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LEGAL RESEARCH DIGEST

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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: IC Transportation Law, IIIC Maintenance, IVB Safety and Human Performance

Supplement to

Liability of the State for Injury or Damage Occurring in Motor Vehicle Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property

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. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 4, *Selected Studies in Highway Law* (SSHL), entitled "Liability of the State for Injury or Damage Occurring in Motor Vehicle Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property," pp. 1966-N89 to 1966-N122.

This supplement will be published in a future addendum to SSHL. Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, 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 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

State and local governments are increasingly looking for ways to minimize potential exposure to liability for personal injury and property damages resulting from highway incidents. These efforts are all a part of providing safe, well-maintained highways for vehicular use. In addition to providing good design and adequate pavement markings, highway officials are responsible for satisfactory maintenance as well. An essential element of such maintenance is the existence of a program for trimming or removing obstructive vegetation growing in the right-of-way or on adjacent private property. Government officials should find this material useful in determining how courts are likely to interpret governmental responsibility in this area. This research should, therefore, be helpful to right-of-way officers, risk managers, design and maintenance engineers, safety officers, and attorneys responsible for tort matters.

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Supplement to

LIABILITY OF THE STATE FOR INJURY OR DAMAGE OCCURRING IN MOTOR VEHICLE ACCIDENT CAUSED BY TREES, SHRUBBERY, OR OTHER VEGETATIVE OBSTRUCTION LOCATED IN RIGHT-OF-WAY OR GROWING ON ADJACENT PRIVATE PROPERTY

SUPPLEMENTARY MATERIAL

Editor's Note: Supplementary material to the paper "Liability of State of Injury or Damage Occurring in Motor Vehicle Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property" is referenced to topic headings therein. Topic headings not followed by a page number relate to new material.

INTRODUCTION (1966–N89)

This paper collects the cases that have been decided since the original paper was written dealing with the liability of the State and its subdivisions for injury, death, or property damage arising out of motor vehicle accidents caused by the presence in the right-of-way or on an adjoining private property, of trees, shrubbery, or other obstructive vegetative growth.

It may be said at the outset that the recent cases are limited in number, and that they provide little in the way of advance over or departure from the rules and principles set forth and discussed in the original paper.

The recent cases are in the main iterative of well-established principles relating to the duty owed by the State and its subordinate units to the motoring public, including the following:

(1) The State and other governmental units do not stand in the capacity of insurer of the safety of highways.

(2) The duty is limited to that of maintaining the roadway systems in a condition reasonably safe for public travel by motorists who are themselves exercising ordinary care.

(3) In an action against the State, or other governmental entities, to recover for death, injury, or property damage caused by a defect lying in, along, above or adjacent to the paved surface, or the shoulder or berm of the roadway, it is necessary to establish that the defect was the proximate cause of the accident, and as a necessary corollary, that the sequential chain of events leading to the accident was not broken by an efficient, intervening, or independent cause.

(4) As a further condition precedent to recovery it is necessary to establish that the State or subordinate governmental agency had either actual or constructive notice of the defect, and at the same time was accorded a reasonable opportunity to take remedial action with respect thereto.

In considering the recent cases these fundamental principles should be borne in mind.

The format adopted in this supplementation paper will be, with but few exceptions, to employ the same headings and subheadings as were used in the original paper, the recent cases being conformable thereto.

First for consideration are cases involving the collision of motor vehicles with trees standing either within or without the limits of the right-of-way.

TREES STANDING WITHIN THE RIGHT-OF-WAY (1966–N92)

It was seen in the original paper that, although the presence of large and deeply rooted trees within the right-of-way limits presents a risk of injury to motorists straying from the paved surface, allowing trees to remain standing within the right-of-way does not constitute negligence as a matter of law. There are innumerable instances throughout the country of trees left standing within the right-of-way, and, ordinarily, it is a question for jury determination whether, taking into consideration the totality of the circumstances of the particular case, allowing a tree to stand in the right-of-way constitutes negligent conduct on the part of the State or its subdivisions. Of particular persuasion in this connection is whether or not there have been prior accidents involving the same tree (or line of trees) thereby presenting actual or constructive notice of a condition hazardous to the motoring public.

Chalk v. State, 147 A.D.2d 810, 537 N.Y.S.2d 685 (1989), was a wrongful death action to recover for the demise of a driver who was killed instantly when the automobile she was operating, in an avoidance maneuver to escape collision with a parked car, crashed into a tree located 6 ft 4 in. from the paved surface of the road on which she was traveling. The evidence disclosed that the construction plans for a roadway provided that "all desirable trees 5 feet or more from the edge of the finished pavement be saved, if possible," and that in conformance with these plans the tree in question was left standing.

In affirming the action of the lower court in ruling that complainant had failed to establish any negligence on the part of the State, the Supreme Court, Appellate Division, stated: "The State does have a continuing duty to inspect and maintain the operation of its highways and to correct any dangers or potential dangers. . . . However, here there was no evidence of any prior accident or that the State had been given any prior notice of such and, therefore, no liability on the basis of this theory could attach . . . [C]laimant failed to establish a violation of either the State's duty to inspect and maintain the subject shoulder or of the applicable standards or plans."

Thus, the Court held that the decision to leave the tree 6 ft 4 in. from the paved surface conformed to proper and acceptable engineering plans, and that the absence of evidence of any prior accidents involving the tree in question absolved the State of negligence in permitting the tree to stand in close proximity to the traveled way.

Luceri v. County of Orange, 144 A.D.2d 444, 534 N.Y.S.2d 9 (1988), was a case nearly on all fours with *Chalk v. State, supra.* This was also a wrongful death action, involving a driver who likewise made an avoidance maneuver that caused his car to skid into a tree located 6 ft from the paved surface, killing the driver instantly. Suit was brought on the theory that defendant County of Orange was negligent in failing to have removed "such trees which constitute a danger to users of the road." In affirming summary judgment entered for defendant below, the Supreme Court, Appellate Division, stated: "The County may have a duty to trim trees where branches and limbs could fall upon vehicles along the traveled portion of the road. . . . However, the County is not an insurer of those injured on its roads. . . . Absent any competent factual showing that the County was in any way negligent and that its negligence was the proximate cause of decedent's accident . . . or, that the County was given notice of this allegedly dangerous condition and neglected to remedy it . . . it cannot be said that there is any issue to submit to the jury under which it could find the defendant even partly at fault for the decedent's accident."

Thus, the Court ruled that leaving the tree 6 ft distant from the road surface did not constitute negligence, absent actual or constructive notice to the County that the tree in question presented a condition hazardous to the safety of the motoring public.

