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Liability of the State for Injury-Producing Defects in Highway Surface

A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and 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. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.

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 special problems involving tort liability, as well as highway law in general. This report and six others published as Research Results Digest 79, "Personal Liability of State Highway Department Officers and Employees," Research Results Digest 80, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," Research Results Digest 83, "Liability of State and Local Governments for Snow and Ice Control," Research Results Digest 95, "Legal Implications of Regulations Aimed at Reducing Wet-Weather Skidding Accidents on Highways," Research Results Digest 110, "Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings," and Research Results Digest 129, "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," deal with legal questions surrounding liability for negligent design, construction, or maintenance of highways.

These papers are included in a three-volume text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, and a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981. The three volumes now total more than 2,000 pages comprising 48 papers, some 23 of which have been supplemented during the past 2 years. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

A third addendum will be issued late in 1982 and is expected to contain 7 new papers (including that comprising this Digest) and supplements to 7 existing papers.

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Liability of the State for Injury-Producing Defects in Highway Surface

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INTRODUCTION

This paper considers the question of the liability of the State for failure to repair defects in the pavement or surface of the highway which proximately cause motor vehicle accidents resulting in injury or death. The term "defect" is used herein to mean any opening, hole, depression, washout, or breakup in the road surface that results from the operation of natural causes (i.e., ordinary wear and tear, erosion and attrition due to weather, etc.).[1] The cause of action typically arises when a motor-powered vehicle strikes a hole or opening in the highway causing loss of control of the vehicle and an ensuing crash or collision. Liability is sought to be predicated on alleged negligence of the State in failing to make timely correction of the injury-producing condition.

Although it is axiomatic that the State is not an insurer of the safety of public highways, it is equally clear that it owes a duty to keep roadways under its control in a condition reasonably safe for public travel and use.[2] This paper is directed to the problem of when and under what circumstances the State can be held liable for tortious conduct in the performance of this duty.[3]

Cases wherein the defense of sovereign immunity is asserted by the public defendant are not considered in this paper. Also omitted from consideration are cases wherein liability of the public authority was predicated on whether the activity fell into the classification of discretionary or ministerial, governmental or proprietary, the performance of a public duty or a private duty, or actionable misfeasance or nonactionable nonfeasance. The cases involving the application of these dichotomies are fully considered in the papers entitled "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," by Larry W. Thomas, and "Personal Liability of State Highway Department Officers and Employees," by John C. Vance, appearing in *Selected Studies in Highway Law* (Vol. 3, pp. 1771 and 1835, respectively), to which reference is here made for a more complete discussion thereof.

In other words, the cases set forth in this paper uniformly assume both the suability and the liability (upon proof of negligence) of the public defendant. The results in the cases are made exclusively to turn on the applicability to the facts of one or more of the following legal concepts: (1) Proximate Cause, (2) Actual or Constructive Notice, (3) Common-Law Negligence, (4) Statutory Negligence, and (5) Contributory Negligence.

It can be noted at the outset that the cases are many, attesting to the seriousness of the problem of public safety involved. It may be further noted that the money judgments rendered in wrongful death actions or instances of serious bodily injury are such as to present significant fiscal problems to State highway departments.

Turning now to the case law there is first for consideration the applicability of the doctrine of proximate cause.

NECESSITY TO PROVE PROXIMATE CAUSE

In an action for damages based on alleged negligence it is necessary to prove that the act or omission complained of was the proximate cause of the injury suffered. The burden of such proof rests on the plaintiff. The rule is stated in Prosser, THE LAW OF TORTS, 3d ed., § 41 (West Publishing Company, 1964), as follows:

> An essential element of the plaintiff's cause of action for negligence . . . is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection is dealt with by the courts in terms of what is called "proximate cause". . . . On the issue of the fact of causation, as on other issues of the fact of cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the possibilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

The rule, needless to say, applies with full force and effect to injuries suffered in highway accidents. As stated in 39 AM. JUR. 2d, *Highways, Streets, and Bridges*, § 374:

> Liability . . . for highway injuries . . . is subject to the qualification that the act, omission or condition on which the complaint for injuries is based must have been the proximate cause . . . of the injuries, as in other tort and negligence cases generally.

Thus, in any action brought to recover damages for injuries sustained by the driver of or passengers in a motor vehicle which went out of control after striking a hole in the highway pavement or surface, it is necessary for the plaintiff to establish that the defect in the highway was the proximate cause of the loss of control of the vehicle and the subsequent injury. The cases are limited in number wherein the issue of proximate cause is squarely presented, for the reason that it is ordi-

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narily clear that the highway defect was indeed the proximate cause of the injury. Where raised the necessity of proving proximate cause is stated in positive language, as in *City of Ludlow v. Albers,* 253 Ky. 525, 69 S.W.2d 1051 (1934), an action to recover damages for injuries sustained when a car struck a hole in the street and turned over, wherein the Court said: "It was the duty of [plaintiff] to establish by competent evidence that the defective condition of the street was the proximate cause of his injury, i.e., 'the natural and continuous sequence . . . produced the injury and without which it would not have occurred.'"

It is an essential element of proximate cause to show that the sequential order of events leading to the accident was not broken by an intervening cause.

The question of independent cause was before the Court in *Cregger v. City of St. Charles,* 11 S.W.2d 750 (Mo. App. 1929), a wrongful death action brought by the widow of decedent wherein it was alleged by plaintiff that her husband was thrown from his standing position in the bed of a truck to the street as a result of the wheels of the truck striking a hole in the pavement, and contended by defendant city that the sharp turning of the truck to round a corner immediately after striking the hole was the efficient cause of decedent's fall from the truck. The Court said in respect to intervening cause:

> In determining whether the continuous sequence of events has been broken by an efficient intervening cause so as to constitute the latter the proximate cause of injury, it is understood that for a cause to be properly denominated as efficient and intervening it must be a new and independent force or agency which breaks the chain of causal connection between the original wrong and the final consequence. Such intervening act or event must be sufficient to stand of itself as the cause of the injury, and be one but for which the injury would not have occurred; and if the new cause serves merely to accelerate the effect of an original cause which alone was sufficient to produce the injury, the first cause will still be considered the proximate cause.

In holding that the jury was justified in finding that the striking of the hole by the wheels of the truck was the proximate cause of decedent's fall from the truck the Court said:

> Here there is no violence done to the facts in evidence, or to the ordinary experience of mankind, to say that the dropping of the wheel into the hole in the street, with the resultant jar and jerk, set in motion an unbroken chain of circumstances which directly led up to the fall of decedent from the truck, and was so connected to the succeeding events, that is, to the turn, that all became a continuous whole.

