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

A report prepared under ongoing 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 Technical Activities Division 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 special problems in highway law. This report deals with the liability of governmental agencies for injuries and death caused by motor vehicle accidents involving trees and other vegetation growing in the right-of-way or on adjoining private property.

This paper will be included in a future addendum to a 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, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new

papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. 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.

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

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INTRODUCTION

This paper considers the question of the liability of the State and its subdivisions for injury or death arising out of motor vehicle accidents caused by the presence in the right-of-way, or on adjoining private property, of trees, shrubbery, or other obstructive vegetative growth. There is a substantial body of case law that deals with this problem because trees, shrubbery, and other vegetative obstructions have been widely productive of motor vehicle accidents, many of them of the most serious possible nature. It goes without saying that the collision of a rapidly moving automobile with either a standing or falling large tree, or the intersectional crash of motor vehicles caused by vegetative obstruction of traffic signing, ordinarily results in grave physical injury, and, in all too many cases, death, or multiple death, is the result. Such being the case the extent of the exposure of the State and its subdivisions to substantial judgments and serious financial loss needs no comment.

By way of introduction to the body of this paper there may be set forth at this point certain fundamental principles that are governing in respect to all aspects of the tort liability of the State. The underlying rules that broadly announce the duty and care owed by the State to the motoring public in its use of highways may be stated as follows:

1. The State is not an insurer of the safety of its highways.
2. The duty of the State is limited to that of maintaining the highways in a condition reasonably safe for public travel by motorists exercising ordinary care.
3. In an action against the State to recover for injury or death caused by a defect lying in, on, or along the paved surface or shoulder or berm of the highway, it is necessary to establish that the defect was the proximate cause of the accident and as a necessary corollary that the sequential chain of events leading to the accident was not broken by an efficient, intervening, or independent cause.
4. As a further condition precedent to recovery it is necessary to establish that the State had actual or constructive notice of the defect and at the same time was accorded a reasonable opportunity to remedy the same.

Bearing these principles in mind we turn now to an examination of the case law relevant to the subject matter of this paper, after first noting the following: There are excluded from consideration herein cases wherein liability of the public authority was made to turn on the question of whether the challenged government activity fell into the classification of discretionary or ministerial, governmental or proprietary, the performance of a public or a private duty, or constituted actionable misfeasance or nonactionable nonfeasance. Cases involving the application of these dichotomies to determine liability are fully considered in the papers appearing in *Selected Studies in Highway Law* entitled, respectively, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," by Larry W. Thomas, Vol. 4, p. 1771, and "Personal Liability of State Highway Department Officers and Employees," by John C. Vance, Vol. 4, p. 1835. The defense of sovereign immunity is not at issue in any of the cases considered herein, all cases treated in this paper assuming both the suability and the liability (upon proof of negligence) of the public defendant.

Papers of related interest in the field of tort law that appear in *Selected Studies in Highway Law* include the following: "Liability of State and Local Governments for Snow and Ice Control," by Larry W. Thomas, Vol. 4, p. 1869; "Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed to Reducing Such Accidents on Highways," by Larry W. Thomas, Vol. 4, p. 1889; "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," by Larry W. Thomas, Vol. 4, p. 1966-N1; "Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges," by William P. Tedesco, Vol. 4, p. 1966-N55; "Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings," by Larry W. Thomas, Vol. 4, p. 1943; "Liability of the State for Injury-Producing Defects in Highway Surface," by John C. Vance, Vol. 4, p. 1966-N33; and "Liability of the State for Injuries Caused by Obstructions or Defects in Highway Shoulder or Berm," by John C. Vance, *NCHRP Research Results Digest 153*.

Distinction Between Trees Located in Rural and Urban Areas

A threshold matter which requires only cursory mention is that there exists some scant authority which seeks to draw a distinction, insofar as liability for roadside hazards is concerned, between trees growing in rural areas and trees located in urban areas. The distinction has its origin in the so-called "natural conditions" rule, which is succinctly stated and explained by Dean Prosser, as follows:

> The rule of non-liability for natural conditions was obviously a practical necessity in the early days, when land was very largely in a primitive state. It remains to a considerable extent a necessity in rural communities, where the burden of inspection and improving the land is likely to be entirely disproportionate not only to any threatened harm but even to the value of the land itself. . . . This is well illustrated by the cases of dangerous trees. It is still the prevailing rule that the owner of rural land is not required to inspect it to make sure that every tree is safe, and will not fall over into the public highway and kill a man. . . . But when the

