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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: 11 administration, 40 maintenance, 51 transportation safety, 70 transportation law (01 highway transportation)

Supplement To
Personal Liability of State Highway Department Officers and Employees

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 "Personal Liability of State Highway Department Officers and Employees," pp. 1835-1868-S9. 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.

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SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Personal Liability of State Highway Department Officers and Employees" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION (p. 1835)

For reasons set forth in the first supplementation paper (in *Selected Studies in Highway Law*, p. 1868-S1, *et seq.*) there has been a sharp decline in the number of law suits brought against public officers and employees to recover damages for alleged negligent conduct in the performance of their duties.

The principal reason for such decline is, of course, that in sharp contrast to times past, total immunity of the State to suit in tort litigation has become the rare exception rather than the general rule. Following upon the heels of the enactment of the Federal Tort Claims Act in 1946 (28 U.S.C. 2680) the proliferation of State Tort Claims Acts, based on the language of the Federal Act, has proceeded at a rapid and ever accelerating rate. The result has been to eliminate the prime reason for bringing actions against private individuals, i.e., that the "deep pocket" of the State could not be reached because the State could not be made a party defendant in tort litigation.

The immunity provided by the State Tort Claims Acts is, of course, no more than partial in nature because the exemption for discretionary activities is ordinarily incorporated into the terms thereof. However, such retention of immunity provides little or no incentive for plaintiff attorneys to bring actions against public officers or employees rather than the State. This is for the reason that, as pointed out in the original paper, the doctrine of discretionary immunity had its origin and development in suits brought against public officers and employees because the State was unreachable in court, and such immunity fully obtains today irrespective of the enactment of legislation waiving the immunity of the State with the exception of activities discretionary in nature. Suits against public officers and employees have been dwindling in number in recent years and there is no reason to expect that this trend will not continue in the future.

It is suggested that a further reason for institution of suit against the State rather than private individuals is that over the years the courts have displayed an understandable tendency to greater reluctance in holding underpaid public servants liable in damages for alleged tortious conduct than in holding the State liable under the same or similar circumstances. Supportive of such comment (admittedly *ad hominem*) are recent cases holding that certain routine maintenance activities, when performed by public officers or employees, are discretionary rather than ministerial in character, and hence constitute exempt activities under the discretionary-ministerial distinction.

REMOVAL OF OBSTRUCTIONS FROM ROADWAY AS DISCRETIONARY ACTIVITY

For example, it has been held that decision-making with respect to the removal of obstructions from the roadway falls into the category of discretionary activity and hence is beyond judicial review.

Plaintiff in *Baker v. Seal*, 694 S.W.2d 948 (Tenn.App., 1984), was injured when the tractor he was driving along a county road struck a large rock in the roadway, causing him to lose control of the vehicle, plunge down a steep embankment, and overturn. Suit was brought against the County Highway Commissioner and his bonding company, alleging negligence on the part of defendant Commissioner in failing to have removed the obstruction from the highway. Defendant took the position that the failure to clear the roadway of the obstruction was a discretionary decision, and hence protected by the common law rule adopted by the Tennessee courts that public officials cannot be held liable for the consequences of discretionary decisions, absent a showing of corruption or malice. In accepting this argument and holding defendant and his bonding company not liable, the Court stated:

> As Highway Commissioner, [defendant's] job entails determining which existing roads are most in need of repair and whether or not certain locations require new roads to be constructed. We find that such a job definitely requires that the person occupying it exercise a wide degree of discretion. Therefore, as the failure of [defendant] to remove the rock from Fox Branch Road was purely a discretionary activity, we conclude that neither he, as Highway Commissioner, nor . . . his bonding company, can be held liable for the injury resulting from such nonfeasance, since no corruption or malice has been pleaded.

REPAIR OF POTHOLES AND LIKE DEFECTS AS DISCRETIONARY ACTIVITY

It has also been held that decision-making by a public servant with respect to the repair of potholes and like defects in the paved surface of the roadway falls within the ambit of the protected discretionary function.