It is well established that proof of proximate cause cannot be made to rest on evidence that is conjectural or speculative. Thus, in *Arcenaux v. Louisiana Highway Commission,* 12 So.2d 733 (La. App. 1943), it was held that proof of the ultimate fact that a truck turned over 25 to 30 ft beyond a hole in the highway could not be made the basis of a finding that the hole was the proximate cause of the accident where there was no eyewitness testimony to support the conjecture (however plausible) that the vehicle turned over as a result of striking the opening in the highway.

In sum, although proximate cause has proved a troublesome doctrine to the courts (it being often stated that the rule cannot be enunciated with precision), it is altogether clear that in an action to recover damages for negligence in failing to correct a dangerous condition in the highway it is essential to establish that the defect or dangerous condition was the proximate cause of the injury sustained, and the burden rests on the plaintiff to show by competent evidence that the defect was the efficient cause of the accident unaffected by the intervention of a supervening cause. See generally the following cases:

Pendlebury v. City of Bristol, 118 Conn. 285, 172 A. 216 (1934).
Williams v. Kansas State Highway Commission, 134 Kan. 810, 8 P.2d 946 (1932).
Graham v. Rudison, 348 So.2d 711 (La. App. 1977).
Fitzpatrick v. State, 2 Misc.2d 253, 151 N.Y.S.2d 534 (1956).
Ingram v. City of Pittsburgh, 350 Pa. 344, 39 A.2d 49 (1944).

NECESSITY TO PROVE ACTUAL OR CONSTRUCTIVE NOTICE

Once proximate cause is established the plaintiff has the burden of adducing competent evidence to establish that the defendant had actual or constructive notice of the defect in the highway and sufficient time to take corrective action in respect thereto. Proof of such notice and reasonable opportunity to take remedial action is a condition precedent to recovery.[4]

The general rule is stated in 39 Am. Jur. 2d, *Highways, Streets, and Bridges,* § 411, as follows:

> [T]he public authority, in order to be rendered liable for injuries resulting from unsafe conditions in highways, streets and bridges, which it has not itself erected or authorized, must have knowledge or notice thereof for a sufficient length of time before the accident to have remedied the conditions or to have taken other precautions to guard against injury therefrom. . . . In other words, the public authority to be charged with liability, must have notice, either actual or constructive, of the unsafe conditions.

Thus, in *Mistich v. Matthaei,* 277 So.2d 239 (La. App. 1973), in holding the Louisiana Department of Highways not liable for alleged negligence in failing to repair a hole in the road which was the proximate cause of an accident on the ground that the proof failed to establish that the Department had actual or constructive notice of the defect, the Court said:

> It is clear that the hole was there and that its size and location on this particular highway made it inherently dangerous. The very fact that this serious accident was brought about . . . by its presence is in itself proof of these elements. But for the Department to be liable to anyone it must be shown to have had actual or constructive knowledge of the defect. . . . To hold adversely to the Department in the instant case

> would place upon it an intolerable burden. Every time a motorist suffered damages from a pot hole or rut in a road, on a showing that he was not negligent, he could point his finger at the Department and require it to prove when that particular stretch of road was last inspected. While our sympathy is with such a motorist, we must also sympathize with the Department which, as the representative of all citizens, has the responsibility for thousands of miles of roads throughout the State. Accordingly, we find no actionable negligence on the part of the Highway Department in the instant case.

Whether or not the public authority has received actual or constructive notice of the defective condition in the highway in sufficient time to take appropriate action in respect thereto is, of course, dependent on the facts of the particular case. No general rules can be stated that are helpful in making determination of this question. However, a study of the facts and the holdings in the various cases that have considered the question yields useful instruction. The cases that have dealt with the problem are set forth immediately following and grouped according to whether it was held that notice was or was not received.

Cases Holding Notice Received

In the following cases, it was held that notice, actual or constructive, was received.

In *Pendlebury v. City of Bristol,* 118 Conn. 285, 172 A. 216 (1934), plaintiff was injured when the left front wheel of the automobile she was driving dropped into a hole in the highway causing the vehicle to veer from the road and crash into a telephone pole. It was contended by the City of Bristol that it did not have notice of the defect. The Court said in respect thereto:

> It is urged that the defendant did not have a constructive notice of the defect. The finding shows that the character of the defect was such that by ordinary diligence and care its existence could have been known to the defendant. It had been there four to six weeks and was known to those who traveled that road, and it clearly appears that the defendant had full opportunity not only to learn of the defect but to repair it.

Suit was brought in *Jones v. Louisiana Department of Highways,* 338 So. 2d 338 (La. App. 1976) by the driver of and certain passengers in an automobile who were injured when the car, travelling at a speed of approximately 40 miles per hour, struck a hole in the highway and rolled over into a ditch. The Court stated that "before the Highway Department will be found negligent it must be shown that the Department had either actual or constructive notice of the dangerous condition and failed within a reasonable time to correct it." In holding that such notice had been received the Court relied on testimony of the Department's maintenance personnel that they knew of the poor condition of the highway at least two weeks before the accident. And the Court said that: "Whether the Department had actual notice of the particular hole which plaintiff's vehicle struck is of little consequence."

Fitzpatrick v. State, 2 Misc. 2d 253, 151 N.Y.S.2d 534 (1956), was an action to recover injuries sustained by occupants of a motor vehicle which struck a hole in the highway and rolled over several times. In holding that the State was charged with notice of the defective condition the Court pointed out that "the highway had been badly out of repair, full of holes at different locations" and that the "hole involved herein had been in the road for many months."

The Kansas State Highway Commission was held to have adequate notice of the presence of holes in the highway which proximately caused a motor vehicle accident where it was shown that maintenance department personnel "had full knowledge of the defects and had tried in a futile way to repair them by putting dry loose sand in them and the next day the sand would be gone." *Williams v. Kansas State Highway Commission,* 134 Kan. 810, 8 P.2d 946 (1932).

Likewise in *Collins v. Kansas State Highway Commission,* 138 Kan. 629, 27 P.2d 216 (1933), the Commission was held to have notice of an injury-producing hole in the highway where it was shown that an employee of the Commission had "during a period of eight or ten days immediately prior to the accident . . . made repeated but ineffective efforts to repair it."

And similarly in *Matthews v. State,* 14 Misc. 2d 438, 179 N.Y.S.2d 115 (1958), notice was established by evidence showing that unavailing and ineffective efforts had been made to patch a hole before the date on which it operated to bring about a motor vehicle accident.

