

NCHRP

National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

December 1988

Number 3

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

Supplement To Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings

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 and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and

Pavement Markings," pp. 1943-1966-S4, 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 Volume 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.

CONTENTS

Supplement To Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings

Introduction.	3
Duty of the State or Governmental Agency to Install and Maintain Highway Warnings, Traffic Lights, or Pavement Markings.	3
Common Law Negligence.	8

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION (p. 1943)

The principal development of interest and significance since the writing of the first supplementation (in *Selected Studies in Highway Law*, p. 1966-S1, *et seq.*) to the paper entitled "Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings" has been in the application of the discretionary exemption provisions of State Tort Claims Acts to the duty of the State and its subdivisions in respect to the signing and signalling of roads and streets. Hence, in the cases that follow, chief emphasis will be accorded to those cases involving the impact of the discretionary exemption on the duty of the State and its subordinate units to erect and maintain signs and signals to provide aid and assistance in the safe movement of traffic. The cases set forth herein are intended (as in the original paper and supplement thereto) to be representative only, no attempt being made to provide an exhaustive collation of all recently decided cases pertaining to highway signing and signalling.

DUTY OF STATE OR GOVERNMENTAL AGENCY TO INSTALL AND MAINTAIN HIGHWAY WARNINGS, TRAFFIC LIGHTS, OR PAVEMENT MARKINGS (p. 1944)

It was pointed out in the original paper (at p. 1944) that in "the absence of statute . . . there is no general duty of a State or other governmental unit to install or provide highway signs, lights, or markings." Such general rule finds support in the case law construing the provisions of State Tort Claims Acts in which it has been held that the decision whether or not to install traffic signs and signals is a protected discretionary decision within the meaning of the discretionary exemption provisions contained in such Tort Claims Acts. Illustrative are the following cases dealing with decision-making in respect to the installation of traffic lights and electronic signals.

Traffic Lights (p. 1949)

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 intersecting roads, in lieu of installing the customary 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 rendered for the State below, the Court stated that although 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 recognized 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 provide flashing red and yellow lights instead of a sequentially changing 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 pre-existing 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 *Wainscott 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 allow for 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), patterned squarely, as in so many States, on the language of the Federal Tort Claims Act (28 U.S.C. 2680), 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." On the basis of such language 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 sequence previously set, and is itself not defective. Thus, this case must be considered under T.C.A., Section 29-20-205 [set forth in part above]. 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 alleged 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 discretionary function exception of 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, therefore, was 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.

However, the position has been taken in a number of cases that once traffic lights or electronic signals are installed the exercise of discretion is exhausted, and the duty to maintain the same in good working order is one arising at the operational rather than planning level of activity, and, therefore, under the planning and operational dichotomy, is subject to judicial review.

Stevenson v. State, Department of Transportation, 290 Ore. 3, 619 P.2d 247 (1980), involved an intersectional collision allegedly caused by the fact that a green light guiding the movement of traffic on one of the two intersecting roads was clearly visible to drivers when rounding a curve on the other of the two connecting roads—causing confusion—and that the State was negligent in failing to shield the light, once it was erected, in manner such as to render the same visible on only one of the intersection 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, on the ground that after the light was installed the duty arose to maintain the same in proper working order, and that the discretionary exemption of the State Tort Claims Act did not extend to failure to maintain the light in a safe operating condition after installation in the absence of a showing that the decision in question, i.e., not to shield the light, was based on the exercise of what was termed "governmental or policy discretion."

Although the duty to maintain traffic lights in proper working order, once installed, arises at the operational level of activity and, hence, is not protected by the discretionary exemption, the State cannot be held

liable for negligence in failing to correct a malfunctioning light in the absence of showing the State had actual or was charged with constructive notice that the traffic light was not in good working order.

Thus, in *Zuniga v. Metropolitan Dade County*, 504 So.2d 491 (Fla.App., 3d Dist., 1987), where defendant County was charged with negligence in failing to correct a malfunctioning railroad preemptive signal, summary judgment in favor of the County was affirmed for the reason that plaintiff, injured in a collision allegedly caused by failure of the signal, adduced no evidence to show that the County had actual or could be charged with constructive notice that the preemptive signal was not functioning in a proper manner.

And the State or other governmental entity must, of course, be allowed a reasonable time after receipt of notice of malfunction to take corrective action with respect thereto. Thus, in *City of Bowman v. Gunnells*, 243 Ga. 809, 256 S.E.2d 782 (1979), an action to recover for injuries sustained in an intersectional collision allegedly caused by the fact that a bulb in a traffic light had burned out, the fact that the accident occurred approximately 2 hours after defendant City was notified of the extinguishment of the light, was held not to state a cause of action for negligence, where it was shown that the bulb was duly replaced within the reasonable period of 4 hours after receipt by the City of notification of the fact that the light was inoperative.

