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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, 52 human factors, 54 operations and traffic control, 70 transportation law (01 highway transportation)

Supplement to
Liability of State and Local Governments for Snow and Ice Control

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, Selected Studies in Highway Law, entitled "Liability of State and Local Governments for Snow and Ice Control," pp. 1869-1888S5.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of

1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two 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 "Liability of State and Local Governments for Snow and Ice Control" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION (p. 1869)

Fundamental to the duty of the State to remove snow and ice from highways, or treat for the same, is the rule that the State, although not an insurer of the safety of its highways, is at all times under a duty to provide reasonable safety for the benefit of travelers who are themselves exercising ordinary prudence. Because the fall of snow or the formation of ice on highways is an act of nature beyond the control of man, the mere presence of snow or ice on roadways does not give rise to a cause of action. The latter only arises in a situation where sufficient time has elapsed in which to take precautionary actions, and the same have either not been taken, or have been carried out in a negligent manner. The fundamental duty of the State in respect to snow and ice control, borne out in innumerable cases, thus narrows down to the duty of *reasonable care;* and what constitutes reasonable care depends entirely on the facts and circumstances of the particular case.

Hence, the great majority of the recent cases deal with the question of what constitutes reasonable care under the particular circumstances. In this respect the recent case law presents little in the way of change, departure, or advance over the vast body of preexisting case law. Cases that are deemed representative have been selected for inclusion herein to illustrate the application of the duty of reasonable care to differing factual situations.

DUTY OF REASONABLE CARE AS APPLYING TO PARTICULAR FACT SITUATIONS

Cases are hereinafter grouped, insofar as possible, according to the particular or significant fact situation involved.

Preferential Icing on Bridges

Special problems are presented by the meteorological phenomenon of ice formation on bridges before icing occurs on the surface of adjacent highways. The problem is compounded by the fact that preferential icing takes place almost instantaneously and is largely, if not wholly, unpredictable.

The question of the duty of care in respect to the phenomenon of preferential icing on bridges was before the Court and the subject of consideration in *Salvati v. Department of State Highways,* 415 Mich. 708, 330 N.W.2d 64 (1982). The action in this case was one for wrongful death, the undisputed facts being that the vehicle plaintiff's decedent was operating skidded on entering upon an icy bridge in the early morning of a day when the air was clear and dry, and collided with a tractor-trailer, which had earlier jackknifed on the bridge, causing the instant death of plaintiff's decedent. Warning of the meteorological phenomenon of preferential icing on bridges was provided by two reflectorized signs, erected on either side of the road 1,000 ft from the entrance to the bridge, each reading WATCH FOR ICE ON BRIDGE. The trial judge granted judgment for the plaintiff in the amount of $175,000.00, based on the finding that the signs in question did not adequately warn of the intermittent and unpredictable nature of preferential icing. In reversing the finding of negligence below, the Supreme Court of Michigan ruled that the signs were adequate to warn of the potential danger for the reason (*inter alia*) that the technology available at the time of the accident was not advanced to such point as would permit the installation of a flashing sign which would be automatically activated upon the actual appearance of ice on the bridge, and, hence, the signing involved fully met and satisfied the technology available at the time.

Estate of Klaus v. Michigan State Highway Department, 90 Mich. App. 277, 282 N.W.2d 805 (1979), involved consolidated wrongful death and personal injury actions growing out of a skidding accident on an icy bridge, and the Court stated with respect to the phenomenon of preferential icing on bridges that: "Short of full time human surveillance of the bridge from early fall to late spring, there is no assured method for immediate detection of this condition." It continued that: "The Highway Department cannot be held to so stringent a standard."

The Court went on to rule, however, that because the State Highway Department had knowledge of the propensity of the bridge to preferential icing that the Department was negligent in failing to have installed a visible WATCH FOR ICE ON BRIDGE sign at the approaches thereto.

Where a district supervisor of the Louisiana Department of Transportation & Development had been instructed by his superior to display all ICE ON BRIDGE signs available in the district because of a predicted freeze the following morning, and the supervisor failed to carry out these instructions, the Department was found guilty of negligence in failing to have taken all such reasonable precautions as were necessary to prevent the skidding accident that occurred the next day on the iced-over bridge. *Moraus v. State, Department of Transportation & Development,* 396 So.2d 596 (La. App., 1981).

Icing Due to Tree Shelterbelt

It is well known that prolonged icing may occur in the situation where a portion of highway is shaded from sunlight by a shelterbelt of trees. The duty of care in respect to such situation was the subject of consideration in *Shepard v. State, Department of Roads,* 214 Neb. 744, 336 N.W.2d 85 (1983).