Farris v. City of Columbus, 85 Ohio App. 385, 85 N.E.2d 605 (1948), was an action brought by a motorcyclist who sustained injuries upon being thrown into the street when his cycle struck a hole therein. He produced a witness who resided and conducted a place of business at the location where the accident occurred, who was permitted to testify that he telephoned City Hall three times (prior to the accident) to report that the street was in dangerous condition. In holding such testimony admissible and of sufficient probative value as properly to be submitted to the jury on the question of notice of the dangerous condition, the Court said that although the "witness did not describe in detail the particular hole which caused the accident . . . this is not required. The street was full of holes. The report made by the witness sufficiently described the existing condition of the street. The defect which caused the accident was of the same general character as described by the witness and was a usual concomitant of the general defective condition of the street."

Actual notice of holes in the highway which caused a motor vehicle accident was held to have been established in *Leiva v. King County,* 38 Wash.2d 850, 233 P.2d 532 (1951), on the basis of evidence that the road department of defendant County had made efforts to patch the holes with oil and gravel and that the said repair work had failed to hold.

The question of constructive notice of a hole in the highway which was the causative agent of a motor vehicle accident was held, in *Meier v. Town of Cushing,* 246 Iowa 441, 68 N.W.2d 74 (1955), to have been properly submitted to the jury on the basis of eyewitness testimony that the hole had existed for a period of several months prior to the accident.

The testimony of several witnesses that a hole in the roadway which caused a vehicle to turn over after striking the same had existed for a considerable period of time before the accident, was held in *Netterville v. Parish of East Baton Rouge*, 314 So.2d 397 (La. App. 1975), sufficient to charge the defendant Parish with constructive notice of the existence of the defect.

Evidence that injury-causing hole in the highway had existed for more than 2 months prior to the accident was held in *Mayor and City Council of Baltimore v. Poe*, 161 Md. 334, 156 A. 888 (1931), sufficient to establish that defendant should have known of the existence of the hole and therefore properly could be charged with constructive notice thereof.

Evidence that a hole causing the overturn of a truck that collided therewith had existed for a period of 3 to 4 weeks prior to the accident was held in *Chambers v. Kansas City*, 446 S.W.2d 833 (Mo. 1968), a sufficient length of time to make a fact issue for the jury on the question of defendant's constructive knowledge of the defect.

In affirming judgment for plaintiff who brought suit to recover damage for injuries suffered when she lost control of her car after striking a large hole in the Southern State Parkway, the Supreme Court of New York, Appellate Division, Third Department, stated in *Gaines v. Long Island State Park Commission*, 60 App. Div.2d 724, 401 N.Y.S.2d 315 (1977):

> Notice of a defect in a public way will be implied when the defect has existed for so long a period that it should have been observed. On this record the trial court could have found constructive notice of the defect. The court relied on the testimony of a disinterested witness who claimed he had seen the pothole 34 hours before the accident. . . . A 34-hour delay in detecting a large pothole on a major highway is unwarranted.

The New York Court of Claims ruled in *Miner v. State*, 196 Misc. 752, 92 N.Y.S.2d 562 (1949), that proof of the existence of an injury-producing hole in the highway for as long as 2 weeks prior to the accident was sufficient to establish constructive notice, stating that: "Certainly in that length of time the State had constructive notice of its existence."

In *Breaux v. Louisiana Department of Highways*, 347 S.2d 1290 (La. App. 1977), an action to recover for injuries sustained when plaintiff's automobile struck a hole in the highway and swerved into a tree, it was held that notice of the defect was properly imputed to the Department of Highways where the investigating police officer testified that the road contained many holes and the Department's maintenance superintendent admitted the Department "had been working on the road for some time." The Court stated in respect to the receipt of notice that, as previously pointed out in this paper:

> . . . *Every case must be decided on its own facts.* (Emphasis supplied.)

See the following further cases wherein it was held that notice, actual or constructive, of the presence of an injury-producing defect in the highway was received:

Anderson v. San Joaquin County, 110 Cal. App.2d 703, 244 P.2d 75 (1952).

Thomas v. Board of Township Trustees, 224 Kan. 539, 582 P.2d 271 (1978).

City of Catlettsburg v. Davis' Adm'r., 255 Ky. 382, 74 S.W.2d 341 (1934).

Marshall v. City of Baton Rouge, 32 So.2d 469 (La. App. 1947).

County of Harris v. Eaton, 573 S.W.2d 177 (Tex. Civ. App. 1978).

Cases Holding Notice Not Received

In the following cases the plaintiff was denied recovery on the ground that the evidence failed to establish that the public entity having jurisdiction and control over the road system received actual notice or was charged with constructive notice of the defective condition thereof.

In *Johnson v. City of Jacksonville*, 157 Fla. 14, 24 So.2d 717 (1946), an action to recover damages for injuries sustained when plaintiff drove an automobile into a hole in the city street caused by a washout of the foundation, the Supreme Court of Florida upheld the action of the trial court in directing a verdict in favor of the City of Jacksonville on the ground that there was "nothing in the evidence to show that the defendant either knew, or should with reasonable diligence have known, of the alleged defect in the street."

In the absence of evidence showing that a 4-ft long hole in the highway had existed for such length of time as to charge the Louisiana Department of Highways with constructive notice thereof the Department could not be held liable for injuries sustained when an automobile ran into the hole and caused it to collide with an oncoming vehicle. *Mistich v. Matthaei*, 277 So.2d 239 (La. App. 1973).

In *Doucet v. State, Department of Highways*, 309 So.2d 382 (La. App. 1975), an action to recover for injuries suffered by plaintiff when a pickup truck being driven by her struck a hole in the highway and rolled over, the Court, in affirming judgment for the Department, stated that the "evidence in the instant suit is uncontradicted that the Department of Highways had no notice, either actual or constructive, of the existence of the alleged defect in the highway before the accident occurred" and ruled that the defendant could be held "liable for damages only when the evidence shows that . . . the department had notice, either actual or constructive, of the existence of the defect and failed within a reasonable time to correct it."

It was held in *Hogan v. State*, 2 Misc. 2d 174, 152 N.Y.S.2d 352 (1956), that where evidence was adduced to show that holes in the highway alleged to have been the proximate cause of an accident had been patched, and no evidence was introduced to show that the State had knowledge the patches did not hold, the State could not be held liable in an action to recover damages for injuries sustained in the accident.

Thus it is seen that the law is clearly settled that in an action to recover for injuries suffered in an accident proximately caused by a defect in the highway, the burden rests on the plaintiff to establish that the public authority having responsibility for the roadway either knew

or should have known of the defective condition of the roadbed, and that such knowledge was received by or imputed to the public entity in sufficient time to take corrective action in respect thereto.