However, although a governmental entity may have been negligent in the maintenance of a roadway, recovery can not be had unless it is shown by satisfactory proof that the negligence was the proximate cause of the injury suffered. Thus, in *Tinao v. City of New York*, 112 A.D.2d 363, 491 N.Y.S.2d 814 (1985), a wrongful death action to recover for the demise of a motorist killed when his vehicle left the paved surface and struck a tree located in the shoulder of the road, it was held that drinking and driving too fast on the part of the deceased operator of the vehicle was the proximate cause of the accident, not the existence of flooding and a dangerous crack in the roadway on which the deceased was operating his vehicle.

Next for consideration are cases involving motor vehicle collision with trees standing outside the right-of-way limits.

TREES LOCATED OUTSIDE THE RIGHT-OF-WAY (1966–N95)

It was seen in the original paper that the fact a tree stands outside the right-of-way does not in and of itself relieve the State or other responsible governmental agency of *common law* liability for injury or death arising out of motor vehicle collision therewith. However, liability may be made to turn on the provisions of applicable statute law.

In *Carney v. Department of Transportation*, 145 Mich. App. 690, 378 N.W.2d 574 (1985), plaintiff brought action to recover for injuries suffered when the vehicle she was operating veered from the paved surface of the roadway, plunged down a steep embankment, and struck a large tree located outside the right-of-way limits. The complaint charged that the failure to remove or guard against the tree in question constituted breach of a Michigan statute (M.C.L.691.1402) imposing a limited duty on defendant Michigan Department of Transportation to keep "the improved portion of the highway designed for vehicular travel" in a state of "reasonable repair." In holding that there had been no breach of the duty so imposed by statute, the Court stated:

> In this case, plaintiff's automobile was out of control and had completely departed from the road when it struck the tree. The tree was not within reach of a vehicle with all four wheels on the shoulder. We must bear in mind the Legislature's restriction of defendant's duty "only to the improved portion of the highway designed for vehicular travel," M.C.L.691.1402. The particular allegations of negligence which are based solely on defendant's failure to remove or guard the tree do not, in our view, constitute a viable claim under M.C.L.691.1402 . . . This was a country road lined by numerous trees and other vegetation. Defendant's duty to maintain the road in reasonable repair does not entail deforestation of the surrounding countryside.

Thus it was held that a statute imposing the restricted duty of keeping in a state of "reasonable repair" only the "improved portion of the highway designed for vehicular travel" relieved the State of any duty to guard against, by removal, barriers, signing, or otherwise, a tree located outside the right-of-way limits.

As hereinbefore stated, where the defective condition of a roadway is alleged to have been the proximate cause of vehicular collision with a tree, the burden rests on the plaintiff to show that the government had actual or constructive notice of the defect in the roadway, and a reasonable opportunity to correct the same; and where such actual or constructive notice is established by the evidence, the government may be held liable despite the fact that the tree is located outside the right-of-way. Exemplary is *Peterson v. Department of Transportation*, 154 Mich. App. 790, 399 N.W.2d 414 (1986), wherein plaintiff was seriously injured when the vehicle she was operating went out of control after the wheels slipped over a 2–5-in. drop-off between the paved surface and the shoulder of the road, and careened into a tree located outside the right-of-way limits. Stating that defendant DOT could not be held liable without a showing that it had actual or constructive knowledge of the highway defect, the Appellate Court affirmed the finding below that the defendant had constructive notice of the dangerous drop-off condition, and that the same was the proximate cause of the injury suffered. In upholding judgment below entered for the plaintiff, the Court said the liability was imposed not because of proximity of the tree to the road, but because of defendant's failure to repair the hazardous drop-off.

FALL OF TREES BORDERING THE TRAVELED WAY (1966–N97)

This paper now moves on to a consideration of the cases involving injury or damage suffered as a result of motor vehicle collision with a falling or fallen tree or limb.

It is obvious that the fall of large trees and limbs on or into the path of vehicles using the traveled way poses grave and sometimes fatal danger to motorists. Therefore, it has been widely recognized by the courts that highway agencies are under a duty to the motoring public to inspect trees bordering the traveled way in order to identify those trees that are suffering from such readily detectable form of arboreal disease as would cause them to be in a weakened condition and susceptible to fall across the public way. In order to hold the State or subordinate government agencies liable for the fall of such trees, it is necessary to show that the government had actual or constructive knowledge of the diseased condition of the falling or fallen tree or limb. Thus the question usually is as to the adequacy of the inspection procedures followed and employed in the particular case.

It was seen in the original paper that "drive-by" or "windshield" inspections by moving patrol cars has been held sufficient to satisfy the duty of reasonable care. That it is to say, if the diseased condition of a tree is not detectable by trained observers in moving patrol cars, the State or its own agencies cannot be charged with constructive knowledge of the diseased condition of trees bordering the traveled roadway. If, on the other hand, the diseased condition of a tree is or should be apparent to such observers, the State or its agencies can be charged with constructive knowledge of a hazardous condition, and the duty then arises to take remedial action, whether the tree stands within the right-of-way, or on private land adjacent to the right-of-way.

Trees Located Within the Right-of-Way (1966–N98)

The case of *McGinn v. City of Omaha*, 217 Neb. 579, 352 N.W.2d 545 (1985), contains an exhaustive examination of the question whether "drive-by" or "windshield" inspections of trees located within the right-of-way satisfies the requirements of due care. The thoroughness with which the Supreme Court of Nebraska explored this question justifies, in the opinion of the writer, quotation from the opinion at some length.

In this case plaintiff brought suit to recover for the consequences of the fall

upon the automobile that he was operating of a large tree located in the right-of-way of a street owned and maintained by the defendant City of Omaha. It was not disputed that the tree fell during a severe storm, causing injuries to plaintiff of such nature as to render him a quadriplegic. Nor was it disputed that photographs taken after the accident revealed that the interior of the tree was badly decayed, leading to its fall.

Judgment was rendered for plaintiff at trial, and defendant City appealed. The Supreme Court of Nebraska first stated the applicable law to be as follows: "It is generally recognized that governmental units are liable under ordinary negligence principles for injuries or damage which result from a tree falling onto a public road from land in possession of the governmental unit." The Court then went on to say that: "There was no evidence that the city had actual knowledge of the condition of the tree. Therefore, the plaintiff was required to prove that the city had constructive notice or knowledge of the condition of the tree. . . . Under the plaintiff's theory of the case he had the burden of proving that if the city had carried out reasonable inspection of the tree, it would have known of the defect in the tree and removed it."