This was an action to recover for severe injuries incurred by plaintiff when the automobile she was operating skidded on an icy pavement into the opposing lane of travel and collided with an oncoming truck. The action of the lower court, in denying recovery on the ground that the State had discharged its duty of reasonable care in respect to the icy condition of the roadway, was upheld by the Supreme Court of Nebraska on the following set of facts: The accident site was bordered by a shel-

terbelt of trees, which caused icy conditions to persist in the winter months longer than on those portions of the roadway that were not so sheltered. Recognizing this condition, the State prior to the accident had caused the accumulated ice on the pavement to be scraped, and several heavy applications of a mixture of sand, salt, and calcium chloride applied thereto. Although the actions taken failed to remove the ice which caused the accident, the Court concluded that the actions taken were all that were required in order to discharge the State's duty of reasonable care to the traveling public.

"Spot Sanding" of Roads

Freund by Freund v. State, 137 A.D.2d 908, 524 N.Y.S.2d 575 (1988), involved the question whether the use of the procedure of "spot sanding" icy roads satisfied the requirements of due care. Pursuant to this procedure or system, the drivers of DOT trucks containing salt and cinders distributed the chemicals or abrasives only on those areas of the roadways that appeared to be slippery. In holding that such methodology did not constitute negligence rendering the State liable for a skidding accident, the Court stated: "While a DOT operational guideline suggested that abrasives be applied to potential problem areas, DOT's standard practice of sanding only where slippery conditions actually existed does not establish negligence."

Mounding of Snow Against Guardrails

It being the purpose of guardrails to act as a restraining device for errant vehicles, the question arises as to whether the State is guilty of negligence in snow removal operations when during the course thereof snow is mounded against guardrails in such manner that, when frozen and hard packed against the guardrail, the same is converted into a catapulting rather than restraining device.

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

Operation of Snowplow

It is common to the conduct of snow plowing operations that a cloud of snow be cast into the air, thereby impairing or wholly obscuring the vision of the drivers of vehicles following closely behind an operating snowplow. Inevitably involved in such situations are questions of the liability of the governmental entity responsible for the operation of the snowplow and the duties of affected drivers in respect to assumption of risk and contributory negligence.

Wilson v. Doe, 740 P.2d 687 (Mont., 1987), was an action to recover for injuries suffered in a rear-end collision allegedly caused by a cloud of vision-obscuring snow being thrown into the air through the operation of a snowplow by an employee of the State of Montana. The collision occurred when the operator of a vehicle following the snowplow decelerated because of impaired vision, and plaintiff's automobile, next in line, ran into the rear thereof. The Supreme Court of Montana stated that the sole question before it was the following: "Is the creation of a snow cloud, caused by the operation of a State snowplow, negligence?"

In holding to the contrary, the Court ruled that the creation of a snow cloud through the operation of a snowplow was not in and of itself negligence, and, although neither contributory negligence nor assumption of risk was raised in the pleadings, the Court took pains to point out that it is entirely foreseeable on the part of a driver following behind a snowplow that visibility would be obscured through the operation thereof.

Artificial Conditions Causing Recurrent Icing

It appears that where the State has actual or constructive notice of an artificial condition that causes recurrent icing on highways the State is under a duty to post adequate warning of the potential danger or take remedial action to correct the artificial condition productive of the icing.

The Court in *LaBuda v. State,* 86 A.D.2d 692, 446 N.Y.S.2d 534 (1982), stated the New York rule to be that mere proof that an accident was caused by an automobile skidding on an icy State road was insufficient in and of itself to establish negligence on the part of the State; that in order to hold the State liable there must be proof that the State had actual or constructive knowledge that a dangerous condition existed and that it failed to take appropriate action with respect thereto.

Applying this rule to the facts of the instant case, an action to recover for personal injuries suffered in an accident caused by skidding on ice, the Court ruled that a lower court finding of negligence on the part of the State was adequately supported by testimony to the effect that the formation of ice on the particular stretch of highway where the accident occurred was a recurrent condition resulting from faulty highway drainage, and that the evidence established that the State had prior notice of this dangerous condition, and failed to give notice thereof or take appropriate remedial action with respect thereto.

In *Rooney v. State,* 111 A.D.2d 159, 488 N.Y.S.2d 468 (1985), the facts disclosed that plaintiff's vehicle skidded on a patch of ice located on a roadway running underneath an overpass and collided with a pier supporting the overhead structure. The facts further established that the State had actual knowledge that in wet weather conditions water was accustomed to drip from the overpass onto the road surface below. Holding that the State had constructive knowledge that such recurrent condition would cause icing in freezing weather, the Court found the

State guilty of negligence for its failure either to post signs warning of the danger of icing or to apply sand once the icing occurred.

See, generally, to the same effect, *Hoffmaster v. County of Allegheny,* 550 A.2d 1023 (Pa. Commw., 1988).