Although the courts have consistently declined to announce any firm rules as to what does or does not constitute constructive notice, it seems clear from the case law that the longer the lapse of time between the appearance of the fissure in the highway surface and the date of the accident caused thereby the more likely it is that the highway agency will be charged with constructive notice of the defect. However, no time frame can be specified as being either sufficient or insufficient to constitute constructive notice. This is evidenced by the fact that in the cases previously set forth the period of elapsed time varied from days, to weeks, to months; but, in one case involving a primary artery, a brief span of hours was deemed sufficient to impute knowledge. If any generalization is permissible, it is that the time frame may possibly be shorter in the case of a heavily travelled primary highway than in the case of a sparsely used secondary road.

No firm rules are laid down in the cases as to what constitutes actual notice. However, it is probably safe to say that proof of knowledge of the defect on the part of a person or persons employed by the highway agency and charged with maintenance duties and responsibilities will, absent special circumstances, suffice to constitute actual notice to the agency.

Once the necessary conditions precedent to recovery of showing proximate cause and notice have been satisfied, the plaintiff in order to prevail must then establish either common-law negligence on the part of the defendant or (in jurisdictions where applicable) violation of the terms of statute law constituting negligence *per se*.

First for consideration is liability on the grounds of common-law negligence.

LIABILITY PREDICATED ON COMMON-LAW NEGLIGENCE

As stated earlier in this paper the State (or subdivision having jurisdiction and control over roads) is not an insurer of the safety of highways and public travel thereupon. It is, however, under an unequivocal duty to exercise *reasonable diligence* to keep highways *reasonably safe* for public use. The general rule, as stated in 39 AM. JUR.2d, *Highways, Streets, and Bridges*, § 372, is as follows:

> The public authority is not responsible for every accident that may occur on its highways, streets, and bridges—that is, it is not a guarantor of the safety of travelers thereon or an insurer against all injury which may result from . . . defects therein, unless made so by statute. Nor does it warrant that its public ways will be free from . . . defects . . . at all times. So far as concerns liabilities for injuries caused by . . . defects . . . in its public ways, not due to its own wrongful act, *its duty and sole duty . . . is to exercise reasonable diligence to put and keep them in a reasonably safe condition.* (Emphasis supplied.)

Whether the public authority has breached its duty in this regard may, depending on the circumstances, be either a question of law or one of fact. That is to say, if the highway defect is wholly trivial, a directed verdict for the defendant may be proper; and, if the defect is patently highly dangerous, a directed verdict for the plaintiff may be in order. A jury question is ordinarily presented where the fact situation lies in between the two extremes. As stated in *City of Okmulgee v. Bridges*, 185 Okl. 537, 94 P.2d 927 (1939):

> If the particular defect be so slight or trivial that all reasonable men will agree that it does not, under the circumstances, constitute a danger or menace to the travelling public the courts will hold as a matter of law that no negligence is shown. . . . In case of a plain defect . . . dangerous to such extent that all reasonable men would say under the existing circumstances it was a danger or menace to the travelling public . . . a court would be justified in holding the [public body] guilty of negligence as a matter of law. . . . Between the two situations above stated, there must be cases where all reasonable men would not agree on whether the . . . defect, though all the facts be agreed upon, would under the circumstances constitute a danger or menace to the travelling public. In such case . . . the question would be one for the jury to determine.

There is no legal foot rule by which the performance of the State's duty to keep its roads in a reasonably safe condition can be precisely measured and accurately determined. Such determination must find resolution in each case on the basis of the particular fact situation involved. To the end of presenting an overview of fact situations in which the State (or other public body) was held to be negligent, and those in which the State or other public entity was held on the facts not to be negligent, representative cases are immediately hereinafter set forth and grouped according to whether the public body was found guilty or not guilty of negligent conduct in the performance of its duty.

Cases Allowing Recovery

In the following cases the State (or other public entity) was found to have been guilty of negligence in failing to perform its duty of maintaining the public highways in a condition reasonably safe for public travel.

The Court stated in *City of Louisville v. Hale's Administrator*, 238 Ky. 182, 37 S.W.2d 20 (1931), in respect to the duty of the City of Louisville, "to maintain its streets in a reasonably safe condition for the use of the public" that:

> [T]here is no fixed standard of the requirements of this duty. Its measure is not defined by statute. The requirements are not the same under all circumstances and in all places. In its very nature it is incapable of exact expression, or reduction to unvarying formula. . . . The rule is that, where the defect is such that reasonable men may differ as to whether it renders traveling unsafe for those exercising ordinary care for their own safety, the issue is to be submitted to the jury as one of fact.

The evidence of decedent's administrator in this case was to the effect that the deceased was standing in the back of a truck, which was proceeding at a speed of no more than 20 miles per hour, when it struck a hole in the city street 2 to 2½ feet wide and 2 to 4 inches deep, causing decedent to be thrown from the truck and killed by reason of skull fracture. The City introduced evidence to show that there was not a hole in the street but only an undulating depression that could not have caused decedent to fall from the truck. In affirming judgment for the plaintiff the Court said that the conflicting evidence was precisely of such nature as "to warrant submission of the case to the jury."

In *Jones v. Louisiana Department of Highways*, 338 So. 2d 338 (La. App. 1976), plaintiff, the operator of a motor vehicle, and three minor children who were passengers therein, were injured when the car, proceeding at approximately 40 miles per hour, struck a hole in the highway measuring 8 to 14 inches in depth and 12 to 24 inches in circumference, causing the automobile to veer off the roadway and roll over into a ditch. Uncontradicted testimony was introduced to the effect that the road was in generally poor condition and that the particular injury-producing hole had existed for at least 2 weeks prior to the accident. In sustaining the finding of negligence made below, the Court stated that the Louisiana Department of Highways "owes a duty to the public to maintain the state's highways in a reasonably safe condition" and to that end "is required to maintain an efficient system of inspection and repair" and ruled that "the fact that such a serious defect existed on an already poor roadway is sufficient proof the Department breached its duty to the motoring public."

Where plaintiff, the driver of an automobile, was injured by being thrown from the car when it struck a hole in the highway 3 feet long, 2 feet wide, and 7 inches deep, and it was shown that the State had knowledge of the hole more than 1 month prior to the accident, the State was "remiss in its duty" to repair the hole and guilty of such negligence as would authorize the plaintiff to recover in damages for injuries proximately caused by the presence of the hole. *Matthews v. State,* 14 Misc. 2d 253, 179 N.Y.S.2d 115 (1958).