The Court next provided a detailed description of the facts of the case before it, stating:

> The uncontroverted evidence shows that the City of Omaha had instituted an inspection program to detect and remove hazardous trees from the city's streets. The department entrusted with the program was headed by a city forester and staffed by 26 field personnel and 1 secretary.
>
> The department is responsible for the care and management of all trees and woody ornamentals in the city, including programs for tree removal, maintenance, and planting. The area encompassed consists of the 90 to 95 square miles which make up the city and the 6,000 areas of parkland contained therein.
>
> There are 59,610 street trees which are under the care of the department, as well as 153,000 trees which are located in city parks. The department also handles about 10,000 calls a year from owners of trees on private property who are seeking advice with regard to their trees or who seek to complain about hazardous trees.
>
> An annual inspection program to check for hazardous trees is carried out each fall by five members of the department staff who are trained in forestry. Each member is given a map and assigned to an area of the city. Every street in the city is included in the program and inspection is made on a "street-by-street," "tree-by-tree" basis. Staffers check the trees for signs of a hazard while driving by in their cars. If problems are spotted the inspector will get out of his car and walk around the tree, examining it for defects. Trees requiring removal are marked. A file card is prepared for that tree, and the tree is then listed as part of a contract package for tree removal. Such trees are cut down sometime during a period from November through March.
>
> The members of the department also look for hazardous trees on a continuing basis throughout the year as they are performing their various duties. Dr. Terry Tattar, a professor of plant pathology at the University of Massachusetts, testified that he was aware of few cities which had an inspection program such as Omaha's and stated that Omaha's program was one of the best he had seen.
>
> In June through October 1979, a census was taken of all street and park trees. The census was conducted by paid, part-time helpers trained and assisted by the assistant city forester. The number of trees in each area of the city was recorded in a plat book. Trees were listed by groups, indicating approximate size, species, and condition.

The Court then noted that despite such extensive inspection procedures, the trial court in ruling for the plaintiff, had found that "the 'windshield inspections' carried out by the city were a rather cursory attempt to fulfill its duty to inspect."

The Supreme Court disagreed with this conclusion and in reversing the lower court's ruling in favor of the plaintiff, took the position that "windshield inspections" were all that were required in order to satisfy the requirements of due care. Relying on the testimony at the trial by expert witnesses, it noted that the following external signs of disease may be observed by such type of inspection: dead wood in the crown, cankers, conks, oozing sap, trunk damage, splits, holes, or cavities that break to the outside and can be probed, the number and color of the leaves, and the condition of the bark and crotch. The Court ruled that "an inspector must rely upon external indications when inspecting for decay, as other, more reliable methods for detecting internal decay are semidestructive and impractical." It then went on to say that: "There was no indication that the tree was found to be hazardous as a result of any inspection made by the city. From our review of the evidence we conclude that the plaintiff did not prove that the city failed to inspect the tree and that the city failed to observe visible signs of substantial decay."

Thus this case would appear squarely to support the case law set forth in the original paper that "drive-by" or "windshield" inspections by trained observers in moving patrol cars satisfies the requirements of due care, and that there is no duty to tap or bore trees in search of internal decay, where external evidence of a diseased condition does not indicate a condition of internal decay.

The decision of the Supreme Court of South Carolina in the case *Marsh v. South Carolina Department of Highways and Public Transportation,* 380 S.E.2d 867 (S.C. 1989), affirms the existence of the duty of inspection. This was an action brought by the driver of a truck who was injured when a tree growing within the right-of-way of a State highway on which he was traveling fell and crashed into his vehicle. The facts in the case were succinctly stated by the County as follows:

> The tree that injured Marsh stood close to the travelled portion of the road and leaned across it. Before the tree fell, it had leaned toward Highway 41 for at least 4 years. Anyone travelling Highway 41 could have seen that the tree was leaning. On Thursday, the day before the accident, the tree leaned toward the road at a 60- or 70-degree angle.
>
> Road crews from the Department periodically cut the grass and filled in the holes in the vicinity of the tree before it fell. They had been instructed almost daily by the resident maintenance engineer, who himself routinely checked the highways for dangerous trees, to inspect for disease or burn on each tree that leaned toward the highway and remove each such tree if it endangered the travelling public.
>
> The basal portion of the tree's trunk was decaying and manifested symptoms of severe infection by fusiform rust fungus, a tree disease characterized by the spindle-shaped swelling on the trunk or branches. The disease, which takes no expert to detect, typically causes structural weakness and, ultimately, trunk or stem breakage.

In affirming a judgment entered below against the South Carolina Department

of Highways and Public Transportation in the amount of $300,000, the Court first stated the general rule with respect to the fall of trees standing within the right-of-way, or in close proximity thereto, to be as follows:

> In South Carolina, as elsewhere, a public authority, such as the Department is liable for damages caused by the fall of a tree standing within the limits of or in close proximity to its highway, provided the public authority had notice, or in the exercise of reasonable care should have been informed, that the condition of the tree was such as to make it hazardous to persons or property in the immediate vicinity.

Applying the general rule as above stated to the facts of the instant case, the Court ruled as follows:

> The evidence, in our view, sufficiently establishes that the Department in the exercise of reasonable care should have known of the defective condition of the tree in question and of the danger it represented to persons and property alike on Highway 41. The jury could well have concluded that prior to the tree's falling, the Department's highway maintenance personnel saw that the tree was leaning toward and across the highway but neglected to determine whether its diseased condition, which could have been discovered on inspection, was such as to make the tree hazardous to person and property.

However, a different result was reached in the case of *Roman v. City of Stamford*, 16 Conn. App. 213, 547 A.2d 97 (1988). This was an action to recover damages for injuries suffered by plaintiffs, the driver and passenger in an automobile that was struck by a rotted falling pine tree. The Court stated that the dispositive issue was "whether a municipality is liable in negligence where an automobile is struck by a falling tree located within the limits of the roadway, because a city charter provision directs the city's park commission to provide for the care and control of all trees within the limits of public roads."

The Court took the position that recovery must be denied because the charter provision in question established a duty to the public generally, and not a private duty owing to the plaintiffs. In applying the public versus private duty distinction, it stated:

> [W]e conclude that the duty involved in the present case on the part of the city to maintain and care for the trees within the limits of all public roads does not constitute a private duty. The tree in question was one of a[t] least 100,000 trees growing on approximately 250 miles of land bordering Stamford roads, for which the city's park commission was responsible. The duty involved here was not of such a nature that its performance would likely affect any passengers on city roads in a manner different in kind from the way it affects the public at large. The duty to maintain and care for such trees is aimed principally at preserving the scenic and environmental values fostered by their continued viability, and only incidently at the safety of travelers on the adjoining highway.