Private Vehicle Parked on Snow Covered Road Shoulder

The question of the duty of the State in respect to a privately owned vehicle parked on the road shoulder during a snowstorm was the subject of consideration in *Lynd v. Charter Township of Chocolay,* 153 Mich. App. 188, 395 N.W.2d 281 (1986).

In this case it appeared that a vehicle which had developed engine trouble had been left unattended on the shoulder of the road for a period of several hours during the nighttime, without the installation of flares or warning lights. Two employees of the Michigan Department of Transportation, during the course of snowplowing operations, observed the unattended and unlighted vehicle, but took no action with respect thereto. Later the same night the operator of a snowmobile crashed into the parked car, and died as the result of injuries sustained in the collision. Suit was brought by the decedent's personal representative charging, *inter alia,* that the failure of the MDOT to take action with respect to the parked car after receipt of notice thereof constituted the breach of a Michigan statute imposing upon MDOT the duty to "maintain the highway . . . so that it is reasonably safe and convenient for public travel." In affirming the action of the trial court in ruling that the duty imposed by the statute had not been breached, the Court of Appeals emphasized that the car was parked not on the highway but on the shoulder thereof, and stated that "while it can be assumed that the presence of [the] vehicle on the shoulder . . . affected the safety of the highway, we cannot conclude that the highway was no longer *reasonably* safe for public travel." (Emphasis by the Court.)

Effect of Manual on Uniform Traffic Control Devices

It has been held in at least one case that compliance with the *Manual on Uniform Traffic Control Devices* was not in and of itself sufficient to avoid a charge of negligence in traffic signing.

In a suit brought against the Michigan State Highway Department to recover for injuries suffered as the result of a skidding accident on an icy overpass that was a constituent part of I-196, the fact that a sign was posted warning of possibly icy conditions on the overpass, which sign fully met the requirements of the *Manual on Uniform Traffic Control Devices,* was held not in and of itself to absolve the Department from the charge of negligence in permitting ice on the structure, for the reason (*inter alia*) that the value of the sign as a warning device was eroded because it was posted the entire year round. *Sweetman v. State Highway Department,* 137 Mich. App. 14, 357 N.W.2d 783 (1984).

Duty of Care in Respect to Gravel Roads

The duty of care in respect to the removal of snow and ice from gravel (as opposed to other type) roads was the subject of consideration in *Hume v. Otoe County,* 212 Neb. 616, 324 N.W.2d 810 (1982).

This case involved an intersectional collision wherein one of the vehicles ran through a STOP sign as the result of sliding on ice. The highway in question was a gravel road that had been "bladed" by defendant County before the accident, but despite such operation the road was covered with packed snow and ice. Negligence was charged to defendant (a) in failing to clear the road of snow and ice, and (b) in failing to post signs warning of the slippery condition. The trial court absolved the County of negligence by finding that the "blading" of the road satisfied the requirements of due care. In upholding the judgment, the Supreme Court of Nebraska stated: "The county produced expert testimony that the usual and customary procedure to remove snow from gravel roads was with a maintainer; that it is not practical or desirable to sand or salt gravel roads. There was evidence that the condition of the road near the intersection was not substantially or materially different from the condition of all gravel roads in the county at the time the accident happened. The fact that the surface of the road was partially covered with ice or packed snow was open and apparent, and there is no requirement that signs be posted to warn of such conditions."

This concludes the review of selected recent cases dealing with the question of what constitutes reasonable care on the part of State highway departments in respect to the presence of snow or ice on highways.

Next for consideration are cases involving the application of the so-called "dangerous conditions" rule.

DUTY OF STATE TO WARN OF OR TAKE REMEDIAL ACTION WITH RESPECT TO KNOWN DANGEROUS CONDITIONS

The general rule is well established that where the State has actual or constructive notice of a dangerous condition, it is under a duty either to give adequate warning of the peril, or take remedial action with respect thereto. This rule, which appertains to all types of roadway hazards, was given application in the following cases to dangerous conditions created by the presence of snow or ice on the highways.

Commonwealth, Pennsylvania Department of Transportation v. Phillips, 488 A.2d 77 (Pa. Commw., 1985), was a wrongful death and survival action brought to recover for the demise of a driver killed instantly in a two-car collision caused by skidding on ice. The patch of roadway ice in question measured 50 ft in length and 18 in. in depth, and resulted from a combination of rainfall, and water pumped onto the street from the flooded basement of an adjacent house, which together froze on the surface of the highway when the temperature plunged.