> tree is in an urban area, and falls into a city street, there is no dispute as to the landowner's duty of reasonable care, including inspection to make sure that the tree is safe.[1]

The rule of non-liability for failure to remove dangerous trees located in rural areas was applied in *Hensley v. Montgomery County,* 25 Md. App. 361, 334 A.2d 542 (1975). This was an action brought by a motorist, severely injured when a large limb from a dead tree fell through the windshield of the vehicle he was operating. Named as co-defendants were the private landowner on whose property the tree stood, and the county having jurisdiction and control over the road on which plaintiff was traveling. The Court first applied the "natural conditions" rule to the situation of the private landowner in exonerating him from liability, stating:

> To those who dwell in urban areas with one or two trees in their yard at most, the onus of inspection is modest. The farmer, the developer or the landed gentry who own large and sometimes sprawling tracts of woodland adjacent to or through which a road has been built, may find the task of inspecting for trees dead, dying or decayed so potentially onerous as to make property ownership an untenable burden. . . . [T]he practical difficulty of continuously examining each tree in the untold number of cases of forest bordering roads . . . contrasts with an urban homeowner's inevitable awareness of one or a few ornamental trees situate in his yard. In the latter instance inspection is an incident of daily life, in the former it would be a time consuming and difficult effort. The growth and adaptation of the common law to our contemporary concerns should not impose impractical burdens or impossible duties.

In also exonerating the defendant county from liability the Court again relied on the rural-urban distinction, stating that the imposition of the duty on defendant county to inspect and remove trees in non-urban areas "would be far too great a burden on the taxpayer when balanced against the purpose to be served." It concluded by observing that there "are still some dangers from which we cannot rely upon the government for protection."

However, the rural-urban distinction was expressly rejected in *Taylor v. Olsen,* 282 Ore. 343, 578 P.2d 779 (1978), wherein the Supreme Court of Oregon took critical note of the ruling in *Hensley v. Montgomery County, supra.* This case likewise involved the question of the duty of care owed by both a private landowner and a government agency in respect to the inspection and removal of trees located in rural areas. The Court, in holding that the duty of inspection and removal may properly be imposed both on the private landowner and the governmental authority, after first noting the result reached in *Hensley,* had the following to say in repudiating the rural-urban distinction:

> The extent of . . . responsibility . . . cannot be defined simply by categorizing . . . land as "urban" or "rural." Surely it is not a matter of zoning or city boundaries but of actual conditions. No doubt a fact-finder will expect more attentiveness of the owner of an ornamental tree on a busy sidewalk than of the United States Forest Service . . . but the great variety of intermediate patterns of land use . . . prevents a simple "urban-rural" classification.

[1] *The Law of Torts,* 3d ed. § 57 (West Publishing Company, St. Paul, Minnesota).

Whether a rule of law having primary application to private landowners should have equal relevance for governmental agencies charged with the duty of promoting and protecting public safety is an open question, but the matter need not be dwelt upon, because in the vast majority of cases (as will be seen later herein) the rural-urban distinction is not even adverted to, much less given force and effect in the decisional process.

This paper now proceeds to a consideration of the cases involving motor vehicle accidents caused by collision with trees (1) standing in the right-of-way; (2) located outside the right-of-way; (3) falling or fallen across the riding surface; (4) overhanging the pavement; and (5) accidents caused by vegetative growth obscuring highway visibility.

TREES STANDING WITHIN THE RIGHT-OF-WAY

Although it is a normal incident of highway construction to remove trees standing within the designated right-of-way, there are throughout the road systems of the country innumerable instances of trees left standing within right-of-way limits. And it goes without saying that it is a natural and normal event for trees to spring up through natural propagation in grassy or unpaved portions of the roadway. With the emphasis placed in recent years on highway beautification, trees and shrubs have frequently been planted by highway authorities in median strips and along areas bordering the traveled way. Such plantings serve, in addition to scenic enhancement, the purposes of erosion control and other utilitarian aims. Thus, trees and shrubs, growing at some point within the right-of-way limits, are as much the rule as the exception.

The fact that large trees standing in the right-of-way constitute a hazard to motorists is sufficiently obvious as not to require comment. It is a known and accepted fact that a mature and deeply rooted tree can be as dangerous in the event of being struck by a moving vehicle as a steel or concrete emplacement in the roadbed, recent studies establishing that crashes with trees and utility poles constitute a major source of death on highways. Hence, the preliminary question arises as to whether negligence as a matter of law can be said to exist in allowing trees to stand at some point within the right-of-way limits thereby presenting a peril to motorists.