The case was heard on appeal to the Supreme Court of Connecticut, wherein the same result was reached. In affirming the Appellate Court's ruling that the duty to care for the trees within the municipal limits of the City of Stamford was one owing to the public generally, and not a private owing to plaintiffs, the Court, in *Roman v. City of Stamford*, 211 Conn. 396, 559 A.2d 710 (1989), stated:

> In this negligence case, the dispositive issue is whether a municipality creates an actionable private duty by adopting a municipal charter in which it undertakes to provide for the care of public trees. The plaintiffs, Joann Roman and Madeline Roman, sued the defendant, the city of Stamford, for injuries that they suffered when their automobile was struck by a rotten tree located within the roadway. The case was tried to a jury on the theory that the defendant could be found liable for negligence by virtue of a provision contained in the Stamford city charter that imposed on the defendant a duty to maintain and care for "all trees . . . within the limits of any public road." Stamford City Charter C-595.1(2). After a verdict finding the defendant liable, the trial court rendered judgment in favor of the plaintiffs. The Appellate Court overturned this judgment and directed that judgment be entered in favor of the defendant. . . . This court then granted the plaintiff's petition for certification to appeal limited to the following question: "When a city charter provision directs the city's park commission to provide for the care and control of all trees within the limits of public roads, can a municipality b[e] held liable in negligence where an automobile is struck by a falling tree located within the limits of the roadway. . . ." We conclude that this question must be answered in the negative and that the judgment of the Appellate Court must accordingly be affirmed. . . . The Appellate Court's resolution of this issue is thoughtful, scholarly and comprehensive. It would serve no useful purpose for us to elaborate further on the discussion contained in the opinion of the Appellate Court.

It is beyond the scope of this supplementation paper to undertake a review and discussion of the cases dealing with the public duty–private duty dichotomy. It is a complex subject matter, and, as has sometimes been said, neither the courts nor commentators have succeeded in drawing a bright line of distinction between the two. However, a thoughtful, scholarly, and illuminating discussion of the dichotomy is to be found in the paper by Kenneth G. Nellis, entitled "The Public Duty Defense to Tort Liability," appearing in *Selected Studies in Highway Law*, Vol. 4, at p. 1868–N1, to which reference is here made for a full treatment of the subject matter. It suffices for the purposes of this paper to point out that if highway lawyers wish to use the public duty defense in an action brought to recover for injuries occasioned by falling trees or limbs, the case of *Roman v. City of Stamford, supra*, stands as a substantial measure of support for such position.

Trees Located Outside the Right-of-Way Limits (1966–N102)

As previously indicated herein and as shown in the original paper, it is the general rule that the State and subordinate agencies are under a duty to inspect trees located outside the right-of-way limits, but within falling distance of the roadway, to determine by inspection of visible symptoms of disease or decay, whether a tree is in such weakened condition as to pose the threat of fall across the traveled way. However, as pointed out in connection with discussion of the holding in *McGinn v. City of Omaha, supra*, the duty of inspection does not extend to the discovery of internal decay that does not evidence itself by readily visible external symptoms. Such rule was recognized and given application in the case of *Walker v. Department of Transportation & Development*, 460 So.2d 1132 (La. App. 1985). This was a wrongful death action to recover for the demise of a passenger in an automobile, who was killed when the vehicle in which she was riding collided with a 70-year-old cottonwood tree that had become uprooted

during a severe ice storm, and fallen from a location outside the right-of-way to a position across the paved surface of the road on which decedent was traveling.

In affirming judgment entered below for the Louisiana DOTD the Appellate Court first stated the applicable law as follows:

> The DOTD has the right to remove a tree located on private property adjacent to its right-of-way when the tree poses imminent dangers to the users of the highway. . . . The DOTD has a duty to remove a tree from property adjacent to its right-of-way when it has actual or constructive knowledge the tree is in a condition where it may fall upon the road and create imminent danger for the user of the road.

However, it then went on to hold that recovery must be denied because the DOTD could not be charged with constructive knowledge of a buried root defect that caused the cottonwood tree to become uprooted and fall across the highway. It stated:

> DOTD is not required to make a minute examination of the base of every tree along its right-of-way. The duty of DOTD is to observe and remove trees that are dead or leaning or otherwise appear defective by general observation. This tree did not break or fall from any defect that existed in the trunk of the stump. . . . It uprooted. It would be an impossible task to carefully inspect every tree on property adjacent to the highway right-of-way to determine if there is a possibility of root deterioration that could result in a tree covered with ice uprooting and falling across the highway. We conclude that the appellant's evidence fails to establish the DOTD had either actual or constructive notice of possible root defect in the cottonwood tree that would cause it to uproot and fall upon the highway. This green cottonwood tree which grew for many years adjacent to the highway gave no indication to the highway employees who frequently inspected the area that it was in a condition where it might fall and create imminent danger to the users of the highway.

This paper now turns to an examination of the question of liability of the State or its agencies for motor vehicle collision with tree limbs overhanging the public road.

INJURY OR DAMAGE CAUSED BY STRIKING OVERHANGING TREE LIMBS (1966–N109)

There would seem to be little doubt that the State or its subordinate units may be held liable for injuries or damages incurred as the result of leaving unpruned tree limbs overhanging the public way at such height as to be in the path of moving vehicles. That such is the case borne out in the decision in *Sanker v. Town of Orleans*, 27 Mass. App. Ct. 410, 538 N.E.2d 999 (1989). This was a wrongful death action brought against the Town of Orleans to recover for the demise of a motorcyclist who, while riding his vehicle on a township road, struck his head against an overhanging tree branch, causing him to lose control of the motorcycle, and careen into a utility pole, from which collision he suffered a fractured skull and multiple internal injuries. Negligence was charged to the Town in failing to have pruned the overhanging tree branch.

Apparently it was contended by the Town that the decision whether or not to prune the overhanging branch was a discretionary decision rendered immune by the discretionary function exception of the Massachusetts Tort Claims Act. In rejecting this contention and holding that the decision was not a "planning" activity protected by the discretionary function exception, the Court stated: "The day to day care and maintenance of a public road seems at the opposite end from policy and planning . . . and municipal negligence in such a respect is not sheltered as a discretionary function."

However, although there is a finding of negligence in failing to trim an overhanging tree limb, recovery may be denied on the ground of contributory negligence.

