller* and *Friedman*, *supra*, clearly establishes the rule that decisions, made during the course of the *Weiss*, imposed duty to review—in respect to the need for installation of guardrails or barriers—must be carried out within a *reasonable* time after the making of such decision, or the State may be held liable for negligent conduct in failing timely to implement the decision once made. Confining its opinion to the facts before it the Court gave no indication as to what period of delay might be considered reasonable. As has been seen, the period of delay adjudged unreasonable in *Muller* was 3 years, and the unwarranted length of delay in *Friedman* was for a period of 5 years. What constitutes an acceptable period of delay doubtless must be determined in the light of the facts and circumstances of the particular case.

This concludes the review of representative recent cases dealing with liability of the State for design, construction, and maintenance defects. There follows next an update of the material in the prior supplementation paper relating to recent statutory developments.

#### STATUTES RELATING TO TORT LIABILITY OF THE STATE

New statutory developments relating to tort liability of the State include the following:

##### Arizona

Section 12-820.03, ARIZ. REV. STAT., provides that: "Neither a public entity nor a public employee is liable for an injury: . . . Arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions."

##### Colorado

The Colorado Governmental Immunity Act has been extensively amended. See COLO. REV. STAT., 24-10-101, *et seq.* Governmental immunity from tort liability has been reinstated with six specified exceptions, including waiver of immunity for "dangerous conditions" of public highways. Payment of judgments against and defense of public employees are provided for in 24-10-110.

##### Delaware

The State of Delaware has enacted a Tort Claims Act. See DEL. CODE, tit. 10, § 4001, *et seq.* This statute adopts the discretionary exemption, provides for indemnification of public officers and employees, authorizes the State and its political subdivisions to procure liability insurance, and makes provision for payment of costs of legal defense of public officers and employees.

##### Georgia

The State of Georgia has enacted legislation creating a Claims Advisory Board to hear and determine claims against the State. See GA. CODE, ANN., tit. 28, ch. 5, § 60, *et seq.*

##### Mississippi

The State of Mississippi has enacted a Tort Claims Act. See MISS. CODE, ch. 11, tit. 46, § 1, *et seq.* This statute waives sovereign immunity with certain exceptions, included among which are claims: "Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused."

##### Missouri

The State of Missouri has enacted a "dangerous condition" statute. See MO. STAT. ANN., § 537.600. This statute waives sovereign immunity in suits brought against the State for injuries caused by the dangerous condition of public property, including highways.

##### New Hampshire

The State of New Hampshire has enacted legislation creating a Board of Claims to hear and adjudicate claims against the State. See N.H. REV. STAT. ANN., ch. 541-B, §§ 1-19. Excluded from the operation of the act are claims "based upon the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee, or official acting within the scope of his office or employment."

##### Oklahoma

The State of Oklahoma has enacted a Tort Claims Act. See OKLA. STAT. ANN., tit. 51, §§ 151-1, *et seq.* Exemptions from liability include: "Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees."

##### Virginia

The State of Virginia has enacted legislation providing that "the Commonwealth shall be liable for claims . . . on account of damage to or loss of property or personal injury or death caused by the negligent or

wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth, if a private person, would be liable to the claimant for such damage, loss, injury or death." See VA. CODE, § 8.01-195.3.

#### Wyoming

The State of Wyoming has enacted a Government Claims Act. See WYO. STAT. ANN., tit. 1, ch. 39, § 101, *et seq.* Exclusions from waiver of immunity are set forth as follows:

The liability imposed by W.S. 1-39-105 through 1-39-112 does not include liability for damages caused by:

- (i) A defect in the plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;
- (ii) The failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or
- (iii) The maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

#### SUMMARY

As stated at the outset of this paper and as shown by the cases hereinbefore set forth the major development since the prior supplementation paper was written has been in the widespread application of the discretionary exemption to cases involving the design, construction, and maintenance of highways. As also stated at the outset and shown by the cases the results have been mixed. The law relating to the construction and interpretation of the discretionary exemption is clearly still in the development stage. Hence, a few words by way of editorial comment in respect to trends and possible future development are perhaps in order.

It has been frequently stated by the courts that because all actions other than those purely reflexive involve some element of judgment or discretion that it is *impossible* to draw a clear-cut line between activities that are discretionary and those that are non-discretionary.

It follows from such indeterminate premise that any distinction sought to be made must admit of considerable flexibility or be drawn only between broad parameters. The planning-operational distinction meets these exigencies or requirements, which probably accounts for its widespread adoption and use. It would appear that such dichotomy is, by now, firmly entrenched in the law as a useful tool of distinction, it is here to stay, and future developments will hinge on its continued application.

The major thrust in the development of this dichotomy to date appears to be along the lines of categorizing planning activities as those functions which involve evaluation of broad *policy* considerations, and operational activities as those functions which involve mere *implementation* of such broad policy decisions.