The answer to this question is in the negative. It is now well established that the mere fact that a tree is left standing within right-of-way limits does not constitute negligence as a matter of law carrying with it absolute liability for injury or death arising out of a motor vehicle collision therewith. The following cases illustrate the application of this rule:

In *Kinne v. State,* 186 N.Y.S.2d 895, 8 App. Div.2d 903 (1959), plaintiff motorist brought suit to recover for injuries sustained when the automobile he was driving was forced off the paved surface of the roadway by an oncoming car traveling in the wrong lane, causing plaintiff's vehicle to crash into a large maple tree growing within the right-of-way

limits at a distance of 3 ft from the edge of the pavement. The sole act of negligence charged against the State was failure to remove the tree from the position where it stood within the right-of-way limits. The New York Court of Claims found in plaintiff's favor and awarded damages. The Supreme Court, Appellate Division, Third Department, reversed, and in so doing stated:

> Claimant was very familiar with the road in question, and it is of course obvious that the tree in attaining a diameter of 20 inches had been there for many years. When the State provides an unobstructed pavement reasonably adequate to accommodate traffic it is permissible for it to use the remaining land within the boundary lines of the highway for other useful purposes. It is frequently required to place guardrails, culverts and drainage ditches in close proximity to the pavement. Trees enhance the beauty of highways, and serve a useful purpose. A paved highway 20 feet in width is adequate for public travel, and travel upon other lands within the State highway limits is not contemplated. A driver who is forced to leave the paved portion of the highway by the misconduct of some other driver would be as likely to hit a tree 10 feet from the pavement as he would one closer.
>
> Carried to its logical conclusion, the theory of negligence applied to this case would require that the State cut and remove every tree located within the extreme highway limits along every State highway in the State of New York, or permit them to remain at its peril of being subject to damages. . . . [T]he claimant has failed to establish that the State was negligent or that any act or omission on the part of the State was the proximate cause of his damages.

A similar result was reached in *Rafferty v. State,* 24 N.Y.S.2d 689, 261 App. Div. 80 (1941), an action to recover both for personal injuries suffered and death resulting from the collision of an automobile with a tree located in the 5-ft shoulder of the roadway at a distance of 32 in. from the paved portion of the highway. The driver of the vehicle testified that he was blinded by the lights of an oncoming car, pulled onto the shoulder, and immediately collided with the tree which he could not see. The sole question before the Court on appeal was whether the State was guilty of negligence in allowing the tree to stand in the right-of-way in close proximity to the paved surface. The Court held that permitting a tree to stand in the right-of-way does not constitute negligence as a matter of law, and that upon the basis of the evidence before it, the lower court was justified in finding as a fact that the State was not guilty of negligence in allowing the tree to stand in its particular position relative to the traveled way.

Goodrich v. Kalamazoo County, 304 Mich. 442, 8 N.W.2d 130 (1943), was an action brought by the administratrix of the estate of the deceased who, while riding as a passenger in an automobile, was killed when the driver thereof swerved onto the shoulder, for reasons not determined at trial, and caused the vehicle to collide with a tree that was situated in the shoulder of the road at a distance of 30 in. from the paved surface. It was conceded that the highway in question was under the jurisdiction and control of defendant Kalamazoo County. In reversing judgment entered for plaintiff below the Court ruled that permitting the tree to stand in the right-of-way did not constitute negligence as a matter of law and that no material evidence was adduced on the basis of which it could have been found that defendant county was guilty of negligence in the maintenance of the highway and the discharge of its statutory duty to keep the way "reasonably safe for public travel."

See also *Taylor v. City of Cincinnati,* 143 Ohio St. 426, 55 N.E.2d 724 (1944), an action brought against the City of Cincinnati to recover for injuries sustained by a passenger in an automobile which crashed into a large elm tree located in the berm of the roadway at a distance of but 20 in. from the paved surface. The accident occurred as the result of evasive action taken by the driver of the vehicle in departing the traveled portion of the way to escape a head-on collision with another automobile. The Supreme Court of Ohio, in affirming the judgment entered below for defendant City, ruled that the lower court was justified in finding that the City was not guilty of negligence in allowing the elm tree to stand in the right-of-way at a distance of less than 2 ft from the traveled portion of the City street.