McMillen Transfer Inc. v. State, 225 Neb. 109, 402 N.W.2d 878 (1987), was an action to recover for damage to a trailer, which took place when the vehicle collided with a tree limb protruding over the highway. The action was brought against the State of Nebraska, which had gratuitously assumed the maintenance of the highway on which the trailer was proceeding. The trial court found that the State was negligent in failing to trim the protruding tree limb, but ruled that recovery must be denied because of contributory negligence on the part of the driver of the rig. In affirming the judgment rendered below, the Supreme Court of Nebraska stated:

> What determines the exercise of reasonable care, or the breach of that duty of care, must be determined by the circumstances of each case. In this case, the trial court, as finder of fact, determined that plaintiff's driver was guilty of contributory negligence.
>
> The finding was based on the driver's prior knowledge of the highway . . . and of the trees lining the highway. There was no need for plaintiff's driver to proceed as close as he did to the . . . edge of the . . . highway, and thus to the adjoining tree. The driver could see the tree whose limb the vehicle struck at a sufficient distance to safely stop or swerve the vehicle to the north, and while plaintiff's driver testified he could not see the overhanging limb, he knew, as stated by the trial court, that "trees had limbs." Under the circumstances of this case, to proceed along the . . . edge of the highway, close to known trees, when there was sufficient room to proceed in the main portion of the highway constituted negligence. We determine that the trial court's finding that plaintiff's driver was guilty of contributory negligence in a degree sufficient to defeat plaintiff's recovery is supported by the evidence and is not clearly wrong. The judgment of the trial court in favor of defendant State is affirmed.

This paper now leaves the subject of liability for motor vehicle collision with standing trees, falling or fallen trees, and overhanging tree limbs, and turns to the question of the duty of the State and subordinate agencies to cut or remove vegetation, growing either within or without the right-of-way, that obstructs the view of motorists of the road ahead, including the full visibility of upcoming road intersections.

DUTY TO CUT OR REMOVE VEGETATION OBSCURING HIGHWAY VISIBILITY (1966–N111)

A majority of the courts have recognized that the presence in the right-of-way or on adjoining private land, of vegetative growth that obstructs or impairs the view of the road ahead constitutes a breach of the duty to maintain highways and streets in such condition as to be reasonably safe for public use by motorists exercising ordinary care. This obtains with particularity to road intersections, because of the high incidence of accidents that take place at road junctures. Where

the view of intersecting roads is rendered blind by vegetative growth, or the visibility of STOP or other signs warning of danger ahead is impaired by vegetation, it is generally held that the State and subordinate highway agencies are under a common law duty to cut or remove such vegetation in order to restore or maintain highway visibility. As shown in the original paper, this duty has been held to extend to obstructive vegetative growth on adjacent private property, a duty being imposed to enter upon such property by whatever legal means are necessary in order to take steps necessary to the control or removal of the hazard.

However, in a minority of cases, the position has been taken, on public policy grounds, that to expose smaller units of government, such as counties and municipalities, to liability for failure to control vegetative growth at hundreds, or thousands, of road intersections within their jurisdictions, would cause an undue financial burden and hardship, and, therefore no common law duty exists to cut or remove such obscurant vegetation.

Cases Affirming Existence of Duty

The complaint in *Donaca v. Curry County,* 303 Or. 30, 734 P.2d 1339 (1987), alleged that plaintiff was injured when in riding his motorcycle along a road owned and maintained by defendant County, a collision took place with an automobile entering the County road from a private driveway; that tall grass growing within the right-of-way so impaired visibility that plaintiff was unable to see the vehicle entering the County road from the private driveway; that defendant County was responsible for keeping the grass cut so as not to obscure visibility of the intersecting roads; that defendant knew or should have known that the height of the grass was of such level as to obscure the vision of motorists at the intersection; and that defendant County was negligent in failing to have kept the grass cut below such level.

The complaint was dismissed by the trial court, and such action was affirmed by the intermediate Court of Appeals, on the ground that the potential costs of controlling vegetative growth at intersections throughout the County was such as to preclude, on public policy grounds, the imposition of liability on defendant. The Court of Appeals relied heavily in reaching this result on a decision by the Supreme Court of Wisconsin in the case of *Walker v. Bignell,* 100 Wis. 2d 256, 301 N.W.2d 447 (1981). [For a discussion of *Walker,* see the original paper, *Selected Studies in Highway Law,* Vol. 4, at pps. 1966–N114 et seq.] In *Walker,* the Wisconsin Court had taken the position that the imposition of liability on municipalities for failure to keep obstructive vegetation cut at intersections would create an unmanageable burden and the potential for significant financial loss, and hence declined, on purely policy grounds, to impose such liability. On appeal, the Supreme Court of Oregon, after discussing the Wisconsin decision at some length, declined to accede to the reasoning therein, and in reversing the decision of the Court of Appeals in favor of the County, had the following to say:

> We do not follow the . . . approach of the Wisconsin court, as we have not embraced freewheeling judicial "policy declarations" in other cases. In recent years, for instance, this court had declined to explain tort liability for injuries from defective products by a "loss spreading" rationale, . . . to decide for or against intrafamily immunity from negligence liability by assessing the defendant's potential conflict of interest when his or her liability is covered by insurance . . . or to consider either the use of liability insurance or possible burdens on the courts as factors in defining substantive claims and duties. . . .
>
> Similarly, we do not immunize counties from whatever responsibility for visibility of intersections they otherwise might have in order to relieve them of the cost of defending against unsuccessful claims. Nor are counties immune from liability that owners of private roads would face under identical circumstances merely because precautions are costly. . . .
>
> The Court of Appeals let an argument against the cost of a "duty to control vegetation at intersections" lead it into a categorical "no duty" rule for uncontrolled intersections between public and private roads. . . . The rule illustrates the pitfalls of cost-based judicial generalizations. The risk of collisions at obstructed intersections and the cost of clearing the obstructions are empirical data. They can be expected to differ substantially from one location to another. One county road may carry many times the traffic of another. One private road may take many cars onto a county road daily, or during some seasons, more than some intersecting public roads do; another may hardly ever be used. Risks of collision will differ accordingly. The cost of controlling vegetation may differ from climate to climate, from county to county and from road to road. Of course there are no data of this kind in the record; the case was decided on plaintiff's complaint alone. The "no-duty" rule stated by the Court of Appeals will be taken to govern county roads throughout Oregon, regardless of particular circumstances. . . . The decision of the Court of Appeals is reversed and the case is remanded to the circuit court for further proceedings.

Thus the Court in this case, unaided by the provisions of statute law imposing a duty, ruled that a common law duty exists on the part of county governments to control obstructive vegetation growing within the right-of-way at road intersections.

In a subsequent Oregon case, *Pritchard v. City of Portland,* 310 Or. 235, 796 P.2d 1184 (1990), the Supreme Court dealt with the question of the common law duty of a municipality to control obstructive vegetation growing on private property adjacent to the right-of-way. The complaint in this case alleged that plaintiff was injured when he rode his motorcycle through an intersectional STOP sign that was obscured by vegetation, resulting in a collision with a pick-up truck. The complaint charged negligence on the part of the City in failing to discover that the sign was hidden from view by foliage, and in failing to cut back or remove the obscurant foliage. The defense was interposed that the City was relieved of any obligation to control the vegetation in question by a City ordinance providing that it shall be "unlawful for any person, firm or corporation, owning, in possession of, or occupying or having control of any premises within the City, to plant, maintain or allow any tree, shrub, bush or plant to partially or wholly obstruct the visibility of a stop sign, or a regulatory sign, for a minimum distance of 100 ft as viewed from the normal vehicular approach." The position was taken that this ordinance, in placing a duty on the private landowner to cut or remove obstructive vegetation, relieved the City of any residual common law liability for failure to control obscurant vegetation.