The evidence disclosed that the Pennsylvania DOT received notice of the serious icy condition the day before the fatal accident, and in response thereto placed a trestle at the site, and, in addition thereto, spread salt and cinders on the ice. On the day of the accident the Assistant County Superintendent, while on regular patrol, observed the large ice patch and the precautions that had been taken with respect thereto, but took no further action to correct the situation. In affirming the action of the

lower court in finding PennDOT guilty of negligence in failing to take the necessary precautions under the circumstances (such as by closing the road), the Commonwealth Court simply stated that "DOT had the duty to warn and correct the dangerous ice condition and because of its failure to do so, after actual knowledge of the condition on the day before the accident, DOT was not improperly found liable by the trial court."

State Department of Highways and Public Transportation v. Bacon, 754 S.W.2d 279 (Tex. App., 1988), was a personal injury and wrongful death action arising out of a vehicular collision on an icy bridge. Although the Department of Highways and Public Transportation had knowledge of the icy condition of the bridge it gave no warning with respect thereto. Judgment for the plaintiffs was rendered in the trial court. Among the questions on appeal was that of the nature of the State's duty to warn of the presence of known dangerous conditions. The Court of Appeals held that under the law of Texas the duty of the State to warn of known dangerous conditions was the same as the duty owed by a private person to a licensee on private property; that duty is to warn the licensee of a dangerous condition, or make the condition reasonably safe, in the situation where the licensor has actual knowledge of the dangerous condition and the licensee does not have actual knowledge thereof. Applying this rule to the facts of the instant case the Court found that the State had actual knowledge of the dangerous condition whereas the injured plaintiff did not, and hence the State was guilty of negligent conduct in failing to provide warning of the icy condition of the bridge.

"HIGHWAY DEFECT" STATUTES

The action created by a "highway defect" statute is not an ordinary negligence action, the crux of recovery under such type of statute being the establishment of the fact that a "highway defect" existed and that such defect was the proximate cause of an accident. The following cases deal with the question of when and under what circumstances the presence of snow or ice on highways constitutes a "highway defect" within the meaning of that language as used in the statute.

In construing the provisions of the Connecticut "highway defect" statute (Gen. Stat., Sec. 13a-144) the Supreme Court of Connecticut held, in *Cairns v. Shugrue,* 186 Conn. 300, 441 A.2d 185 (1982) that: "The presence of a *dangerous* accumulation of ice or snow unquestionably would make a highway defective within the meaning of this statute." (Emphasis added.)

In *Patrick v. Burns,* 5 Conn. App. 663, 502 A.2d 432 (1985), the following instruction was held to be a correct statement of the applicability of such type of statute to an accident resulting from icy roadway conditions: "In the eyes of the law, a highway is defective as the result of ice on it when it is not reasonably safe for public travel. The mere fact that there is ice on the surface of the highway does not of itself render the highway defective. Ice is a defect only when its presence on the highway creates a condition which is not reasonably safe for public travel. The law does not require that a highway be kept perfectly or absolutely safe for public use. In other words, ice on the surface of a highway is not a defect even though the highway because of it is not perfectly and absolutely safe, provided it can be said that the highway is reasonably safe for public travel."

Thus, under Connecticut law, it appears that a "highway defect" is established by a showing that the presence of snow or ice on the highways created either (a) a dangerous condition, or (b) rendered the roadway not reasonably safe for public travel.

CONSTRUCTION OF PARTICULAR STATUTES AFFECTING DUTY IN RESPECT TO SNOW AND ICE CONTROL

A few recent cases have involved the construction of particular and differing statutes affecting the duty of governmental entities in respect to snow and ice control.

One type of such statute is that which accords immunity for the effect of "weather conditions" on the use of highways.

Horan v. State, 212 N.J. Super. 132, 514 A.2d 78 (1986), involved the construction in *pari materia* of two New Jersey statutes. The one, N.J. Stat. Ann. 59:4-7, accorded governmental immunity in cases where personal injury is "caused solely by the effect on the use of streets and highways of weather conditions." The other, N.J. Stat. Ann. 59:4-2, imposed a duty on governmental agencies to warn of known dangerous conditions.

It was undisputed that the accident in question was caused by skidding on ice formed on a bridge before icing occurred on the adjacent highways, and that no warning of the hazard of preferential icing had been posted. In sustaining the action of the trial court in granting motions for summary judgment made by the governmental defendants having joint control over the bridge, the Court stated:

> The substance of plaintiff's argument is that the injury was not caused solely by the weather, but that the failure of defendants to warn of the likelihood of this potential contributed as a causal event. He embellishes this argument by insisting that *N.J.S.A.* 59:4-2 imposes a duty when there is a dangerous condition to warn of that condition. As the trial judge recognized and as we agree, if these arguments were thought to be sound, the weather immunity statute would, in effect, be written out of the books. It is apparent that weather contributes to the occurrence of injury from an accident only when that weather creates a dangerous condition. If the weather does not create a dangerous condition, then there is nothing with which to charge government in any event.

Thus, the "weather conditions" statute was construed to provide immunity in the case of icy conditions notwithstanding the provisions of the companion statute requiring that warning be given of known dangerous conditions.