Although it is thus clear that permitting a tree to stand in the right-of-way does not constitute negligence as a matter of law, it is equally clear that, where injury or death occurs as a result of a motor vehicle collision with a tree or stump standing in the right-of-way, a jury question is ordinarily presented whether the State or other governmental agency is guilty of negligence as a matter of fact in allowing the tree or stump to stand in its particular position relative to the paved surface or traveled way. The question for jury decision is whether or not the tree or stump is so situated as to be reasonably safe for motor vehicle travel. If the jury question is answered in the negative, it follows that there has been a violation of the duty of the State and other highway agencies to maintain public ways in such condition as is reasonably safe for use by the motoring public. Exemplary are the following cases.

Plaintiff, in *Meridian City Lines v. Baker,* 206 Miss. 58, 39 So.2d 541 (1949), was injured when the vehicle he was driving, in seeking to avoid collision with an oncoming passenger bus, struck a large tree, the trunk of which protruded a distance of 2.7 ft from the sidewalk into the paved surface of a city street. Action was brought against the City of Meridian for negligence in allowing the tree to occupy a portion of the surfaced roadway. In affirming judgment for plaintiff below the Court confined itself to the statement that "the jury was abundantly warranted in finding the city guilty of negligence in permitting such a permanent traffic hazard in the traveled portion of its street."

In *Hendrick v. Kansas City,* 227 Mo. App. 998, 60 S.W.2d 704 (1933), where plaintiff was injured when the automobile that he was driving at nighttime collided with the stump of a tree left standing in the center of a street of the City of Kansas City, the finding of the lower court that the municipality was guilty of negligence in allowing the stump to stand in the midst of the traveled way, unguarded and unillumined in the hours of darkness, was affirmed without comment by the appellate court.

Plaintiff, in *Fox v. Village of Nassau,* 44 N.Y.S.2d 906, 266 App. Div. 1058 (1943), suffered damage to his truck and trailer when it collided with a tree standing in the midst of the main street of defendant Village of Nassau. In reversing a nonsuit entered below the Supreme Court of New York, Appellate Division, stated that "it was the duty of the village to remove the tree if it rendered or was reasonably likely to render public travel . . . unsafe."

City of Waco v. Killen, 59 S.W.2d 940 (Tex. Civ. App. 1933), was an action brought by a guest passenger in an automobile to recover for injuries sustained when the automobile in which she was riding crashed into a tree stump situated off the paved surface but within the right-of-way of a street of the City of Waco. The stump was not guarded against by rail or barrier and no signing warned of its presence. In affirming judgment against the City of Waco the Court stated:

> Under the evidence we think it was a question of fact for the jury to determine whether or not said stump was in such close proximity to the used portion of the street as to endanger those using the street in a prudent manner and whether or not the city was negligent in failing to provide some protection to prevent striking said stump.

Thus, in the ordinary situation the question whether a highway agency is guilty of negligence in allowing a tree or stump to stand within the confines of the right-of-way is one of fact for jury determination, and the circumstances of the particular case will be determinative of the question of negligence.

TREES LOCATED OUTSIDE THE RIGHT-OF-WAY

The fact that a tree or stump stands outside the actual right-of-way limits does not in and of itself relieve the State of liability for injury or death arising out of vehicular collision therewith. If a tree or stump stands in close proximity to the traveled way, and is so located as to constitute a hazard to prudent drivers who, consistent with the exercise of ordinary care, have occasion to leave the traveled way, the State or its governmental subdivisions having jurisdiction over highways may be found liable for negligent failure to protect against the dangerous condition, by means of guardrails, barriers, signing, or by physical removal of the hazardous tree or stump. The question whether the highway agency was, under all the circumstances, guilty of negligence, is one of fact for jury determination. Such rule is given application in the following cases.

Williams v. Saratoga County, 43 N.Y.S.2d 641, 266 App. Div. 431 (1943), was an action brought to recover damages for the death of a passenger in an automobile who was killed when the driver of the vehicle in which he was riding at nighttime on a road owned and maintained by Saratoga County failed to negotiate a turn and crashed into a row of trees located a short distance from the macadam surface of the road. The Court found that only one sign signalled the upcoming curve, and that over the preceding 10 years there had been more than a dozen accidents involving cars failing to make the turn and colliding with the trees, which were deeply scarred as a result of the previous accidents. In sustaining judgment rendered below for plaintiff administratrix the Court said that although "the curve alone was not so sharp as to create a dangerous condition, when coupled with the other elements it created a situation which the jury might properly say was unreasonably dangerous. . . . [T]he questionable adequacy of the sign . . . [and] the proximity of the trees to the pavement, [sic] united to render this particular portion of the highway dangerous, and the many previous accidents gave the county more than ample warning of this condition."