State v. Lewis, 498 So.2d 321 (Miss., 1986), was a suit against an individual member of a board of county supervisors alleging that he failed in his duty to keep a county road free of potholes and other indentations in the driving surface, and that as a result of such negligent conduct plaintiff lost control of the vehicle that he was operating, ran off the road, and sustained injuries in the wreckage of the vehicle. The Court approached the question of liability from the standpoint of whether defendant's duty in respect to repair of the road in question was discretionary or ministerial. It stated:

> The distinction between discretionary and ministerial acts by a government employee is directly correlated to what immunity he will enjoy in the event he has been negligent in his actions or in failing to act. The basis for extending sovereign immunity to government officials lies in the inherent need to promote efficient and timely decision-making without lying in fear of liability for miscalculation or error in those actions. The immunity defense has generally been extended to officials' discretionary acts in most states, Mississippi ranking among them.

> In order to allow our lawmakers and government officials to participate freely and without fear of retroactive liability in risk-taking situations requiring the exercise of sound judgment, the discretionary-ministerial distinction has evolved, and remains an integral part of our judicial system in the determination of liability of the state and its employees.

In absolving defendant of liability on the basis of the ruling that his duties were discretionary in nature the Court found that "at least some roads may be in a state of disrepair from time to time, particularly due to the lack of funds, which would, of course, require that the main, heavily-traveled roads receive the supervisor's immediate attention. Certainly, making the determination as to which roads should be the better maintained under such conditions would be a discretionary matter with the individual member of the board, absent some personal tort committed by him."

Thus, the Court ruled in this case that decision-making with respect to the repair of potholes and like defects in the paved surface of roadways is a discretionary rather than ministerial activity and, as such, is exempt from judicial review.

DECISION-MAKING WITH RESPECT TO INSTALLATION OF SIGNING AS DISCRETIONARY ACTIVITY

Leaving now the matter of maintenance activities, it has been held that decision-making with respect to the installation of traffic control signs on roadways is discretionary in nature and therefore beyond the scope of judicial review.

The facts in *Hjerstedt v. Schultz*, 114 Wis.2d 281, 338 N.W. 2d 317 (1983), were as follows: Plaintiff suffered serious injuries in a collision that took place when the automobile that he was operating, upon leaving the exit ramp from a highway, was struck by another car proceeding along a street that intersected with the exit ramp, the driver of such latter vehicle having run a STOP sign placed on the intersecting street at the point of juncture with the exit ramp. However, no signing had been placed on the exit ramp warning of the road juncture immediately ahead. Negligence was charged to defendants, engineers of the Wisconsin Department of Transportation, in failing to have placed any warning signs on the exit ramp. The Court announced that the following policy considerations are to be taken into account in determining the liability of public officials for alleged negligence in the performance of their duties:

> (1) [T]he danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates, and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

However, after the enunciation of such broad policy considerations, the Court went on to determine liability solely on the basis of application of the discretionary-ministerial distinction, ruling that decision-making with respect to the installation of signing is a discretionary rather than a ministerial activity precluding judicial scrutiny of defendants' decision not to erect warning signs on the exit ramp.

IMMUNITY AS DETERMINED BY POLICY CONSIDERATIONS

That considerations of public policy other than the policy of discretionary immunity are frequently given weight in making determination as to the liability of public officials is illustrated by the quotation set forth in *Hjerstedt v. Schultz, supra. Pine v. Synkonis*, 470 A.2d 1074 (Pa.Commw., 1984) is illustrative of the unusual case in which exclusive weight is given to policy considerations other than that of according immunity for discretionary activities. This was a wrongful death action wherein the facts established that the vehicle decedent was operating was struck by another car which had crossed through an opening or missing section of a median barrier into the lane of travel in which decedent was proceeding. Named as defendants and charged with negligence in failing to repair or replace the missing section of the barrier were six defendants—all employees of the Pennsylvania Department of Transportation. The defense was asserted that in their capacity as public officials defendants were immune to civil suit. The Court announced that determination of the immunity of public officials was, under Pennsylvania law, made to depend on the application of the several tests as follows:

> 1. Can the official be held to a predictable standard of care, which can be defined and applied with relative ease.
> 2. Do the official's decisions or actions have a significant impact on the public or impact on a large portion of the public. The greater the impact of such decision making, the greater the need to isolate the official from the threat of liability.
> 3. Did the official himself engage in actionable conduct. Officials will not be held liable for the acts of those under them simply because they are in the chain of command.
> 4. But for a defendant's status as an official, would an action in negligence lie. Plaintiff must establish a duty, breach of that duty, causation and injury.
> 5. Would any public policy be promoted in sheilding the official from liability.
> 6. Has the plaintiff failed to pursue other available remedies.

Applying these tests the court found that three of the defendants were immune to suit and the remaining three were not so protected. In reaching this result Court reasoned as follows:

1. The three immune parties were engineers with supervisory duties over a regional or five-county area. The first two testified that they had no personal knowledge of the missing section of barrier. The Court found that neither was under a duty "to continuously ride the 4,500 miles of road under . . . supervision to discover maintenance problems," and that

neither could be held liable simply because of their positions in the upper eschelon of the chain of command. The record established that the third engineer, with similar supervisory responsibilities, had received notification of the accident causing damage to the median guardrail in question, but the Court concluded that "public policy is best served if the maintenance official at this level is free to exercise his judgment and establish repair priorities unfettered by a threat of suit."

2. The remaining three defendants were County Superintendents having supervisory duties only within the County in which the accident occurred. Thus, the scope of their duties was restricted to 360 to 400 miles of roadway rather than the 4,500 miles of roadway for which the other three defendants were responsible. The Court concluded that because of their more limited range of activities sound policy required that they be denied immunity, stating that:

> While the responsibilities of a county superintendent are broad, we have no difficulty defining a standard of care to which an official at this level should be held. While we would not hold a county superintendent liable for failure to repair *every* pothole or road defect within the scope of his supervision, a county superintendent can easily be held responsible for failure to order correction within a reasonable length of time of a known or knowable condition which poses a serious hazard to the safety of motorists. We believe also that rather than shield the superintendent from liability, public policy would favor imposing liability on those whose duty it is to identify road hazards and order them corrected. (Emphasis by the Court.)

Thus, the Court in this case completely eschewed the discretionary-ministerial test as determinative of liability, and rested its decision squarely on considerations of policy other than the policy of immunity for acts discretionary in nature.

Also decided on policy grounds and without regard to the discretionary-ministerial distinction is the decision in *Durr v. Stille,* 139 Ill.App.3d 226, 93 Ill.Dec. 715, 487 N.E.2d 382 (1985). This was an action brought to recover for minor damage to plaintiffs' motor vehicle caused by driving over a freshly oiled segment of highway covered with newly laid gravel. Negligence was charged to defendant township highway commissioner in having ordered the oil and gravel overlay without first posting signing warning of the condition of the road. In absolving the defendant of liability the Court stated that he "was under no duty to warn that the quarter-mile stretch of road had been freshly oiled. To hold otherwise would place an unreasonable burden on those responsible for the maintenance of roadways."

IMMUNITY OF PUBLIC OFFICIALS AS DERIVATIVE FROM IMMUNITY OF STATE

In jurisdictions where policy considerations dictate the general rule that public officials are not liable for non-malicious acts performed within the scope of their employment and official duties, the question has arisen whether such immunity is wholly derivative from the immunity of the State, or whether the immunity of public officials is based on policy considerations that exist independent of the immunity of the State, so that such immunity survives when the immunity of the State is withdrawn.

The question has been presented in cases involving the construction of statutes that expressly waive immunity of the State but are silent in respect to waiver of public officials' immunity. The issue thus raised is whether the express waiver of the State's immunity carries with it, by necessary implication, waiver of public officials' immunity to suit. Divided results have been reached in answer to this question.