Bellino v. Village of Lake in the Hills, 166 Ill. App. 3d 702, 117 Ill. Dec. 845, 520 N.E.2d 1196 (1988), likewise involved a statute according immunity for "weather conditions," and a statute imposing liability for failure to warn of known dangerous conditions. However, in the instant case, the latter was disposed of on the ground that no proof was offered

to show that defendant municipality had actual or constructive notice of a dangerous condition.

The complaint in *Bellino* recited that plaintiff was injured in an intersectional automobile collision and charged that the accident was caused by the negligence of the Village of Lake in the Hills in depositing during plowing operations piles of snow near the intersection of such height as to obscure vision. The weather immunity statute (Ill. Rev. Stat. 1985, Ch. 85, para. 3-105) provided that: "Neither a local public entity nor a public employee is liable for an injury caused by the effect on the use of streets, highways ... of weather conditions."

In upholding the action of the trial court in dismissing the complaint, the Court stressed that during the winter months in Illinois mounds of snow created by plowing operations were commonplace, and frequently long-lasting. It then went on to rule that the act of mounding snow during plowing operations, even in vision-obscuring piles, was protected from tort liability by the terms of the "weather conditions" statute.

Another type of statute provides immunity for snow and ice conditions except and unless *affirmative* acts of negligence on the part of a governmental entity are shown. Such type of statute was under consideration in the following cases.

The Minnesota Municipal Tort Liability Act (Minn. Stat., Secs. 466.01-466.15), abolishing sovereign immunity for political subdivisions of the State, retained immunity for any "claim based on snow or ice conditions on any highway ... except when the condition is affirmatively caused by the negligent acts of the municipality." This language was the subject of construction in *Matter of Heirs of Jones,* 419 N.W.2d 839 (Minn. App., 1988), involving the deaths of the driver of and two passengers in an automobile that skidded on a snow-packed road into the path of an oncoming train at a railroad crossing. The contention was made by the personal representatives of the decedents that the accident was "affirmatively" caused by the failure of defendant county to use salt when the roadway was plowed. In rejecting this argument and reversing the trial court's denial of defendant county's motion for summary judgment, the Court stated:

> In this case, the slippery road conditions were caused by traffic on the road which packed down natural snowfall. While the county may have been able to avert the condition by using salt, the county cannot be said to have *affirmatively caused* the slipperiness. The statute requires the condition to have been caused by an act, not an omission, of the county. Respondents' argument, that failure to maintain a road can be an affirmative cause of its bad condition, would essentially nullify that statutory language. (Emphasis by the Court.)

However, a different result was reached in *Draskowich v. City of Kansas City,* 242 Kan. 734, 750 P.2d 411 (1988), involving a similar type statute. The Kansas statute [Kan. Stat. Ann., Sec. 75-6104(k)] accorded governmental immunity from claims arising out of "snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity." The ice condition that was the cause of the skidding accident in this case originally came about by reason of the break of a water main under a street of the City of Kansas City. After turning the water off to prevent further flooding the City turned the water back on in order to locate the leak, which action precipitated additional flooding and freezing. In holding that the slippery condition was "affirmatively caused," within the meaning of the statutory language, the Court stated: "Under these factual circumstances, we hold that affirmative acts of the City caused the accident. The ice on the highway was not the result of natural weather conditions, but developed only after the [City] employees turned the water back on and allowed the street to be flooded."

Miscellaneous types of statutes allegedly affecting the duty of snow and ice control were the subject of consideration in the following cases.

Plaintiffs, in *Goodine v. State,* 468 A.2d 1002 (Me., 1983), were passengers in an automobile that struck a disabled vehicle on a bridge on I-295, and after the collision careened across the highway and plunged over a snow-covered guardrail into a harbor some 50 ft below. The complaint charged negligence on the part of the State in conducting snow removal operations on the bridge in such manner as to cause ice and snow to accumulate along the guardrail thereby converting it into a propelling mechanism rather than a restraining device. Suit was brought under a statute making governmental entities liable for negligent acts: "Arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway ... [or] bridge." It was contended that the snow removal operations in question fell within the meaning of the words "street cleaning."

In rejecting this contention and affirming the action of the trial court in dismissing the action against the State, the Supreme Judicial Court of Maine stated: "The term 'street cleaning' is commonly understood to mean the removal of debris which is generated by pedestrian and vehicle traffic at all times of the year. Snow plowing, on the other hand, denotes the clearing (not cleaning) of snow and ice from the main portion of the roadway in order to create a lane of travel for motor vehicles. This distinction is as apparent to the citizens of Maine as it is to the Legislature.... We decline in this case to adopt a forced construction of [the statute] which would extend its operation beyond what the Legislature intended and in clear contravention of the plain meaning of its terms."