Hubbard v. Estate of Havlik, 213 Kan. 594, 418 P.2d 352 (1974), involved consolidated personal injury and wrongful death actions brought against a municipal defendant alleging negligence on the part of the municipality in failing to sign or otherwise guard against the presence of a large elm tree standing near the paved surface of a street of the city. In affirming judgment rendered against the city the appellate court dismissed as "without merit" the contention of the city that there was no evidence to support the charge that the presence of the large tree in close proximity to the city street did not constitute a condition hazardous to the motoring public.

Provine v. Bevis, 70 Wash.2d 131, 422 P.2d 505 (1967), was an action brought by a guest passenger in an automobile who was injured when the car in which she was riding at nighttime struck a tree stump located at a point beyond the end of a road owned and maintained by defendant Pierce County. The complaint charged the County with negligence in failing to warn of the dead-end character of the road with reflectorized signing or otherwise indicate by adequate signing the danger created by the presence of the tree stump. In affirming judgment entered for plaintiff below the Court ruled that the question of negligence was properly submitted to the jury.

And in *Baran v. City of Chicago Heights,* 43 Ill.2d 177, 251 N.E.2d 227 (1969), plaintiff was injured when he drove his automobile past the dead end of a street owned and maintained by the City of Chicago Heights and crashed into a nearby tree. The street on which he was traveling at a moderate rate of speed at nighttime ended in a "T" intersection that was not forewarned by reflectorized or other type of signing. In affirming judgment rendered for plaintiff below the Court ruled that the issue of negligence on the part of the City in allowing the tree to stand at the point where the street ended abruptly and without warning was properly submitted to the jury.

However, in *Norris v. State,* 337 So.2d 257 (La. App. 1976), involving consolidated actions to recover for injuries and death occurring in a motor vehicle accident where an automobile traveling at a high rate of speed left the highway and crashed into a large hackberry tree situated 9 ft 3 in. from the paved surface, the Court, in upholding the lower court's finding that the Louisiana Highway Department was not guilty of negligence in permitting the tree to stand without warning or barrier at a distance of 9 ft 3 in. from the traveled way on a sharp curve, stated:

> Regarding the hackberry tree situated 9 feet 3 inches from the edge of

La. 498, the trial judge found that ... said tree presented no hazard to the driver exercising a reasonable degree of care. ... [W]e are of the opinion that the evidence supports a finding that the hackberry tree was not an obstacle which was patently dangerous to an ordinarily reasonable and prudent driver.

Although it is evident that the further a tree is positioned from the edge of the right-of-way the more difficult the proof of negligence becomes, there is no rule of thumb by which to determine what constitutes a safe distance, and each case must be determined in the light of its own facts. The test is whether or not the tree is so located in relation to the traveled way as to constitute a condition reasonably safe for prudent drivers exercising ordinary care in the operation of their motor vehicles.

FALL OF TREES BORDERING THE TRAVELED WAY

In a number of cases suit has been brought to recover for damages incurred when a falling tree or limb struck a moving vehicle. It is obvious that when a collision occurs between an automobile moving at high speed and a large and heavy falling tree or limb, the consequences can be disastrous, and, resultantly, a large number of cases involve wrongful death actions or suits to recover for grave and sometimes permanently incapacitating personal injuries. The courts have uniformly recognized that dead, diseased, or decayed trees are likely to fall of their own accord or be toppled by strong winds onto the highway, and have consequently imposed on highway agencies the duty to be on constant alert to correct the dangerous conditions presented by their presence.

This is true whether the trees are located within the right-of-way limits or outside of the right-of-way limits, as the danger to the motoring public of a falling tree or limb is obviously not lessened by the fact that the tree stands on private land adjacent to the right-of-way proper rather than within the right-of-way itself. Thus, the duty of inspection, and removal where necessary, is imposed notwithstanding that procedures formal or informal must be instituted to enter on private land for the purposes of inspection, and where required, the elimination of a public hazard. The defenses of civil trespass or unlawful taking where interposed are given short shrift by the courts. The duty is imposed to take all such steps as are necessary under local law to enter upon private land for the purpose of protecting highway users from conditions on such land hazardous to the motoring public.

Since the duty of inspection and removal where required is clear, the question in virtually all of the cases is whether the governmental entity charged with the maintenance of the roadway had adequately performed such duty; and the resolution of this question in the majority of the cases in turn rests on the question whether the highway agency was in receipt of actual notice, or could be charged with constructive notice, of the dangerous condition of the tree prior to its fall.

First for consideration are the cases involving the fall of trees situated within right-of-way confines.