In *State v. Dieringer,* 708 P.2d 1 (Wyo., 1985), an action was instituted against an officer of the Wyoming Highway Patrol, seeking to hold him personally liable for alleged negligent conduct in failing to have reported to the Wyoming Highway Department that a section of roadway was dangerous because of icy conditions and consequently in need of immediate sanding to reduce the hazard of skidding. It appears that defendant had been called to the scene of the icy roadway to investigate a skidding accident and, although thus made aware of the dangerous condition of the road, refused the suggestion of a Deputy Sheriff, also present, that the Highway Department be promptly notified and requested to dispatch sanding crews. Some 4 hours later, the vehicle in which plaintiffs were traveling skidded on the icy roadway into the path of an oncoming truck, causing serious injuries to the plaintiffs in the collision.

Defendant claimed immunity from tort liability under the terms of Sec. 1-39-104 of the Wyoming Governmental Claims Act, providing that:

> A governmental entity *and its public employees* while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-112. (Emphasis added.)

The exception to immunity made by the above-referenced Sec. 1-39-112 of the Act omitted the words "and its public employees" and had reference only to a "governmental entity," thus imposing liability in the language as follows:

> *A governmental entity* is liable for damages resulting from tortious conduct of law enforcement officers while acting within the scope of their duties. (Emphasis added.)

Defendant contended that he was granted immunity by the express language of Sec. 1-39-104, *supra,* relating to "public employees" and that such immunity was not withdrawn by Sec. 1-39-112, *supra,* because liability was imposed by the terms thereof only on a "governmental entity" and not upon its "public employees."

Plaintiff countered with the argument that public employees' immunity is wholly derivative from immunity of the State, and that when the Legislature withdrew the immunity of the State in the provisions of Sec. 1-39-112, *supra,* it intended to withdraw at the same time the public employees' immunity provided by Sec. 1-39-104, *supra.* The Court accepted this argument and in ruling that defendant was not immune to suit stated:

> [G]iven the state of the law in Wyoming at the time of the adoption of the Wyoming Governmental Claims Act, an employee of the State enjoyed immunity that can best be described as derivative from the immunity of the State. Against that legal history we can understand that in drafting the exceptions to immunity of the State and public employees the legislature must have assumed that when immunity of the State was withdrawn by virtue of an exception such as that contained in Sec. 1-39-112 there remained no immunity for a public employee because that individual's immunity was purely dependent upon the immunity of the State. Read in this light the exceptions to immunity include both the State and the public employee involved, and the grant of the immunity in Sec. 1-39-104, upon which [defendant] relies, must be perceived as limited to those situations not encompassed by the exceptions. (Emphasis added.)

Thus, the Court ruled that public officials' immunity is wholly derivative from the immunity of the State and that when the latter is withdrawn the former is withdrawn by necessary implication.

However, a different result was reached in *Reed v. Medlin*, 328 S.E.2d 115 (S.C.App., 1985), wherein the Court took the position that the immunity of a public official was not wholly derivative from the immunity of the State, with the consequence that a statute waiving immunity of the State did not carry with it waiver of the immunity to suit of a public official.

The facts in the case established that an automobile being operated by plaintiff's decedent was stopped at a road block erected by members of the highway patrol when a tractor-trailer rounded a nearby curve and crashed into the parked vehicle, causing an explosion and fire which took the life of the driver. An action for wrongful death was instituted against the South Carolina Department of Highways and Public Transportation under a statute (S.C. CODE, Sec. 57-5-1810) waiving immunity of the Department in the language as follows: "Any person who may suffer injury to his person or property by reason of (a) a defect in any State highway or (b) the negligent repair of any State highway may bring suit against the Department for the actual amount of such injury or damage."

Plaintiff appealed from a trial court order denying his motion to add the Chief Highway Commissioner as a party defendant. In sustaining the trial court's action the Appellate Court stated:

> The amended complaint sought to join the Chief Highway Commissioner in his official capacity. In the absence of a statute expressly authorizing such a suit against him, the Commissioner, in his official capacity, enjoys sovereign immunity from liability and from suit.... Sec. 57-5-1810 authorizes suit against the Highway Department only, not against the Commissioner. Therefore, the Commissioner's immunity is not waived by that statute.