Plaintiff, in *Homan v. Chicago and Northwestern Transportation Company,* 314 N.W.2d 861 (S.D., 1982), was the owner and operator of a trucking service, who, in making his regular rounds, struck the underside of a railroad overpass, allegedly as the result of accumulation of snow and ice on the pavement surface to such extent as to eliminate the normal clearance interval. Plaintiff brought suit against the township having jurisdiction over the road to recover for damages to his truck. Instead of framing the action in negligence for failure to remove the snow and ice, suit was brought under a statute which accorded a cause of action for damages caused by highways that were "out of repair." In affirming the action of the lower court in dismissing the suit, the Supreme Court of South Dakota stated: "Although the presence of snow

on a highway may indeed present a hazard to motorists, to hold that unremoved snow causes a ... highway to become out of repair would constitute a remarkable extension of the duty imposed by [the statute], and we decline to so hold."

In *Longworth v. Michigan Department of Highways and Transportation*, 110 Mich. App. 771, 315 N.W.2d 135 (1981), an action was brought by a governmental employee to recover for personal injuries sustained when in operating a snowplow the blade thereof struck an expansion joint in an Interstate highway, causing him to be thrown to the floor of the machine with resultant back and hip injuries. Suit was brought under a Michigan statute (Mich. Stat. Ann., Sec. 3.996 (102)), authorizing recovery for bodily injury sustained "by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair and in condition reasonably safe and fit for travel."

The State appealed from a judgment in favor of the plaintiff on the ground that the statute was designed to accord a remedy solely to persons engaged in "public travel," and that a governmental employee engaged in road maintenance did not fit this description. In rejecting this contention, the Appellate Court pointed out that the word "travel" was not qualified by the word "public" in the statute, and that, in any event, a governmental employee operating a snowplow was engaged in "public travel" on the highways.

REQUIREMENT OF WRITTEN NOTICE

Some statutes require as a condition precedent to recovery for negligent conduct respecting snow and ice control that prior written notice of a snow or ice condition be filed with the governmental entity having jurisdiction over the road where the condition occurs. The question of the force and effect of such provision (i.e., whether mandatory or merely directory) was before the courts in the following cases.

In *Rodriguez v. County of Suffolk*, 123 A.D.2d 754, 507 N.Y.S.2d 227 (1986), the Court had before it the terms of a New York statute (Town Law, Sec. 65-a[1]) providing that a township could not be held liable for damages or personal injuries sustained "solely as a consequence of the existence of snow or ice upon any highway ... unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice." The action in this case was to recover for personal injuries sustained in a multicar accident allegedly caused by the presence of snow and ice on the highway. It was admitted at trial that the notice required by the statute had not been given. In affirming the action of the lower court in granting summary judgment for defendant township, the Court stated that the only exceptions to the operative effect of the statute were upon a showing of affirmative negligence by a township or a showing that the town had created the hazard, and that since neither was shown in the instant case the failure to give the required statutory notice operated as a bar to recovery.

Failure to comply with the provisions of the above specified Town Law, Sec. 65-a[1], requiring written notice of snow and ice conditions as a precondition of suit to recover for injuries caused thereby was held in *Camera v. Barrett*, 144 A.D.2d 515, 534 N.Y.S.2d 395 (1988), to operate as a complete bar to recovery in a wrongful death action charging negligence on the part of the county in failing to give warning of an icy roadway condition allegedly caused by the overflow of waters onto the highway from a defective drainage ditch.

See, also holding that the statute operated to bar recovery where notice of snow and ice condition was not given, *Kirschner v. Town of Woodstock*, 536 N.Y.S.2d 912 (1989).

LIABILITY OF POLICE DEPARTMENT WITH RESPECT TO REPORTING SNOW AND ICE CONDITIONS

It is the practice of many police departments to report to appropriate highway agencies snow and ice conditions that, in the interest of public safety, should be given immediate attention by such agencies. The question has arisen whether such reporting practices, when voluntarily assumed by a police department, give rise to the status of a legal duty for breach of which the police department may be held accountable to the highway agencies.

This unusual question was before the Court in *Stilo v. County of Nassau*, 122 A.D.2d 41, 504 N.Y.S.2d 201 (1986). The action in this case was to recover for personal injuries sustained in an accident caused by skidding on ice. Defendant County of Nassau, which had jurisdiction over the road where the accident occurred, sought contribution and/or indemnification from the Port Washington Police District, alleging that officers of the District had made a practice of reporting snow and ice conditions to the County, that the County relied on such reports, and that no report had been made to the County by the District of the ice condition that was the cause of the accident in question.