Plaintiff, in *Munden v. Kansas City, Mo.,* 225 Mo. App. 791, 38 S.W.2d 540 (1931), was injured when his car collided with a hole in the city street measuring 2 to 3 feet in length, 1½ feet in width, and 8 to 9 inches in depth, causing the vehicle to leave the road and roll over a railroad embankment to the tracks below. In affirming judgment entered below for the plaintiff the Court upheld an instruction of the trial judge reading, in part, that "it is the duty of the defendant to exercise ordinary care in keeping its streets in a reasonably safe condition for the use of travelers . . . and if you find and believe from the evidence that the hole . . . was of such a nature as to make such street dangerous for travelers . . . then your verdict may be for the plaintiff."

In *Kane v. Cayuga County*, 254 App. Div. 613, 2 N.Y.S.2d 812 (1938), plaintiff's intestate died from injuries received when riding as a passenger in an automobile that ran into a hole in the road 2 to 3 feet wide and 3 to 6 inches deep, causing the vehicle to strike an obstruction and cross the road and overturn. HELD, that "the evidence presented a question of fact as to defendant's negligence" where survivors of the accident testified that the driver lost control of the vehicle after striking the hole.

Testimony that car crashed causing personal injuries after striking holes in the road of varying sizes and shapes, some as large as 3 feet in diameter and 6 in. deep, was sufficient to enable the trier of facts to find negligence on the part of the State of New York in failing to repair the road. *Steele v. State*, 7 App. Div. 2d 774, 179 N.Y.S.2d 934 (1958).

Injury suffered by plaintiff when his car travelling at 35 to 40 miles per hour struck a hole 1 foot wide and 2 to 6 inches deep and turned over, was compensable upon a showing that the section of roadway where the accident occurred was in generally poor condition and that the particular hole which caused the accident had been in existence for "many months" prior to the accident, the Court ruling, in *Fitzpatrick v. State,* 2 Misc. 2d 253, 151 N.Y.S.2d 534 (1936), that the "State has failed in its duty of reasonable care and such failure is negligence."

It was held in *Fleury v. State*, 9 App. Div. 2d 838, 192 N.Y.S.2d 825 (1959) that the evidence supported a finding of negligence on the part of the State of New York where evidence was introduced to show that plaintiff was injured when the car he was driving turned over after striking a hole in the highway measuring 8½ feet in length, 2½ feet in width, 2½ inches in depth, and extending at a 45-degree angle across the road.

Testimony that there were numerous holes in a city street ranging from 4 to 5 feet in circumference and up to 12 inches in depth was sufficient ground to submit question of negligence to the jury in an action brought by a motorcyclist who was injured when thrown from his cycle on hitting one of such holes. *City of Dalton v. Cochran,* 80 Ga. App. 252, 55 S.E.2d 907 (1949).

In *Tapscott v. City of Chicago*, 301 Ill. App. 322, 22 N.E.2d 774 (1939), a wrongful death action brought by the administratrix of the estate of decedent, it was held that the City of Chicago was liable on the ground of negligence in "failing to keep the street in repair" where it was stipulated that the decedent died of injuries received when the car in which he was riding struck a hole in the city street measuring 3 to 5 feet square and 12 inches in depth.

Introduction of evidence to show that plaintiff's decedent was killed when thrown from the car in which he was riding when it struck a hole in the city street measuring 18 to 24 inches square and 2 to 3 inches deep was sufficient to submit questions to the jury whether defendant municipality was negligent in failing to repair the defective condition. *Mayor and Council of Buford v. Medley,* 58 Ga. App. 48, 197 S.E. 494 (1938).

See also the following cases:

Graham v. Rudison, 348 So.2d 711 (La. App. 1977).

Dekowski v. Montgomery County, 263 App. Div. 697, 34 N.Y.S. 2d 457 (1942).

Erb v. City of Youngstown, 62 Ohio App. 482, 24 N.E.2d 629 (1937).

Cases Denying Recovery

In the following cases the public authority was held not to have breached the duty to keep roads under its jurisdiction in a condition reasonably safe for public travel and use.

The evidence in *Humphrey v. City of Des Moines*, 236 Iowa 800, 20 N.W.2d 25 (1945), tended to show that the holes in a street maintained by the City of Des Moines, which allegedly caused plaintiff's motor vehicle to turn over after striking one or more of the same, had a 2-inch drop around the edges and a maximum drop of 4 inches. Verdict in an action to recover damages for personal injuries was directed by the trial court in favor of the City. On appeal, the Supreme Court of Iowa, in affirming the action taken below, stated that municipalities "are not required to keep their streets free from irregularities and trifling defects" and ruled that "the fact that the holes complained of had a 2-inch drop around the edge would not render them so dangerous to vehicular travel as to constitute actionable negligence."

Jones v. City of Detroit, 171 Mich. 608, 137 N.W. 513 (1912), was an action to recover for personal injuries alleged to have been incurred when the truck in which plaintiff was riding turned over after striking a hole in the city street. At the close of the testimony the trial court found as a fact that the hole was only 3 inches deep, and directed a verdict for the defendant. On appeal, the plaintiff argued that conceding the hole was no more than 3 inches in depth it was, nonetheless, a question for the jury as to whether the City was negligent in failing to repair the same. In rejecting this contention and affirming the action of the trial judge, the Supreme Court of Michigan said:

> It is true that a pavement with several of such holes might make it jolty and unpleasant to ride over, but would not render it unsafe, if it were used as a highway is ordinarily used. Depressions of 3 inches in a county road would not render it unsafe, and, if not, why should they make a pavement unsafe? Nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they do it does not follow that they are unfit and unsafe for travel.

Throckmorton v. City of Port Angeles, 193 Wash. 130, 74 P.2d 890 (1938), was a wrongful death action brought by the father of a minor child killed when a fire truck of the City of Port Angeles, responding to a call, struck a hole in the city street 5 inches in depth, and jumped the road and ran down the child who was standing on the sidewalk. The Supreme Court of Washington, in reversing judgment below for the plaintiff, held that there was insufficient evidence to support a finding of negligence on the part of the City. The Court relied in making such ruling on evidence that the holes had been filled with dry gravel shortly before the accident, which had been thrown out by vehicles passing over them after being so patched. The Court stated that there was "no evidence as to what the city could have done to prevent the holes getting into the graveled surface of the roadway other than what it did."

Lindgren v. La Crosse County, 231 Wis. 347, 285 N.W. 772 (1939), was an action brought by the administrator of the estates of two deceased persons who lost their lives by drowning when the automobile in which they were riding struck holes in a county road and veered over an embankment into water. Judgment in favor of the plaintiff was entered at the trial level. The Supreme Court of Wisconsin reversed, basing its finding that the County could not be found guilty of negligence on the facts that the holes in question were patched on a Saturday, the patching washed out by rain on the following Sunday, and the county employees were enroute the next day, Monday, to again repair the holes when the accident occurred.