The Court rejected this argument, holding that the ordinance placed a concomitant obligation on private landowners, and that it did not "exempt the City from any liability that it might have to an injured party arising out of the City's own negligent failure to remove foliage."

Thus it was held that the municipality could not escape its common law liability for failure to control obstructive vegetation by reason of legislation placing the duty to control such vegetation on the owners of lands within the municipality.

Hamric v. Kansas City Southern Railway Company, 718 S.W.2d 916 (Tex. App. 1986), was a wrongful death action brought by the widow of a motorist killed in an intersectional motor vehicle collision, the complaint alleging that the proximate cause of decedent's demise was the presence on the land of the named defendants, including the State of Texas and the Texas State Department of Highways and Public Transportation, of a stand of tall grass and weeds that obscured the deceased's view of the intersection. Suit was based on alleged breach of the common law duty to cut or remove obscurant vegetation, and on provisions of the Texas Tort Claims Act.

The Court of Appeals, in reversing a summary judgment entered at trial in favor of the State of Texas and its Department of Highways and Public Transportation, ruled that summary judgment was impermissible because a question of fact for jury determination remained as to whether there had been a breach of the common law duty owing by defendants to cut or remove the obscurant vegetation standing in the right-of-way. The Court stated: "We decide that maintaining, efficiently, the rights-of-way of the State Highway System includes the mowing of grass and weeds so that tall Johnson grass, thick weeds, grass, and tall thick vegetation will not impair the view and lookout of motorists in a manner that jeopardizes or endangers their safety when approaching an intersection of highways."

In rejecting the claim that the State of Texas and the Department of Highways and Public Transportation were rendered immune from liability by the language of the discretionary function exception of the Texas Tort Claims Act, the Court summarily stated: "Assuredly, the proper maintenance of the state highways by the highway department is not a discretionary activity falling within the [discretionary function] exclusion . . . of the Texas Tort Claims Act."

Plaintiff in *Briggs v. Hartford Insurance Co.,* 532 So.2d 1154 (La. App. 1988), brought suit to recover for injuries suffered when she ran through a STOP sign located at an intersection, and crashed into trees standing on the far side of the intersection. The action was brought against the State of Louisiana and its Department of Transportation and Development, alleging negligence in having failed to trim tree branches and foliage which allegedly obscured view of the signing at the intersection. In holding the defendants liable for the accident, the Court of Appeals ruled that the evidence at trial provided satisfactory proof that the defendants had constructive notice of the hazardous condition, and that they failed to take action to correct the same within a reasonable time after receipt of such notice.

The opinion is silent as to whether the tree obstructing highway vision was located within the right-of-way, or outside thereof, and hence it would appear that this fact was deemed not material to the decision, the Court stating the "DOTD's duty stems from placing the sign at the intersection," which action gave rise to an obligation to "exercise a high degree of care for the safety of the motoring public," inclusive of preventing view of the sign from being obstructed by vegetative growth.

See also, *Breshers v. Department of Transportation and Development, State of Louisiana,* 536 So.2d 733 (La. App. 1988), holding that a Parish of the State of Louisiana was under a duty to cut or remove obstructive vegetation lining its roadway in order to preserve visibility of a dangerous curve ahead.

Plaintiff, in *Long v. Friesland,* 178 Ill. App. 3d 42, 127 211. Dec. 85, 532 N.E.2d 914 (1988), was injured when in cresting a hill on a narrow road owned and maintained by defendant Hillbourough Township, the automobile being operated by her met in head-on collision with a vehicle coming from the opposite direction on the same road. Suit was brought on the theory of negligence on the part of defendant Township in maintaining a road too narrow for two-way travel, and in allowing vegetation to encroach over and upon the roadway in such manner as to render the road even more narrow, dangerous, and unsafe for public use. Appeal was taken from a jury finding of negligence on the part of defendant Township.

It was argued on appeal that the jury of laymen below could not, without evidence, make a determination of "what constitutes a sufficient width for a roadway." In rejecting this contention, and affirming the jury finding of negligence in failing to trim the obstructive vegetation, the Appellate Court stated:

> It is true that oftentimes expert testimony, evidence of custom, statutes, regulations or some other evidence of an established standard of care is necessary for a jury to make such a determination. However, where the negligence is so apparent that a layman would have no difficulty in appraising it, such evidence of the standard of care is not required. . . . We think such is the case before us. A jury could properly determine whether defendants maintained an unsigned and hilly road which was not wide enough for two oncoming cars to pass each other safely and/or which was overhung by brush forcing drivers to drive near the center of the road and obscuring their vision, and whether such conduct breached the defendant's duty to maintain township roads in a reasonably safe condition. Such determination is within the common sense and knowledge of layperson jurors.

Bailey Drainage District v. Stark, 526 So.2d 678 (Fla. 1988), was a wrongful death action brought to recover for the demise of a motorist killed when the vehicle that he was operating was struck by a truck when entering an intersection not graded or warned against by any traffic control devices. The complaint alleged that the proximate cause of the accident was the negligent failure of the defendants, Broward County and Bailey Drainage District, to cut or remove plant growth alongside the roadway, which had developed to such height as to obscure decedent's view of the intersection. The intermediate Court of Appeals, in reversing the trial court's ruling in favor of the defendants, certified the following question to the Supreme Court of Florida: "Does sovereign immunity bar an action against a governmental entity for failing to warn motorists of an intersection known by the government to be dangerous by reason of the lack of traffic control devices and obstructions to visibility located on the right-of-way?"

In answering this question in the negative, the Supreme Court approached the question from the standpoint of whether under the Florida Tort Claims Act the omission of traffic controls and the failure to control vegetation fell within the penumbra of protected "planning" activities, or rather into the category of unprotected "operational" activities. In opting for the latter, the Supreme Court applied the previously announced rule in Florida, that when a governmental entity knowingly permits a dangerous condition to exist, and such condition creates a hidden trap for motorists, the conduct of the entity in permitting such condition lies within the unprotected "operational" sphere of activity. It stated:

> We note that the failure to regulate traffic at an intersection by posting signs or other means does not in and of itself give rise to an actionable breach of duty. . . . Likewise, the existence of an obstructed view of traffic at an intersection does not in and of itself give rise to liability. We hold, however, and in response to the certified question, sovereign immunity does not bar an action against a governmental entity for rendering an intersection dangerous by reason of obstructions to visibility if the danger is hidden or presents a trap and the governmental entity has knowledge of the danger but fails to warn motorists. Where a governmental entity knowingly maintains an intersection right-of-way which dangerously obstructs the vision of motorists using the street in a manner not readily apparent to motorists, it is the duty to warn of the danger or make safe the dangerous condition. . . . The failure to do so is a failure at the operational level.