Trees Located Within the Right-of-Way

In the following cases recovery was allowed on the ground that the governmental entity charged with the duty of inspection had either actual or constructive notice of the dead, diseased or decayed condition of the tree, and hence was charged with knowledge of the danger that it might suddenly break and fall across the highway.

Cases Allowing Recovery

Rinaldi v. State, 374 N.Y.S.2d 788, 49 App. Div. 2d 361 (1975), was a wrongful death action brought to recover damages for the demise of the driver of a vehicle along a New York State highway who was crushed to death when a 160-year old maple tree growing within the right-of-way limits suddenly fell on top of the automobile that he was operating. The lower court awarded damages in the amount of $375,000.00. In affirming such judgment the Supreme Court, Appellate Division, Third Department, found that the State had constructive notice of the dangerous condition of the tree, by reason of the fact that although the upper portion thereof was obscured from view by limbs and foliage, the lower and visible portion disclosed a hole in the trunk measuring 1 ft in depth and 1 ft in diameter, indicating a process of decay that had been continuing for many years. Stating that such condition "should have been observed by the many Department of Transportation officials and work crews who so frequently traversed thereon," the Court went on to rule that:

> The exercise of reason does not dictate the impossible task of climbing and bore-testing all of the trees within the State's vast highway system, as appellant suggests. However, it does require at least occasional casual observation, and reason dictates that those observing see what is plainly there to be seen and that they initiate appropriate corrective action.

In *City of Birmingham v. Coe,* 31 Ala. App. 538, 20 So.2d 110 (1944), an action was brought to recover for personal injuries suffered when a large elm tree standing in the right-of-way of a street of the City of Birmingham fell on the automobile in which plaintiff was riding as a passenger. An examination of the tree subsequent to the fall disclosed that the tap root was rotten and the branch root decayed, thus producing the weakened condition that led to the accident. Although the testimony was conflicting as to whether the diseased subsurface condition of the tree could be detected from an observation made above ground, the Court, in sustaining judgment rendered below for plaintiff, held that there was sufficient evidence to allow the question to go to the jury whether the City had failed in its duty to maintain its streets in such condition as not to present a hazard to the motoring public.

Suit was filed in *City of Phoenix v. Whiting,* 10 Ariz. App. 189, 457 P.2d 729 (1969), to recover for the wrongful death of a motorist who was killed when a large cottonwood tree standing in the right-of-way of a street of the City of Phoenix fell on and crushed the vehicle she was driving. Examination of the tree disclosed that its fall was due to the

inadequacy of its root system. The evidence was conflicting as to whether the weakened condition of the tree could be detected by observation, some witnesses testifying that the tree was in foliage and appeared healthy, and others testifying that "conks" indicating decay were visible, and that the tree was known to have dropped branches before its fall. In affirming judgment entered below against the City of Phoenix the Court ruled that there was sufficient evidence to go to the jury on the question whether the City had constructive notice of the decaying condition of the tree entailing the duty to remove it from the City street if a hazard to the traveling public was presented by its condition.

City of Jacksonville v. Foster, 41 So.2d 548 (Fla. 1949), was an action to recover for injuries sustained by the driver of an automobile who was hurt when a tree standing in the right-of-way of a city street fell upon and demolished the vehicle she was operating. In sustaining judgment rendered for the plaintiff the Supreme Court of Florida ruled that sufficient evidence was presented to enable the jury to conclude that defendant City of Jacksonville had constructive notice of the dangerous condition of the tree by reason of the fact that (1) a white fungus growth appeared on the tree at the earth line indicating a decay of the root structure, and (2) by the presence of a decayed hole at the bottom of the trunk which was apparent even to the casual observer.

Holding that the fact a municipal corporation did not have any employees whose duties included inspection of trees located in the city streets to determine if they were in safe condition did not relieve the city of its duty to maintain the public streets in a condition reasonably safe for travel, the Court in *City of Bainbridge v. Cox,* 83 Ga. App. 453, 64 S.E.2d 192 (1951), upheld a judgment rendered against the City in favor of plaintiff who was injured by the fall of a tree on her moving vehicle, where the evidence established that a private citizen had caused major repair work to be performed by a tree surgeon on a decayed portion of the tree, and that such repair work was plainly visible for all to see including officers and employees of the municipal corporation.