The foregoing cases serve to illustrate that, as stated at the outset of this section, the question of whether the public authority was guilty of negligence in failing to keep highways and streets under its jurisdiction and control in a condition reasonably safe for public travel is one of law for the court to decide or an issue for jury determination, depending entirely, as does the ultimate question of liability or nonliability, on the facts and circumstances of each individual case.

LIABILITY UNDER "HIGHWAY DEFECT" STATUTES

The statute law of some jurisdictions provides that the State shall be liable in damages to any person who without contributory negligence on his part shall be injured by a "defect" in a State highway. Actions brought pursuant to the terms of such statutes differ markedly from actions brought on a theory of common-law negligence. In suits instituted under the so-called "highway defect" statutes the plaintiff must prove not negligence on the part of the defendant but that a "defect" within the meaning of the statute existed. In other words the question for the court or issue for the jury is solely whether a "defect" did or did not exist. If found to exist negligence follows as a matter of law. A finding by the court or jury of the existence of a "defect" establishes negligence *per se* on the part of the State.[5]

The State of Kansas enacted an early "highway defect" statute, K.S.A. 68–419, reading in part as follows:

> Any person who shall without contributory negligence on his part sustain damage by reason of any . . . defect in a state highway . . . may recover such damages from the State of Kansas.

This statute has been the subject of construction in several cases. The most recent is *Thomas v. Board of Township Trustees of Salem Township*, 224 Kan. 539, 582 P.2d 271 (1978), an action brought against a township to recover for injuries sustained by the driver of a motor vehicle who struck a hole in the roadway causing his car to crash into a utility pole, wherein the Supreme Court of Kansas stated:

> The highway defect statutes, both K.S.A., 68–301 and 68–419,[6] have long been interpreted as based upon the theory of strict statutory liability rather than upon a theory of common-law negligence. Once a defect in a highway has been established negligence exists as a matter of law. K.S.A. 68–301 establishes a strict liability against a county or township in the event an actual defect exists in the highway. It is a concept based upon negligence *per se* arising from the failure of the county or township to maintain the highway in a condition safe for travel.

The holding in this case makes clear that a finding of a "defect" carries with it a finding of negligence *per se*. What is not made clear is the nature of the test or tests to be applied in determining the question whether a "defect" exists either as a matter of law or fact.

The courts of Kansas have consistently declined to attempt a definition of the word "defect." Neither guidelines nor standards have been offered that give material assistance in determining what constitutes a "defect" within the meaning of the statute. Rather each case is made to turn on an evaluation of the operative facts thereof. That the construction of the word "defect" is left purposefully open is made plain in *Collins v. State Highway Commission,* 134 Kan. 278, 5 P.2d 1106 (1931), wherein the Supreme Court of Kansas stated that there is no "rule by which to measure conditions generally and determine with precision whether a condition constitutes a defect."

Because each case must be decided on its own facts the results therein are varying. Thus, in *Williams v. Kansas State Highway Commission,* 134 Kan. 810, 8 P.2d 946 (1922), it was held that a hole measuring 2 feet in length, 10 inches in width, and 5 inches in depth, and one measuring 2 feet long, 10 inches wide, and 4 inches deep, constituted "defects" within the meaning of the statute. But in *Douglas v. State Highway Commission,* 142 Kan. 222, 46 P.2d 890 (1935), certain holes measuring 12 to 24 inches in diameter and 5 to 6 inches in depth were held not to be "defects" within the statutory meaning. For additional fact situations and holdings construing the language of the Kansas statute see *Shafer v. State Highway Commission,* 169 Kan. 264, 219 P.2d 448 (1950), and *Collins v. Kansas State Highway Commission,* 138 Kan. 629, 27 P.2d 216 (1933).

Cases in other jurisdictions having "highway defect" statutes also lay down no hard and fast rules as to what does or does not constitute a statutory "defect." Cases in these jurisdictions are similarly decided on the basis of the particular facts involved. Thus, in *Pendlebury v. City of Bristol,* 118 Conn. 285, 172 A. 216 (1934), the Supreme Court of Errors of Connecticut said in respect to an injury-producing hole measuring 2 feet in length, 2 feet in width, and 3 to 4 inches in depth: "That this hole might be found to constitute a defect in the highway within the meaning of General Statutes, § 1420, is not open to fair question." But in *Zacherer v. Town of Wakefield,* 291 Mass. 90, 195 N.E. 893 (1935), the Supreme Judicial Court of Massachusetts sustained the finding of the lower court that a hole in the roadway measuring 6 to 12 inches wide and no more than 3½ inches deep did not constitute a "defect" within the meaning of the Massachusetts statute.

A careful reading of the cases construing the "highway defect" statutes renders it fair to say that the fact situations justifying the finding of a "defect" closely approximate the fact situations leading to a finding of "negligence" in the cases tried under the actionable negligence theory. To the extent that this is so it is accurate to state that the "highway defect" statutes are complementary to the negligence approach to liability. The same result is likely to be achieved under either approach when dealing with the same fact situation. Nevertheless, it should be borne in mind that there is a sharp difference in underlying theory, the basis for recovery in the one being strict statutory liability and in the other ordinary negligence.

Next for consideration are the defenses to an action to recover damages for injuries suffered as the result of a defective highway condition.

CONTRIBUTORY NEGLIGENCE

Probably the defense most often asserted in actions to recover for injuries suffered or death incurred as a result of striking holes, openings, or like defects in the highway surface is that of contributory negligence. The plea of contributory negligence is an effective defense if proved because it serves as a complete bar to the plaintiff's own cause of action based on negligence. The rule is stated by Prosser, THE LAW OF TORTS, 3d ed., p. 427 (West Publishing Company, 1964) as follows:

> Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault; and the defense is one of plaintiff's disability, rather than the defendant's innocence.

The determination of whether plaintiff has been contributorily negligent is, like the determination of plaintiff's primary cause of action, based entirely on the facts of the particular case. No general rules can be stated that yield useful instruction. Because a study of the individual cases provides the most serviceable guidelines, the same are hereinafter set forth seriatim (in as brief form as possible) and grouped according to whether the plea of contributory negligence was held to be an effective defense or held not to be a bar to recovery.

Contributory Negligence Held Not Bar to Recovery

In the majority of the decided cases the defense of contributory negligence has not prevailed and served as a bar to recovery.