Thus, the Court held that the State Chief Highway Commissioner enjoyed immunity to suit, notwithstanding immunity had been waived with respect to the State (i.e., acting by and through the Department of Highways and Public Transportation), or, in other words, that his exempt status was not wholly derivative from the immunity of the State.

EFFECT OF STATE CONSTITUTIONAL PROVISION INCORPORATING THE DOCTRINE OF SOVEREIGN IMMUNITY

A number of States have enacted legislation providing for indemnification of public officers and employees in the event judgment is rendered against them for negligent conduct performed within the scope of their employment and official duties, provided malice or corruption is not shown. Such statutes present little in the way of problem in States where sovereign immunity may be waived by legislative action or by judicial decree. However, in a scant few States the power to waive sovereign immunity is circumscribed by the fact that the doctrine is incorporated into constitutional provisions and, hence, is incapable of repeal or modification except pursuant to constitutional process. Thus, in those jurisdictions where sovereign immunity cannot be waived by statute law or judicial fiat, the door is opened to the question whether the requirement of indemnification of public officials serves to render the State the real party in interest in negligence actions brought against such officials, thereby rendering the action a constitutionally prohibited suit against the State.

Such question was before the Court in *Beaulieu v. Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986). In this case an action was brought against administrators and engineers of the Arkansas Highway and Transportation Department to recover for injuries received suffered by plaintiff in an intersectional collision. The opinion is silent as to the precise grounds of negligence charged against defendants, the issue for determination being restricted to the sole question whether defendant officers or employees were immune to suit under Arkansas law.

It appeared that the doctrine of sovereign immunity was incorporated into the Constitution of the State of Arkansas (Art. 5, Sec. 20), and that it had previously been ruled by the Arkansas Supreme Court that the immunity so provided did not extend to officers and employees of the State. However, prior to the institution of the instant suit a statute had been enacted (ARK. STAT. ANN., § 13-1420) specifically providing that public officers and employees were "immune from civil liability for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment." A further statute (ARK. STAT. ANN., § 12-3401) provided that: "The State of Arkansas shall pay actual ... damages adjudged by a state or federal court ... against officers or employees of the State of Arkansas ... based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties."

The Supreme Court of Arkansas ruled that in the instant case the defendants were immune to suit on two grounds: (1) Immunity was provided by the above set forth § 13-1420 relating to immunity from civil liability for non-malicious acts performed by public officers and employees within the scope of their employment; and (2) the action was further barred because the provisions of § 12-3401, above set forth, requiring indemnification of "officers or employees" in the event of judgment against them operated to make the State "the real party against

whom relief is sought," thereby bringing the action within the purview of the constitutional provision prohibiting suit against the State.

It is thus apparent that the incorporation into a State constitution of the doctrine of sovereign immunity presents problems (e.g., in respect to indemnification) that do not obtain in States where such doctrine does not rise above the level of a common law rule subject to abrogation by the legislature or the courts.

FAILURE TO CUT VEGETATION OBSCURING SIGNING

Consistent with the general rule that once traffic control devices have been installed the duty to maintain the same in good working order becomes a ministerial rather than discretionary function, it has been held that the failure to cut or remove vegetation obscuring a STOP sign at an intersection constitutes actionable negligence.

Bentley v. Saunemin Township, 83 Ill.2d 10, 46 Ill.Dec. 129, 413 N.E.2d 1242 (1980), was a wrongful death action brought against Saunemin Township and its Highway Commissioner to recover for the demise of plaintiff's decedent who was killed in a collision at an intersection where the STOP sign was wholly obscured by the growth of vegetation. In holding the Township and its Highway Commissioner liable in damages for breach of the duty of reasonable care of highways under their control the Supreme Court of Illinois succinctly stated that "it cannot be seriously questioned that defendants owed plaintiff's decedent a duty of reasonable care in maintaining visibility of the stop sign," and ruled that the failure to maintain the STOP sign in a condition of clear visibility constituted "negligence as a matter of law."[1]

At the time of this writing a slip opinion of the United States Supreme Court in the case of *Westfall v. Ervin* has been issued and reported in 56 U.S.L.W. 4087. Although it relates solely to personal liability of Federal employees and not to personal liability of State highway department employees, it is of possible related interest. The facts in this case were as follows.