In holding the District not liable to the County for contribution and/or indemnification, the Court stated: "Although officers of the district did, commendably, notify the county when they came upon snow and ice conditions in the course of performing their regular police patrols, it appears that this was done for the benefit of the public-at-large pursuant to the district's general police function. While the county relied upon these reports when they were received, and while such reports undoubtedly assisted the county in discharging its statutory obligation to remove snow and ice from its roads ... there is no evidence suggesting the voluntary assumption by the district of a special duty to notify the county of *all* snow and ice conditions existing upon its roadways.... We cannot say that the mere reporting of a dangerous condition by one ... entity to another ... entity having the statutory obligation to correct such condition constituted a voluntary assumption by the former of a special duty to do so in all instances." (Emphasis by the Court.)

IMMUNITY FOR SNOW REMOVAL ON GROUNDS OF POLICY

It has been held in a significant decision by the Supreme Court of Wisconsin that at least some snow removal operations should be immune from liability in tort on grounds of public policy. Although the holding in *Sanem v. Home Insurance Company,* 119 Wis.2d 154, 350 N.W.2d 89 (1984), is of wide general interest, it should be of special interest in those jurisdictions where the climatic conditions during the winter months are such as to produce an abundant or excessive amount of snowfall.

The crux of the holding in this important case is that governmental entities should not, on grounds of public policy, be held liable for depositing mounds of snow along and adjacent to highways in piles of such size as to obstruct the vision of motorists using the highways, including the situation where such mounds or piles of snow may be deemed to have been the proximate cause of an accident resulting in personal injury. The facts were as follows.

On the day of the accident plaintiff was proceeding in her automobile along a State highway which ran in an east-west direction and intersected with another State highway running in a north-south direction. Upon arriving at the point of intersection she stopped her car because the visibility of vehicular traffic moving along the north-south road was obscured by large piles of snow in the median strip. Although proceeding cautiously through the intersection her vehicle was struck by a truck traveling northerly along the other highway. It appeared that the County of Ozaukee had contracted with the State of Wisconsin to effect snow removal in the area of the intersection, and that the obstructive mounds of snow had been deposited in the median strip during the course of its snow removal operations. Suit was brought against the County charging negligence in the conduct of these operations.

In holding that the County should not be held liable on grounds of policy, notwithstanding that the mounds of snow may have been the proximate cause of plaintiff's injury, the Supreme Court of Wisconsin stated:

> ... [W]e find that exposing the county to ... liability according to the facts of this case is contrary to public policy because of the physical properties of snow and the nature of snow plowing. Snow is ubiquitous in the state of Wisconsin during the winter months, and often accompanying the snowfall is the problem of impassable roads if the depth of accumulation is significant, or slippery conditions if the snow becomes packed down by passing vehicles. Therefore, a snowfall often creates an emergency situation, and the county's primary obligation is to remove the snow from the highway as quickly and thoroughly as possible....
>
> A natural consequence of snow plowing is that the snow must be placed somewhere. This is usually on median strips and sides of highways. If the county is to devote its energy toward removing the snow from the highways as quickly as possible, we find it contrary to public policy to impose upon the county the added responsibility of avoiding the creation of snow mounds on medians near any intersections where obstruction of drivers' vision may result. We can only foresee that this added concern will decrease the efficiency of snow removal operations and may indeed result in added frustrations of a different nature through delays in the normal plowing process itself.
>
> In summary, we hold that public policy considerations preclude the imposition of liability on Ozaukee county according to the facts as set forth in this complaint.

Thus, the grant of immunity for snow removal operations was grounded squarely on considerations of sound public policy.

EFFECT OF STATE TORT CLAIMS ACTS ON DUTY OF SNOW AND ICE CONTROL

More than half of the States have enacted Tort Claims Acts which waive sovereign immunity in tort actions brought against the State, with certain specified exceptions. Among these is an exception to waiver of immunity for discretionary, as opposed to ministerial, activities.

The test generally employed to distinguish protected discretionary from unprotected ministerial activities is the planning/operational test. Under this test planning activities are classified as being discretionary in nature; and operational activities, as being ministerial in character. The application of this test to tort liability of the State, in general, has led to a measure of confusion in the cases, and the same is true of its application to the more narrow question of the effect of the exception on liability of the State for snow and ice control. (For a more full discussion of the impact of the discretionary function exception on tort liability in general, see the papers in *Selected Studies in Highway Law,* by Larry W. Thomas, entitled "Liability of State Highway Departments for Design, Construction and Maintenance Defects," Vol. 4, p. 1771, and by John C. Vance, entitled "Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments," Vol. __, p. __.)

The following cases illustrate that divergent results have been reached in respect to the applicability of the discretionary function exception to the duty of snow and ice control.