Installation and Maintenance of STOP Signs

As in the case of traffic lights, it has been similarly held that the decision whether or not to erect a stop sign at an intersection is a protected discretionary decision and immune to judicial review under the discretionary exemption provisions of State Tort Claims Acts.

Illustrative is the case of *City of Tell City v. Noble*, 489 N.E.2d 958 (Ind.App., 1st Dist., 1986). The action in this case 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 to judicial review 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, again as in the case of traffic lights, the rule has been announced that once a stop sign is erected the duty to maintain the same in good working order is one arising at the operational level of activity, and hence is not protected by the discretionary exemption provisions of State Tort Claims Acts. The following cases illustrate.

Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla., 1979), involved a vehicle collision allegedly because of 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 waving 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.

In so doing it adopted the planning and operational dichotomy, and, in ruling against the 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. Analogizing with traffic lights that are in place, the Court stated: "It is apparent that the maintenance of a traffic signal light which is in place does not fall within that category of governmental activity which involves broad policy or planning decisions. This is operational level activity. So too is the proper maintenance of a traffic sign at an intersection and the proper maintenance of the painted letters 'STOP' on the pavement of a highway."

Crucil v. Carson City, 600 P.2d 216 (Nev., 1979), was an action to recover for injuries suffered in an intersectional collision allegedly caused by the failure of defendant Carson City to replace a downed stop sign. The defense of discretionary immunity under the Nevada Tort Claims Act was asserted. In holding that the discretionary exemption provision of the Act was inapplicable, the Court stated: "While the respondent city's initial decision to provide traffic control was a discretionary act ... once the decision to install the stop sign had been made and acted upon, the city's duty to maintain that sign became an operational one. Thus [discretionary immunity] is not applicable."

Smith v. Godin, 61 Ill.App.3d 480, 18 Ill.Dec. 754, 378 N.E.2d 218 (1978), was likewise an action to recover for personal injuries sustained in a collision at an intersection, the accident being allegedly caused by the fact that a stop sign controlling the flow of traffic at the intersection was downed and missing. The Court ruled that although under the Illinois Local Government and Governmental Employees Tort Immunity Act (ILL.REV.STAT. 1975, ch. 85) defendant municipality was under no duty in the first instance to erect a stop sign at the intersection, once the decision had been made to install such sign and the same erected, the city was charged with the responsibility of maintaining the sign in proper condition to facilitate the movement of traffic. The Court stated that:

"The case law is plain that once having elected to erect devices to guide, direct or illuminate traffic, a city then has a duty to maintain those devices in a condition conducive to the safe flow of traffic."

Plaintiff, in *Shuttleworth v. Conti Construction Co., Inc.*, 193 N.J. Super. 469, 475 A.2d 48 (1984), was injured in an intersectional collision when he ran a stop sign that had become obscured by the growth of vegetation. The contention was made by defendant County of Morris that if it had determined not to erect a stop sign at the intersection, such decision would have been protected by the terms of the New Jersey Tort Claims Act (N.J.S.A. 59:4-5), and that its action in allowing the sign to become obscured by vegetation was one "of lesser consequence and likewise should be protected." In rejecting this argument the Court pointed out that the purpose of the statutory exemption was to prevent judicial "second guessing" of a "county or municipal legislative decision to control or not to control an intersection," and that a question for jury determination was presented as to whether the County was guilty of "palpably unreasonable" conduct in allowing the sign to become obscured by vegetation from the clear view of motorists once the same had been installed.

It was pointed out previously in connection with traffic lights that the State cannot be held liable for the malfunctioning of such a device in the absence of actual or constructive notice that the signal is not operating properly. The same rule, of course, obtains with respect to stop signs, and it is clearly settled that the State cannot be held liable for injuries resulting from the fact that a stop sign is downed or missing without actual or constructive notice of such fact.

Thus, in *Bussard v. Ohio Department of Transportation*, 31 Ohio Misc.2d 1, 507 N.E.2d 1179 (1986), where plaintiffs were injured in a two-car intersectional collision allegedly caused by the fact that a stop sign at the intersection was missing, the issue was whether the Ohio Department of Transportation had actual or could be charged with constructive notice that the sign was not in place, and it was held that proof of failure to inspect the site for a period of at least one month prior to the occurrence of the accident was a sufficient length of time to impute constructive notice to the Department that the sign was, for unexplained reasons, removed from its proper location, and hence inoperative to effect traffic control at the intersection.