Abelove's Linen Supply, Inc. v. State, 196 N.Y.S.2d 814, 20 Misc.2d 821 (1960), was an action to recover for damage to claimant's tractor caused by the fall of a large limb from a tree standing in the right-of-way of the New York State highway on which the tractor was moving. It was developed by the evidence that the tree from which the limb fell had been identified by the New York Department of Public Works as being in a decayed and dangerous condition and as a result had been "marked for removal some years prior to the accident." In awarding damages to the claimant the Court stated that the dangerous condition of the tree had "existed for a sufficient length of time to give the State adequate notice of the possible results if left standing in a state of disrepair" and that the failure of the State to "remove or repair a dangerous tree is negligence and ... the sole proximate cause of the accident alleged in the claim."

In *Edgett v. State,* 184 N.Y.S.2d 952, 7 App. Div. 2d 570 (1959), the claimants were injured by the fall of a dead limb from a tree standing in the right-of-way of the New York State highway on which they were traveling. Evidence was introduced to show that the tree was in a state of decay and that the State had actual notice of such condition. In awarding damages to the claimants the Court stated that: "A tree owned by the State with branches overhanging the highway constitutes potential danger to the traveling public and the duty to properly inspect and correct by trimming or removal is essential to proper maintenance."

The facts in *Goranson v. State,* 156 N.Y.S.2d 939, 2 App. Div.2d 895 (1956), disclosed that claimant was riding as a passenger in the front seat of an automobile being driven by her husband along a highway of the State of New York when the vehicle collided with the fallen part of a "Y"-shaped tree which split at its crotch, leaving part of the tree standing where it grew, a distance of "five to six feet from the southerly edge of the pavement." The evidence established that the tree was approximately 100 years old and was badly rotted and decayed at the point of the break. Testimony was introduced to show that the local office of the New York Department of Transportation had been notified of the dangerous condition of the tree prior to the accident. In awarding damages to the plaintiff the Court found that the "State had actual notice of the defective condition of the tree" and that it "failed both in the duty of inspection and removal." Emphasizing that no "signs of the dangerous condition were posted or notice given to travelers by the State," the Court ruled that "the proximate cause of the accident was the negligence of the State."

In *Siegel v. State,* 290 N.Y.S.2d 351, 56 Misc.2d 918 (1968), plaintiff was seriously injured when a large tulip tree standing within the right-of-way limits of the Long Island Expressway fell on the car he was driving. A section of the fallen tree was picked up after the accident and expert testimony adduced at the trial was to the effect that the tree had been weakened by an attack of carpenter ants, and that such fact would have been disclosed by a routine examination of the tree. The State's witness, who was the foreman in charge of detecting and removing dead and decaying trees along the Long Island Expressway, testified that he had observed no evidence of decay in the tree in question, but admitted under questioning that his inspection had been conducted from within the confines of a moving vehicle. In awarding damages to the claimant the Court ruled that the State was charged with constructive notice of the decayed condition of the tree and that its failure to remove the same constituted actionable negligence.

Diamond v. State, 385 N.Y.S.2d 827, 53 App. Div.2d 827 (1976), involved a suit to recover for personal injuries suffered when a large maple tree fell on top of a car that plaintiff was driving along a New York State highway. The sole question on appeal from a judgment rendered in favor of the plaintiff was whether the State could be charged with constructive notice of the decayed and dangerous condition of the tree where inspection of the side of the tree facing the roadway had been made on foot by a State employee and such examination disclosed no evidence of decay, and the Court found that the "sole external and recognizable sign of the diseased nature of the tree was on the side not facing the highway." In sustaining the judgment entered below, the

Court reasoned that because the examination of the tree had been made on foot by the State's employee he should in the course of diligent inspection have walked around the tree, and stated that had he done so the decaying condition of the tree would have become immediately apparent to him, and that his failure to complete the inspection constituted actionable negligence.

However, where the evidence adduced at trial fails to establish that the public authority has actual notice or could be charged with constructive notice of the dangerous condition of the tree before its fall, recovery is denied.

Cases Denying Recovery

Thus, in *Berkshire Mutual Fire Insurance Company v. State,* 189 N.Y.S.2d 333, 9 App. Div.2d 555 (1959), the finding of the trial court in an action to recover damages for personal injuries sustained in the fall of a tree limb on a moving automobile that the State had neither actual nor constructive notice that the fallen limb was in weakened condition was sustained by the appellate court on the ground that the evidence adduced at trial failed to establish visible external evidence of decay, and to the contrary, the fact that the tree was in foliage left the impression that it was alive and free from defect.