Plaintiff, in *Fullerton v. Kansas City, Mo.*, 236 S.W.2d 364 (Mo. App. 1950), was injured when the bicycle he was riding in the night hours struck a hole in the highway causing him to be thrown violently over the handlebars. Plaintiff testified that he could not see the hole because he was blinded by the lights of an oncoming car. Defendant contended that plaintiff was guilty of contributory negligence in that he did not immediately stop his bicycle upon realizing that he could not see because of the lights of the approaching car. In holding to the contrary the Court said:

> If he had stopped instantly, in the middle of the street, when he was blinded, he might have been struck from the rear by an automobile, or from the front, before he could have reached the curbing. . . . We cannot hold, under the evidence here . . . that the blinding lights had affected his vision for such length of time before the accident occurred that plaintiff was guilty of contributory negligence in not having stopped before his bicycle reached the hole.

Plaintiff testified in *Pearson v. City of Weaver*, 69 Idaho 253, 206 P.2d 264 (1949), that: "In order to keep from running into the other car that was approaching, I had to run into a big hole there in the pavement. I had to take my choice between running into this other car or taking the hole, and I took the hole." In ruling that plaintiff was not, on the basis of his testimony, guilty of contributory negligence as a matter of law, the Court upheld an instruction of the trial judge reading that "the fact that the plaintiff had previous knowledge of the existence of the hole in the pavement and notwithstanding such previous knowledge drove his truck into said hole, does not necessarily constitute contributory negligence on the part of the plaintiff."

It was contended by defendant municipality in *Willetts v. Butler Township*, 141 Pa. Super. 394, 15 A.2d 392 (1940), that plaintiff knew of the poor condition of the street on which he was injured as a result of striking a hole therein and that he was guilty of contributory negligence in travelling this route instead of an alternate which he knew to be safer and in better condition. In rejecting this contention the Court stated that a person who uses a street or highway that is open to the public knowing at the time that there is a safer route is not necessarily guilty of contributory negligence because he fails to select the more secure route.

It was held in *Munden v. Kansas City, Mo.*, 225 Mo. App. 791, 38 S.W.2d 540 (1931), that although evidence was introduced that it was raining and the temperature was at the freezing level when plaintiff's vehicle collided with a hole in the highway, plaintiff could not be held guilty of contributory negligence as a matter of law for failure to have used chains on his vehicle during such weather conditions.

In ruling that a motorist who was injured on colliding with a hole in the roadway was not guilty of contributory negligence by reason of failure to exercise ordinary care to avoid the hole after spotting it, the Court in *Netterville v. Parish of East Baton Rouge*, 314 So.2d 397 (La. App. 1975), stated:

> A motorist faced with a sudden emergency posed by an unforeseen roadway hazard, is not required to exercise the calm and deliberate judgment expected of an individual who has sufficient time to consider and weigh all possibilities of means for avoiding impending danger. Such a motorist is not negligent in failing to choose a course of action, which could have avoided the danger, provided his reaction to the peril and his efforts to prevent an accident were reasonable under the circumstances. The reason for the rule is that the law does not require a driver to exercise, under such circumstances, the same degree of care and caution as is demanded of a motorist who has ample opportunity for the exercise of full judgment and reason.

It was held in *Tapscott v. City of Chicago*, 301 Ill. App. 322, 22 N.E.2d 774 (1939), a wrongful death action arising out of a motor vehicle accident caused by the defective condition of a city street, that the question whether decedent driver was sufficiently intoxicated as to have been guilty of contributory negligence was a matter for the jury and that its finding he was not so intoxicated could not be disturbed.

The action of a motorcyclist in following so closely behind vehicles in front of him that he was unable to see holes in the roadway which lay ahead did not constitute negligence as a matter of law so as to bar him from recovering damages for injuries sustained when his cycle collided with one of said holes. *Mayor and City Council of Baltimore v. Poe*, 161 Md. 334, 156 A. 888 (1931).

See the following further cases wherein the defense of contributory negligence was held not to be a bar to recovery:

Pendlebury v. City of Bristol, 118 Conn. 285, 172 A. 216 (1934).
Shafer v. State Highway Commission, 169 Kan. 264, 219 P.2d 448 (1950).
Louisville v. Hale's Administrator, 238 Ky. 182, 37 S.W.2d 20 (1931).
Breaux v. Louisiana Department of Highways, 347 So.2d 1290 (La. App. 1977).
Jones v. Louisiana Department of Highways, 338 So.2d 338 (La. App. 1976).
Howell v. Burchville Township, 211 Mich. 418, 179 N.W. 279 (1920).
Chambers v. Kansas City, 446 S.W.2d 833 (Mo. 1969).
Lawlor v. County of Flathead, 582 P.2d 751 (Mont. 1978).
Fitzpatrick v. State, 2 Misc.2d 253, 151 N.Y.S.2d 534 (1956).
Dekowski v. Montgomery County, 263 App. Div. 697, 34 N.Y.S. 2d 457 (1949).
Erb v. City of Youngstown, 62 Ohio App. 482, 24 N.E.2d 629 (1937).

Contributory Negligence Held Bar to Recovery

In the following cases the defense of contributory negligence prevailed and was held a bar to recovery.

In *Backman v. State*, 67 App. Div. 2d 822, 413 N.Y.S.2d 65 (1979), the

New York Supreme Court (Appellate Division, Fourth Department) upheld a finding by the trial court of contributory negligence on the part of the plaintiff in an action brought by the latter to recover damages for injuries sustained when the motorcycle he was operating ran into a hole in the road and then crashed into a concrete guard rail, on the basis of plaintiff's own admission that he saw a shadow in the roadway and proceeded directly toward the same until he realized too late to take evasive action that it was in fact a hole in the surface of the highway. Affirmation of the judgment below was premised on the ruling that plaintiff failed to exercise due care in taking appropriate action to avoid the defective condition.

A finding by the trial court of contributory negligence on the part of the operator of an automobile was upheld in *Fleury v. State*, 9 App. Div. 2d 838, 192 N.Y.S.2d 825 (1959), apparently solely on the basis of the admission of the driver that he knew of the existence of the hole which produced the injury although he did not know its exact location. The Court in affirming judgment below simply stated:

> His conduct in driving . . . late at night over a narrow rough road on which he knew there was a dangerous condition, although he may not have known the precise location thereof, at a speed of from 40 to 45 miles an hour, can scarcely be labeled as reasonable and prudent conduct under the circumstances.