It is further axiomatic that following receipt of notice, actual or constructive, that a stop sign is not functioning, a reasonable time must be accorded in which to take corrective action with respect thereto.

Thus, in *Bryant v. Jefferson City*, 701 S.W.2d 626 (Tenn.App., 1985), involving a collision which took place at an intersection where a stop sign had been blown down by the wind, it was held that defendant City could not be held liable for injuries suffered by the driver of one of the vehicles, because a lapse of only 2 hours between notification to the City that the sign was down and the occurrence of the accident did not constitute such reasonable period of time as would have permitted the City to make the necessary repairs.

Posting of 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 miles per hour.

Suit was brought under a New Jersey statute providing for liability for 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 miles per hour (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 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 such signing.

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 spec-

ifications 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 traveling in order to avoid a deer suddenly appearing on the highway, and as a result collided with a vehicle oncoming 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. 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 location. 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.

Curve Warning Signs

It has been held in at least two cases that the question whether the posting of a curve warning sign was a discretionary activity protected by the discretionary exemption of State Tort Claims, or instead an unprotected operational or ministerial level activity, was one for jury determination, and that reversible error was committed when the trial court instructed that such activity was discretionary in nature and therefore not subject to jury consideration.

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. 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 in making determination as to the need for signing, 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."

Traffic Control Devices for the Protection of Pedestrians

However, 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]."

Duty to Warn of Known Dangerous Conditions as Unprotected Operational Level Activity

It has been held that the failure to protect against a *known dangerous condition* of highways cannot be classified as falling within the judgmental or planning stage of the planning and operational dichotomy. The position has been taken that the intendment of the statutory exemption for discretionary acts does not encompass relief of the State from liability for failure to warn of a highway condition known to be dangerous to the traveling public, and that where the State or other governmental entity has actual, or is charged with constructive notice, of a dangerous condition, the duty arises either to correct such condition or to give notice thereof by warning signs or signals, and that the failure to take action with respect to either is an omission at the operational rather than planning level and, hence, is not subject to the protection of the discretionary function exemption. The following cases illustrate.

Department of Transportation v. Neilson, 419 So.2d 1071 (Fla., 1982), was an action brought by plaintiffs injured in an intersectional motor vehicle collision. The complaint alleged negligence on the part of defendants State of Florida, County of Hillsborough, and City of Tampa, in that the intersection was "defectively designed as a roadway" and was "not adequately controlled with traffic control signs and devices." The court stated that "the issue to be decided in this case is whether decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability." The Court went on to state: "We answer the question in the negative, holding such activities are basic capital improvements and are judgmental planning-level functions."

However, an exception was carved out by the Court in the case of *known dangerous conditions*. It said: "If . . . the alleged defect is one that results from the overall plan itself, it is not actionable *unless a known dangerous condition* is established. . . . The failure to . . . warn of a *known danger* is, in our view, a negligent omission at the *operational level* of government and cannot reasonably be argued to be within the judgmental, *planning-level* sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity." (Emphasis added.)

Because this was the first time the Supreme Court of Florida had made such pronouncement, the case was remanded with leave to plaintiffs to amend their complaint to bring it in line with the holding of the court in respect to the duty to warn of known dangerous conditions.

Likewise, in *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980), the Supreme Court of Idaho, in construing the discretionary exemption provisions of the Idaho Tort Claims Act, reached the conclusion that the protection of the Act did not extend to a known dangerous condition existing on a State highway, and ruled that a jury could properly find negligence on the part of the State in failing to provide warning of such dangerous condition.

Gavica was a wrongful death action brought to recover for the demise

of individuals killed in a rear-end car collision that took place on a State highway where a thick haze (which was produced by a combination of atmospheric conditions and emissions from nearby industrial plants) reduced visibility to a dangerous extent and which condition of reduced visibility was shown to have existed over a period of many years, on an intermittent but nevertheless frequently reoccurring basis. The State defended against the charge of negligence in failing to warn of the recurring hazard by asserting that its decision in respect to the signing thereof was immune from judicial review under the discretionary function exception of the State Tort Claims Act.

In rejecting this contention the Court analogized the duty of the State with that of a private landowner, stating that:

If a private person or business negligently allowed a dangerous condition to exist in a stairway or elevator and thereby caused injury, we would find the breach of a duty. No less so should we find a breach of a duty on the part of the state or a county which negligently maintained a dangerous condition on a stairway or elevator of a statehouse, courthouse, or other government operated building. We see no distinction between those situations and the negligent maintenance of a *known dangerous condition of a highway*, owned, operated, and maintained by the State and upon which the public is invited to travel. Thus . . . the State's action in the case at bar has a parallel in the private sector, and the State under the Idaho Tort Claims Act bears the same duty as a private landowner. Hence, we hold that the State's alleged negligence is not immunized by the 'discretionary function or duty' exception to governmental liability found in I.C. sec. 6-904(1) [Idaho Tort Claims Act]. (Emphasis added.)