Plaintiff was employed by the Federal Government as a civilian warehouseman at the Anniston Army Depot in Anniston, Alabama. The complaint in this case alleged that during the course of employment plaintiff was exposed to toxic soda ash that had been negligently bagged and stored and that as a result of contact with the toxic substance plaintiff received chemical burns. Defendants charged with the negligent conduct were plaintiff's civilian supervisors at the Depot.

The action was removed from the State court in Alabama where instituted to the United States District Court where summary judgment was granted for the defendants, the District Court ruling that defendants were absolutely immune to suit in their capacities as Federal employees. The Court of Appeals reversed on the ground that the District Court erred in failing to consider whether the challenged conduct was discretionary in nature in addition to being within the scope of defendants' employment.

It appeared that the Federal Courts of Appeals were split on this question, the Courts of Appeals for the 4th and 8th Circuits taking the position that Federal employees are absolutely immune from state-law tort suits for acts performed within the scope of their employment, while the Courts of Appeals for the 3rd and 11th Circuits had adopted the rule that Federal employees are immune only when their activities are both within the scope of their employment and discretionary in nature. The Supreme Court granted certiorari "to resolve the dispute among the Courts of Appeals as to whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability." In opting for the position taken by the Courts of Appeals for the 3rd and 11th Circuits, the Court stated:

> Petitioners initially ask that we endorse the approach followed by the Fourth and Eighth Circuits . . . and by the District Court in the present action, that all federal employees are absolutely immune from suits for damages under state tort law "whenever their conduct falls within the scope of their official duties." . . . Petitioners argue that such a rule would have the benefit of eliminating uncertainty as to the scope of absolute immunity for state-law tort actions, and would most effectively ensure that federal officials act free of inhibition. Neither the purposes of the doctrine of official immunity nor our cases support such a broad view of the scope of absolute immunity, however, and we refuse to adopt this position.
>
> The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government." . . . Because it would not further effective governance, absolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity. . . .
>
> In the present case, the Court of Appeals, reviewing a summary judgment determination, held that petitioners were not entitled to official immunity solely because they were acting within the scope of their official duties, and that there was a material question whether the challenged conduct was discretionary. . . . Applying the foregoing reasoning to this case, it is clear that the court was correct in reversing the District Court's grant of summary judgment.

This concludes the review of case law dealing with the personal liability of highway department officers and employees for alleged negligent conduct in the performance of their duties. There follows next notation of recent developments in applicable statute law.

APPENDIX (p. 1868-S5)

Recent statutory developments that are to be incorporated and read into the chart entitled "State Statutes Pertaining to Liability and Defense of Public Officials and Employees" appearing in the appendix on p. 1868-S5, *et seq.*, *supra*, include the following:

ALASKA:	Alaska Stat., § 09.50.250.
ARIZONA:	Ariz. Rev. Stat., § 12-820.03
COLORADO:	Colo. Rev. Stat., tit. 24, ch. 10, § 101, *et seq.*
DELAWARE:	Del. Code, tit. 10, § 4001, *et seq.*
GEORGIA:	Ga. Code Ann. tit. 23, ch. 5, § 60, *et seq.*
MISSISSIPPI:	Miss. Code, tit. 46, ch. 11, § 1, *et seq.*
NEW HAMPSHIRE:	N. H. Rev. Stat. Ann. ch. 541-B, §§ 1–19
OKLAHOMA:	Okla. Stat. Ann. tit. 51, §§ 151-1, *et seq.*
VIRGINIA:	Va. Code, § 8.01-195.3.
WYOMING:	Wyo. Stat. Ann., tit. 1, ch. 39, § 101, *et seq.*

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[1] For a full discussion of the duty to cut or remove obstructive vegetation see the annotation entitled "Governmental Liability for Failure to Reduce Vegetation Obscuring View at Railroad Crossing or at Street or Highway Intersection," 22 ALR 4th 624 (1983).

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.