Matter of Heirs of Jones, 419 N.W.2d 839 (Minn. App., 1988), was an action to recover for the deaths of the driver and two passengers in an automobile, who were killed when their vehicle skidded on an icy road into the path of an oncoming train at a railroad crossing. The wrongful death action, brought against defendant St. Louis County, was based on the theory that the County was negligent in its snow clearing operations because it failed to apply salt to the road as an adjunct to plowing operations. The County pleaded as a defense the discretionary function exception of the Minnesota Tort Claims Act, asserting that the decision not to use salt as an accompaniment to the plowing operations was a protected planning level decision. In upholding this contention the Court stated: "The supreme court has distinguished between 'planning' and 'operational' decisions in determining whether an action is discretionary.... In this case, taking respondent's version of the facts, the county decided not to salt in order to reduce expenses. That decision involved a weighing of competing policy considerations—e.g., cost versus effect—which is not appropriately reviewed by the courts.... In determining how best to maintain the roads, the county was presented with alternative

possible actions to alleviate the icy condition. . . . The choice among these alternatives is properly characterized as discretionary."

However, in *Robinson v. Hollatz,* 374 N.W.2d 300 (Minn. App., 1985), a different result was reached. This was an action brought to recover for personal injuries sustained in a two-car intersectional collision caused by the impairment of vision of the drivers of the vehicles involved through the piling of snow in the median strip to a height of 8 or 9 ft during snow removal operations conducted by defendant Dakota County. The trial court granted summary judgment for the County on the ground that it was immune to suit under the discretionary function exception of the Minnesota Tort Claims Act (Minn. Stat., Sec. 466.02). In reversing the action of the trial court, the Court of Appeals first reviewed the decisions of the Supreme Court of Minnesota employing the planning/operational test to separate exempt planning activities from nonexempt operational activities. It concluded, on the basis of such review, that "the decision as to whether a road *should* be plowed or whether the plows *should* be employed on any given day falls within the discretionary function because it is made at the planning level." (Emphasis supplied.) It then went on to rule, however, that once the decision is made to go ahead with clearing the road of snow and ice, all activities conducted in implementation or execution of such decision fall within the unprotected operational half of the dichotomy, and hence the State's action in mounding the snow in vision-obscuring piles during plowing operations was an activity unprotected by the Tort Claims Act.

Another approach to the applicability of the exception was taken in *Andolino v. State,* 624 P.2d 7 (Nev., 1981), wherein the Supreme Court of Nevada apparently excluded *all* snow removal operations from the protection of the discretionary function exception. This result was arrived at by closely following the holding by the same Court in a prior and widely known decision [*State v. Webster,* 88 Nev. 690, 504 P.2d 1316 (1972)] wherein the significant rule was announced that discretion is exhausted with the decision to build a highway, and hence all decisions subsequent thereto become operational and nondiscretionary in nature.

Applying this reasoning to the facts of the instant case, an action to recover for personal injuries sustained in a skidding accident on an Interstate exit ramp that was covered with snow and ice, the Court held that all decision-making in respect to snow and ice removal (obviously made after discretion is exhausted) falls within the unprotected operational half of the planning/operational dichotomy, and that the trial court was therefore in error in ruling that decision-making with respect to snow and ice removal was an activity protected by the discretionary function exception of the State Tort Claims Act.

It is readily apparent from the foregoing cases that divergent results have been reached in respect to the applicability of the discretionary function exception to snow removal operations.

MISCELLANEOUS

It goes without saying that the doctrine of contributory negligence is fully applicable to the operation of a vehicle under snow and ice conditions, and that the determination whether the operator of a vehicle is guilty of contributory negligence depends entirely on the facts of the particular case. For a case holding that a speed of 55 mph on an icy road constitutes contributory negligence, see *Desnoes v. State,* 100 A.D.2d 712, 474 N.Y.S.2d 602 (1984). It also goes without saying that, in jurisdictions where the doctrine of sovereign immunity is still in full force and effect, it operates as a complete bar to recovery in actions brought against the State charging negligence in respect to snow and ice control. For a case so holding, see *Counihan v. Department of Transportation of Georgia,* 290 S.E.2d 514 (Ga. App., 1982).

CONCLUSION

In the opinion of the author of this paper the recent cases of more particular interest are those relating to the interpretation of the discretionary function exception. Although the current cases are divided, it is suggested that in most jurisdictions having a Tort Claims Act that embodies the discretionary function exception, a compelling argument can be made that all decision-making with respect to snow and ice control measures which involves *judgment* or *choice* between viable alternatives should be accorded the status of planning level activities, and hence be rendered immune from liability in tort, and it is suggested that such position be strongly urged wherever appropriate.

Also, of special interest is the case law hereinbefore set forth taking the position that at least some snow removal activities should be accorded immunity from liability in tort on the ground of sound and well-considered policy considerations.

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APPLICATIONS

The foregoing research should prove helpful to highway and legal counsel and state highway and transportation employees involved in winter maintenance operations.

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