The Court went on to hold that it was immaterial whether the obstructive vegetation was located on property owned by the government, or on privately owned property adjacent to government land, stating:

> We also conclude that it is irrelevant whether the brush and weeds are actually located on the governmental entity's right-of-way or on privately owned property adjacent to the right-of-way. The relevant inquiry is whether the brush and weeds, wherever located, obstruct the view of motorists, creating a danger which is not readily apparent. If the brush and weeds are located on the entity's right-of-way, the entity may either warn of the danger or remove the obstruction. If the brush and weeds are located on privately owned property so that removal is not an option, the entity still has a duty to warn of the danger.

Sanchez v. Clark County, 44 Ohio App. 3d 97, 541 N.E.2d 471 (1988), reached a similar result insofar as governmental liability for failure to protect against obstructive vegetation growing on private property adjacent to the right-of-way is concerned.

This case, involving statutory construction, was a wrongful death action brought against Clark County to recover for the demise of a motorist killed in an intersectional collision. The complaint alleged that decedent failed to halt at the intersection because the STOP sign on the road, owned and maintained by defendant, was obscured from view by foliage on a tree growing on private property adjacent to the intersection.

Pertinent to the facts was an Ohio statute, R.C. 2744.02(B)(3), providing that: "Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets . . . open, in repair, and free from nuisance." The trial court granted summary judgment for Clark County on the ground that the statute imposed liability only for obstructions or defects existing in, upon, or above the paved surface of the traveled way. In reversing and remanding the Court of Appeals stated:

> In our opinion, a political subdivision's duty under R.C.2744.02(B)(3) to keep its roads open, in repair and free from nuisance extends to adjacent property when a condition on the adjacent property makes the road unsafe for its usual and ordinary mode of travel. A traffic sign that has become blocked by foliage presents a definite hazard to travel. We note that our position finds support in cases from other jurisdictions which have considered statutes analogous to R.C.2744.02(B)(3) in similar factual settings.

Thus it is seen that in the recent cases liability has been imposed in the situation where obstructive vegetation was located in the right-of-way, in the circumstance where the obstructive vegetation was located on private land adjacent to the right-of-way, and also where the court apparently deemed the location immaterial, by reason of its failure to note with specificity the exact location of the hazardous vegetative growth.

Cases Denying Existence of Duty

Next for consideration are cases wherein the duty to cut or remove obstructive vegetation was denied.

Scheurman v. Department of Transportation, 434 Mich. 619, 456 N.W.2d 66 (1990), was a wrongful death action brought to recover for the demise of a decedent killed when the bicycle she was riding on a sidewalk adjacent to a public road collided with a van at an intersection. The facts brought out at trial established that a 6-ft hedge growing on private property adjacent to the intersection obstructed the view of the intersection, on the part of both the deceased, and the driver of the van, to the extent that neither saw the other until it was too late to avoid the collision.

The action was brought under an exception made for highways in a Michigan statute granting immunity from tort liability to all governmental agencies when engaged in governmental functions. The exception for highways under such statute (M.C.L. § 691.1402) was made to extend "*only* to the improved portion of the highway designed for vehicular travel." (Emphasis added.)

Another Michigan statute (M.C.L. § 239.5) imposed the duty on private landowners "to cut or trim, or cause to be cut or trimmed, to a height not exceeding 4½ ft and a width not exceeding 3 ft, all hedges or hedge rows along or on the public highway or adjacent thereto in each and every year. . . ."

In holding that defendant Wayne County was not under any duty to trim or cause to be trimmed the 6-ft hedge located on private property which obstructed view of the intersection, the Supreme Court of Michigan said:

> Clearly, the statutory duty to trim hedges is imposed upon the person owning or occupying the property, not upon the county. . . . In sum, the indisputable fact is that the hedge in question was on private property and had no connection with the roadbed or public travel thereon. While the hedge may have interfered with compass-range vision within the intersection, it cannot be categorized as a defective condition upon "the improved portion of the highway designed for vehicular travel. . .". . . . Therefore, . . . strict compliance with the conditions and restrictions of the statute precludes the inclusion of the obstruction complained of within the [statutory] duty of Wayne County. Thus, liability may not be imposed upon the defendant for a hedge, located on private property, which obstructed the view of travelers.

It is to be noted that in *Pritchard v. City of Portland, supra*, the Supreme Court of Oregon interpreted a similar statute imposing a duty on private landowners to trim obstructive vegetation as creating a duty merely concomitant to the duty of governmental entities to control obstructive vegetative growth, and that such statute left wholly intact the duty of governmental agencies to control vegetative growth on private property where such growth constitutes a hazard to the motoring public. It would appear that the holdings in *Pritchard* and *Scheurman, supra*, can perhaps be reconciled, on the ground that in the former case there was no statute expressly limiting the duty of care owed by highway

agencies, whereas in the latter case statutory language expressly restricted the duty of care owed by highway agencies "to the improved portion of the highway designed for vehicular travel."

Toumberlin v. Haas, 236 Kan. 138, 689 P.2d 808 (1984), was an action brought, *inter alia*, against defendant Franklin County, to recover for injuries suffered by plaintiff in an intersectional collision, allegedly caused by the presence of obstructive vegetation growing in the right-of-way at the corner of the intersection. Suit was brought under the Kansas Tort Claims Act, which had supplanted the prior Kansas statute law rendering the State and its agencies liable in tort upon the showing of the existence of a "highway defect." A considerable body of case law had developed in Kansas concerning the precise meaning of the term "highway defect," and the question under consideration in this case was whether or to what extent the provisions of the Tort Claims Act modified or changed the prior case law relating to liability for "highway defects." In holding that defendant Franklin County was not liable for failure to cut or remove obscurant vegetation that was growing in the right-of-way but not on or over the traveled portion of the way, the Supreme Court of Kansas relied on prior decisions rendered under the "highway defect" statute. It stated in relieving the County of liability:

> Turning to plaintiff's contention that Franklin County was negligent in not removing the weeds, brush and other growth along the right-of-way, we are of the opinion that the trial court was . . . correct in determining no such mandatory duty existed in this case. [T]he evidence is clear that whatever obstruction existed it was not upon the traveled portion of the highway but was alongside it on the remaining right-of-way. The county engineer testified there are over one thousand, seven hundred intersections in Franklin County. Many of them have the view obstructed in various ways by brush, undergrowth, weeds, signs, buildings, structures, etc. While our earlier cases involving obstructions to the view at an intersection were based upon statutory duty to maintain the highways free from defects, they are still persuasive in considering liability under the KTCA.