COMMON LAW NEGLIGENCE

The common denominator of the cases next following is that the discretionary exemption was not the subject of consideration therein 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.

Duty to Warn of Ice and Snow on Highways

It has been held (at least in a jurisdiction where severe climatic conditions are common during the winter months) that there is no duty to warn of ice or snow on the highways.

Lansing v. County of McLean, 69 Ill.2d 562, 14 Ill.Dec. 543, 372 N.E.2d 822 (1978), was a wrongful death action brought to recover for the demise of decedent who was killed when the automobile in which she was riding as a passenger skidded on a 1-in. thick sheet of ice covering the highway and crashed into a culvert. In rejecting the charge of negligence on the part of defendant County in failing to give warning of the icy condition of the roadway under its jurisdiction, the Supreme Court of Illinois stated: "[W]e are of the opinion that no duty was imposed . . . to warn users of the highway of conditions resulting from the natural accumulation of snow and ice. As the plaintiffs admitted in oral argument, a decision in their favor would require the defendants to post warning signs under comparable weather circumstances on every highway subject to their jurisdiction. A similar duty would arise for townships, forest preserve districts, park districts, and any other type of local public entity." In declining to impose such duty the Court cited "impracticability and the expense of posting warning signs and the demands on available manpower."

Failure to Make Timely Repair

The failure to make timely repair of defective signing or signalling after receipt of notice, actual or constructive, that such protective device is not in proper working order, constitutes actionable negligence.

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.

Distinction Between Advisory and Mandatory Signing

It has been held that the posting of advisory rather than mandatory speed limit signs at a dangerous intersection constituted negligent conduct on the part of the State.

The facts in *Scheemaker v. State*, 125 A.D.2d 964, 510 N.Y.S.2d 359 (1986), established that plaintiff, the driver of a vehicle involved in a two-car collision at an intersection, was familiar with the intersection and aware that speed limit signs posted thereat were merely advisory in character. In rejecting familiarity with the accident site as a defense to plaintiff's allegation of negligence on the part of the State in failing properly to sign the intersection, the Court drew a distinction between advisory and mandatory signing, stating that: "The posted advisory speed signs are not binding and were customarily ignored, which fact was known to the State. . . . Under such circumstances, the State's failure to post lower mandatory speed limit signs at this dangerous intersection may be deemed a proximate cause of the accident."

This concludes the review of recent cases selected for inclusion herein on the basis of being representative of recent trends and developments in connection with the law of highway signing and signalling.

The principal conclusions of general application to be drawn from this review are: (1) That the courts are beginning rather uniformly to hold that decision-making with respect to the installation of signing and signalling takes place at the planning level and hence is discretionary in nature, whereas the maintenance of signs and signals once erected is an activity conducted at the operational level and hence is unprotected; and (2) That discretion is exhausted when the State has actual or is charged with constructive notice of "dangerous conditions," the State being under an operational level duty either to take corrective action with respect to a known dangerous condition or to provide warning thereof by means of signing and signalling that is adequate to alert the motoring public to the danger.—JOHN C. VANCE, *Attorney at Law, Orange, Virginia*

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

Chairman
Nolan H. Rogers
Maryland Department of Transportation

Watson C. Arnold^a
Austin, Texas

Ruth J. Anders^b
Laurel, Maryland

Robert F. Carlson^c
Carmichael, California

Kingsley T. Hoegstedt^c
Sacramento, California

Delbert W. Johnson
Washington Department of
Transportation

Thomas N. Keltner^d
Oklahoma City, Oklahoma

David R. Levin^b
Bethesda, Maryland

Michael E. Libonati
Temple University School of Law

Daniel R. Mandelker
Washington University School of
Law

Spencer A. Manthorpe
Pennsylvania Department of
Transportation

Joseph M. Montano^e
Denver, Colorado

Lynn B. Obernyer
Colorado Department of Law

Jean G. Rogers
Federal Highway Administration

Edward V. A. Kussy
FHWA Liaison Representative

Crawford F. Jencks
NCHRP Staff

^a Formerly with Texas Office of the Attorney General

^b Formerly with Federal Highway Administration

^c Formerly with California Department of Transportation

^d Formerly with Oklahoma Department of Transportation

^e Formerly with Colorado Department of Highways