Where driver of a motor vehicle testified he failed to notice an oncoming tractor-trailer until nearly upon him and that he then swerved onto the shoulder of the road and back onto the pavement without reducing speed or applying the brakes, whereupon his vehicle struck a hole in the highway known to him to exist and the car was thereby precipitated against a tree, the driver was guilty of contributory negligence barring him from recovery in an action brought to secure damages, the New York Court of Claims stating that his conduct "constituted failure to use reasonable care under the circumstances." *Miner vt State*, 196 Misc. 752, 92 N.Y.S.2d 562 (1979).

Violation of an Ohio statute requiring automobile lights to be visible during hours of darkness "at least two hundred feet in the direction in which such motor vehicle is proceeding" constituted negligence *per se*, barring plaintiff from recovery in an action brought to recover damages for injuries sustained when the car he was driving collided with a hole in a city street, in which action plaintiff admitted, on cross-examination, that the lights of his automobile did not cast a beam of such distance as was statutorily required. *Village of Newburgh Heights v. Vanek*, 29 Ohio App. 517, 163 N.E. 721 (1928).[7]

In an action to recover damages sustained by reason of collision with a hole in a city street, plaintiff was guilty of contributory negligence barring him from recovery on the basis of his own testimony that he was proceeding at only 12 to 15 miles per hour and saw the hole when 50 feet therefrom, the Court stating that under such circumstances he could have, in the exercise of reasonable care, applied the brakes and avoided the hole. *Marshall v. City of Baton Rouge*, 32 So. 2d 469 (La. App. 1947).

Failure of the driver of an automobile proceeding at 35 miles per hour to see and avoid a hole in the roadway ahead measuring 18 inches in width and 14 inches in depth was held, in *Arcenaux v. Louisiana Highway Commission*, 15 So. 2d 638 (La. App. 1944), to constitute contributory negligence barring recovery in an action brought to secure damages for injuries suffered as a consequence of striking the hole. The Court dismissed plaintiff's testimony that his eyes were focused on curves ahead and approaching traffic rather than the condition of the road with the observation that:

> An automobile driver can easily keep his eyes so focused as to be able to tell whether the road is safe and, at the same time, be on the lookout for other traffic or curves in the road. As a matter of fact, even if it becomes necessary for a driver to carefully look at the surface of the road, the shifting of his eyes from that elevation to an elevation a few feet higher requires an infinitesimal fraction of a second and any careful driver can easily do this and make certain that the roadway is safe and also that he is not endangering other vehicles.

Shepherd v. City of Philadelphia, 279 Pa. 333, 123 A. 790 (1924), was a wrongful death action brought by the administratrix of the estate of decedent who was killed when his motorcycle struck a hole in a street of the City of Philadelphia. The trial court entered a nonsuit on the ground that decedent was negligent in the operation of his motorcycle. In affirming the judgment of the lower court, the Supreme Court of Pennsylvania relied on evidence showing that decedent was familiar with the street and its rutted condition, that the hole measuring 2 feet in length, 3½ feet in width, and 10 inches in depth was plainly visible, and that decedent was proceeding with such slow speed on his motorcycle that with the exercise of due care the accident could and should have been avoided.

The foregoing cases make it altogether clear that whether negligence is to be imputed to the plaintiff barring recovery is a question dependent entirely on the particular facts and circumstances of each individual case.

Comparative Negligence

The "all or nothing" effect of the common law rule of contributory negligence is, of course, modified in those jurisdictions that have adopted the doctrine of comparative negligence. In certain of these jurisdictions the plea of contributory negligence operates as a partial defense where the plaintiff is found guilty of less than 50 per centum of the total fault and a complete defense where 50 per centum or more of the negligence is attributable to the plaintiff. In other jurisdictions contributory negligence serves as a partial defense where the plaintiff is found guilty of any degree of negligence. Whichever the rule and whatever the jurisdiction no special problems are presented in applying the doctrine of comparative negligence to accidents caused by highway defects.

CONCLUSION

A protracted recapitulation of the rules herein discussed is not required. The same, although frequently difficult in application, are clear cut and well established. They are, by way of summary statement, as follows:

In an action to recover damages for injuries sustained or death incurred by reason of a defective highway condition, the burden rests on the plaintiff to establish that such condition was the proximate cause of injury or death and that the public entity having jurisdiction and control over the highway harboring the defect had actual or constructive notice thereof and sufficient time to take corrective action in respect thereto. The public authority having jurisdiction and control over highway systems is charged with the duty of exercising reasonable diligence to maintain the roads therein in a condition reasonably safe for public travel and use. A breach of such duty constitutes actionable common-law negligence. In jurisdictions having "highway defect" statutes the duty is imposed on the public authority to maintain its highways free from "defects." The breach of such duty entails liability on the ground of negligence *per se*. The defense of contributory negligence on the part of the plaintiff serves, when proved, as a complete bar to recovery except in jurisdictions where comparative negligence obtains.

All cases are decided within the framework of the principles as previously stated, but each ultimately turns on the particular fact situation which is therein involved.

[1] The term "pothole" is, of course, widely used to describe such frequently occurring road breakup. Use of the word is avoided in the text hereof solely to escape conflict with the technical dictionary definition attributed thereto of "pot-shaped hole in the surface." (See *Webster's Third New International Dictionary.*) Such definition or description is at variance with the factual situation found and described in many of the cases.

[2] 39 AM. JUR. 2d, *Highways, Streets, and Bridges,* § 372.

[3] Related papers involving duty of care to maintain highways in a reasonably safe condition are "Liability of State and Local Governments for Snow and Ice Control" and "Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed to Reducing Such Accidents on Highways" by Larry W. Thomas, in Vol. 3, *Selected Studies in Highway Law,* pp. 1869 and 1889, respectively.

[4] Notice is, of course, not required where in the course of construction or maintenance activities the highway agency has made an excavation, trench, or other opening in the highway surface. Nor is notice required where the highway agency has erected or installed signing warning of a defect in the highway surface. In the latter case it is to be noted that the presence of a warning sign is an important factor to be taken into consideration in determining whether the highway agency was negligent in failing to make prompt repair of the highway defect.

[5] It goes without saying that in actions brought under "highway defect" statutes it is necessary, as in suits brought on a theory of common-law negligence, to establish proximate cause and show actual or constructive notice of the defective condition of the highway.

[6] The former applies to counties and townships; and the latter, to the State.

[7] See, generally, in connection with inadequacy of vehicle lighting as constituting contributory negligence, Annot., *Contributory Negligence of Driver or Occupant of Motor Vehicle Driven Without Lights or With Defective or Inadequate Lights,* 67 A.L.R.2d 118.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and engineers responsible for the design, construction, maintenance, and operation of facilities. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in tort litigation cases.

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