It seems needless to say that it is a necessary corollary to the ruling that no liability exists for failure to trim vegetation growing alongside but not over or upon the traveled way, that no liability exists for failure to trim obscurant vegetation that is located on adjacent private property.

The facts in *Havens v. Harris Township*, 175 Ill. App. 3d 768, 125 Ill. Dec. 256, 530 N.E.2d 284 (1988), were as follows: Plaintiff was operating a minibike on a country road, owned and maintained by defendant Township, when he became involved in a collision with a truck, resulting in serious injuries to the plaintiff. An action was instituted by plaintiff charging, *inter alia*, that the accident was occasioned by the failure of the defendant to cut obscurant vegetation growing alongside the roadway. The trial court dismissed the complaint for failure to state a cause of action.

In affirming the action of the lower court, the Appellate Court took the position that (a) there was no common law duty on the part of defendant Township to cut or remove weeds, brush, or other obscurant vegetation, and (b) that such duty could arise only in connection with an "improvement" made to the road in question, and that defendant was not under any duty to undertake a "public improvement." It stated with respect thereto:

> The plaintiff agrees with the defendant's brief that a public entity has no obligation to undertake or create public improvements. . . . Rather, the plaintiff argues that the defendants had a duty to maintain the township road involved in a reasonably safe condition. The problem with this reasoning is that the conditions of the roadway in question have remained constant since its creation. It is a one-lane, twisting, gravel country road with trees and vegetation bordering the road on both sides. Thus, to make the roadway safer according to the plaintiff's standards, the defendants would have to change the character of the road itself. This necessitates improving the roadway in some form or fashion, a matter which the plaintiff concedes the defendants are not obligated to do. . . .
>
> Moreover, it is clear that the common law does not impose such a duty in the present case. A township has no common law duty to widen roads, smooth gravel, erect signs, or mow weeds. A duty only arises when a public improvement is actually undertaken. . . . Absent a statutory or common law duty, it is up to the township's discretion to decide whether such road improvements were necessary. And it is well-settled that a public official has an absolute immunity from lawsuits challenging his acts of judgment or discretion. . . .
>
> The law is also clear that if there is no duty to undertake the public improvement in the first instance, then there is no corresponding need to warn of any alleged dangerous condition resulting from the lack of undertaking the public improvement.

Havens v. Harris Township, supra, was followed in *Bainter v. Chalmers Township, McDonough County*, 198 Ill. App. 3d. 540, 144 Ill. Dec. 676, 555 N.E.2d 1195 (1990). The facts in this case are incompletely stated, but it apparently involved the collision of plaintiff's automobile with a school bus allegedly due to the failure of defendant, Chalmers Township, to trim weeds or brush obscuring highway visibility. In relying on *Havens, supra*, the court stated:

> On appeal, the [plaintiffs] ask this court to reverse our holding in *Havens* or find the instant case distinguishable from *Havens*. The [plaintiffs] further request that this court follow the reasoning in *Long v. Friesland* (1988), 178 Ill. App. 3d 42, 127 Ill. Dec. 85, 532 N.E.2d 914, wherein the court found the clearing of brush from alongside a road to be a ministerial act.
>
> We will continue to adhere to our decision in *Havens*. A township has no common law duty to widen roads, smooth gravel, erect signs, or mow weeds . . . and a public official has an absolute immunity for lawsuits challenging his acts of judgment or discretion. Absent a statutory or common law duty, . . . it is up to the township's discretion to decide whether road improvements, such as clearing the brush in the instant case, were necessary.

It is to be noted that the Court was asked in this case to adopt the reasoning in *Long v. Friesland* (previously considered in this paper) wherein the Illinois Appellate Court for the Fifth District upheld the duty to cut or remove obstructive vegetation. Both *Havens* and *Bainter* were decided by the Illinois Appellate Court for the Third District, and the decisions in these latter two cases, denying a duty to cut obstructive vegetation, thus create and establish a division in the Illinois courts.

It is submitted that the view that the duty exists and is ministerial and nondiscretionary, adopted in *Friesland*, is supported by the decisions of the majority of other courts throughout the country. The view taken in *Havens* and *Bainter*, that it is discretionary in nature, has not found general support, including those cases dealing with the discretionary function exception of State Tort

Claims Acts, wherein such position has been advanced and rejected. (See *Hamric v. Kansas City Southern Railway Company* and *Sanker v. Town of Orleans, supra.*)

This concludes the review of recent cases dealing with the liability of the State and its agencies for injury or damage occurring in motor vehicle accidents caused by trees, shrubbery, or other vegetative obstruction, located in the right-of-way, or growing on adjacent private property.

CONCLUSION (1966–N121)

It may be stated by way of conclusion that the recent cases are, in the main, reflective of previously well-established principles, including the following:

1. Allowing a tree to stand in the right-of-way, or in close proximity thereto, does not constitute negligence as a matter of law.

2. Whether such conduct constitutes negligence is a fact question for jury determination, taking into consideration the totality of the circumstances of the particular case.

3. The duty exists to inspect trees standing within falling distance of the traveled way in order to determine whether they are in such diseased or decayed condition as to pose a threat of fall onto or across the traveled way.

4. The duty of inspection is satisfied by "drive-by" or "windshield" inspections made by trained observers in moving patrol cars.

5. The duty of inspection extends only to visible external evidence of disease or decay, there being no duty to bore or tap trees to determine whether internal disease or decay exists.

6. A clear duty exists to prune tree branches overhanging the traveled way at such height as to be in the path of moving vehicles.

7. It is the majority rule that a duty exists to cut or remove vegetation that obscures highway visibility, whether the vegetation is located within the right-of-way, or on private property adjacent thereto. In case of the latter it is the duty to trim or cause to be trimmed the obstructive vegetation, or to post adequate signing warning thereof.

8. In the minority of the cases the rule has been announced that there is no common law duty to trim obstructive vegetation, particularly in the situation where the vegetation does not obtrude over the traveled way, or is located on private property adjacent to the right-of-way.

9. New matter in the recent cases is largely confined to use of the public duty concept as a defense. The public duty defense has been underused in highway cases, and it is suggested that serious consideration be given to inclusion of the same as an additional weapon in the arsenal of the defense. It has been previously noted that valuable instruction in the use of the public duty defense is to be found in the paper by Kenneth G. Nellis, entitled "The Public Duty Defense to Tort Liability," appearing in *Selected Studies in Highway Law*, Vol. 4, at p. 1868–N1.

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