Obviously, this distinction depends for its logic on first spelling out what constitutes policy decision-making, since implementation cannot

follow upon the heels of a non-decision in respect to those factors that constitute policy decision-making. The critical question then becomes—what are policy decisions?

That no clear-cut answer can be given to this question is made evident by the dictionary definition of "policy" as meaning "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." Since by the application of this definition no *catalogue* of policy decisions is possible, it is important to concentrate on what is possible by way of definition and classification:

1. All State highway departments have in common the problem of insufficient funding to accomplish at any given time all that is necessary or desirable. It follows that the establishment of priorities is inevitable. The courts have evidenced full awareness of the limitations placed on highway department activities by insufficient funding, and have uniformly taken the position that the establishment of priorities is an essential part of policy decision-making. It follows that the courts have uniformly recognized that decisions made in respect to the allocation of limited financial resources are part of the planning process and hence immune under the discretionary exemption.

With this in mind it is suggested that in the defense of negligence actions brought against State highway departments that particular attention should be paid to establishment of justification for the action taken on the ground that it was mandated by the establishment of priorities. Where the evidence fully supports this position the case will be brought in line with ample authority standing for the proposition that decisions in respect to the allocation of limited resources constitute policy decisions, and, therefore, are decisions made at the protected planning level.

2. However, the courts have balked at the argument that the establishment of priorities excuses the failure to take corrective action with respect to a *known dangerous condition*. And by way of similar legislative reaction, it is to be noted that a number of States have enacted statutes specifically imposing liability on the State and its subdivisions for maintaining public property in a "dangerous condition," which statutes stand side by side in the same State with legislation enacting the discretionary exemption. But even in the absence of the enactment of a "dangerous conditions" statute, the likelihood appears real that an exception to the discretionary exemption may be carved out by the judiciary in the case of known dangerous conditions, or that the courts may reach the same result simply by ruling that discretion is exhausted when the State has actual or constructive notice of a known dangerous condition.

Thus, it would appear that in the establishment of priorities it is highly desirable, in order to take advantage of the protection accorded by the discretionary exemption, that first priority be accorded to roads with a high accident record, and to each such place or point in the road systems that admits of classification as a "known dangerous condition."

3. It is further suggested the real possibility exists that the lead taken by the courts of last resort in New York and California in announcing

and imposing the duty to review may be followed in other jurisdictions. In such event standard procedure will require that periodic review be made of the original planning to determine if safe in actual operation, or if such planning has been rendered unsafe because of changed conditions. And if upon review a dangerous condition is found to exist, remedial action must be taken within a *reasonable* time or the State may be held liable for negligence in failing to take timely action to correct the dangerous condition so made known.

4. By way of further summary it is to be noted that recent cases have rejected, as being overly simplistic, the broad generalization that all design activities are discretionary in nature and all maintenance activities operational in character. These cases stand for the proposition that both design and maintenance may be broken down into functions that are (a) discretionary, and hence exempt; and (b) operational, and therefore non-exempt.

5. And finally it is to be noted that the general rule appears to be evolving that while decision-making with respect to the initial installation of signs, signals, and other traffic control devices is discretionary in nature, once such signs, signals, or traffic control devices are erected and in place, the duty to maintain the same in good working order is operational in character and therefore not protected by the discretionary exemption.—JOHN C. VANCE, *Attorney at Law, Orange, Virginia*

<sup>1</sup> Attention is invited to the fact that in the later decision of *United States v. Varig Airlines*, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984), the Court took specific note of the contention made by counsel that "*Dalehite* no longer represents a valid interpretation of the discretionary function exception." In expressly rejecting this contention the Court quoted with approval its prior language in *Dalehite* relating to the discretionary exemption, and applying the same to the facts in *Varig* ruled that "the discretionary function exception precludes a tort action based upon conduct of the [Federal Aviation Administration] in certifying . . . aircraft for commercial aviation."

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

<sup>3</sup> This case appears to be *sui generis* in substituting the phrase "professional judgment" for the term "operational". While neither phraseology is wholly precise the substitution of "professional judgment" for "operational" seems the less precise for the reason that the exercise of

"professional judgment" is ordinarily a factor involved in decision-making conducted at the exempt "planning" level.

<sup>4</sup> Cf. the leading California case of *Baldwin v. State*, 6 Cal.3d 424, 99 Cal.Rptr. 145, 491 P.2d 1121 (1972), wherein the Supreme Court of California followed the lead of the New York Court of Appeals in *Weiss v. Fote*, and likewise imposed the duty to review.

## APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel and state highway and transportation employees involved in suits brought against them to recover damages for alleged negligent conduct in the performance of

their duties. Officials are urged to review their practices, procedures and conduct to determine how this research can effectively be utilized to mitigate or eliminate damage claims. Attorneys should especially find this paper to be useful in preparing their defense in claims against agency officers and employees.

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM  
NCHRP Project Advisory Committee SP20-6

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