And in *Piety v. City of Oskaloosa,* 250 Iowa 374, 92 N.W.2d 577 (1958), an action was instituted against the City of Oskaloosa to recover damages for injuries suffered by the occupant of a parked car which was standing at a meter on the City street when the entire top of a tree located in an adjacent park owned by the City suddenly broke off and fell on top of the parked vehicle. In denying recovery on the ground that the City had neither actual nor constructive notice of the dangerous condition of the tree the Court emphasized that the record contained not "a word of testimony that, prior to the break, this tree appeared, or was thought to be, decayed or unsafe" and hence the record displayed not "even a scintilla of evidence tending to show a breach of duty upon the part of defendant."

Next for consideration are the cases involving the fall of trees standing without the right-of-way.

Trees Located Outside the Right-of-Way Limits

It is clear from the cases that the fact a tree stands outside the right-of-way limits growing on private property does not relieve the public authority of the duty of inspection and the necessity to take such corrective action as is required to eliminate the hazard created by the presence of a dead, diseased, or decaying tree that is likely to fall across the highway causing injury or death to the motoring public.

Such rule is announced and applied in the following cases.

Cases Allowing Recovery

Barron v. City of Natchez, 229 Miss. 276, 90 So.2d 673 (1956), was a wrongful death action to recover damages from the City of Natchez for the demise of the occupant of a motor vehicle killed when a tree growing on private property adjacent to a city street fell on the car in which she was riding. The evidence established that the tree was badly decayed and testimony was offered to show that the owner of the private property on which the tree stood had requested the City of Natchez to remove the tree because of the hazard it presented to passing motorists. In reversing the action of the trial court in sustaining a demurrer to the complaint the Supreme Court of Mississippi stressed the fact that the City had received actual notice of the dangerous condition of the tree and ruled that the City was under a duty to remove the tree notwithstanding the fact that it was located on private property outside of the right-of-way limits of the public thoroughfare.

Suit was brought in *Brown v. State,* 58 N.Y.S.2d 691, 2 Misc. 2d 307 (1945), against the State of New York to recover damages for injuries sustained by the driver of a truck incurred when a large elm tree whose trunk stood in private property outside the right-of-way limits of a State highway either fell in front of or on the truck as it was proceeding along the highway. The evidence established that for a period of 10 years prior to the accident the center portion of the tree was bare of leaves indicating a condition of ongoing decay and that a large hole appeared on the side of the trunk facing away from the highway. Ruling that the State had either actual or constructive notice of the dangerous condition of the tree the Court of Claims stated in granting recovery to the plaintiff:

> The State is obligated to maintain its highways in a safe condition for travel, not only with regard to obstructions and defects in the traveled portion of the road, but also with regard to conditions adjacent to . . . the highway which might reasonably be anticipated to result in injury and damage to the users thereof. The fact that the trunks of trees were located outside the highway right-of-way is of no consequence.

The New York Court of Claims reached the same result in *Messinger v. State,* 51 N.Y.S.2d 506, 183 Misc. 811 (1944), an action to recover for permanent injuries received when a 10 to 12 ft limb of a large sugar maple tree growing in a grove on land outside the right-of-way limits of the State highway on which plaintiff was traveling fell through the windshield of plaintiff's motor car and pierced her through the abdomen. The fallen limb showed signs of decay in that it was dry and leafless. In holding the State of New York liable the Court stated:

> It is well established that the State highways must be maintained in a safe condition for travel, not only as respect defects and obstructions in the traveled portion of the roadbed, but also for conditions adjacent to and above the highway which could reasonably be expected to result in injury and damage to the users thereof. The State defends . . . on the ground that it was a fortuitous happening that could not have been reasonably anticipated. This defense we hold is without merit. The highway patrolmen were bound to perform their duties in a diligent and thorough manner, and had they done so in the present instance, would have noticed that the trees were old and that broken and lifeless branches suspended in the tree-top were eventually bound to fall . . . we hold that

> the State is liable for allowing a condition to exist which should have been observed by the patrolmen in the performance of their ordinary duties. The fact that the trunks of trees were outside of the highway right-of-way is no defense. . . .

Also holding that the fact that a tree was growing on private land adjacent to the highway was not a defense in an action brought by a motorist injured in the fall of the tree across the highway, the Court in *Fitzgerald v. State,* 96 N.Y.S.2d 452, 198 Misc. 39 (1944), finding that the State had constructive notice of the decayed condition of the tree in question, ruled that it was "well established that the State is under a duty to make a reasonable inspection of trees along state highways and to trim or remove such trees or portions thereof as are discovered to constitute a danger to users of state highways."

Julian v. State, 63 N.Y.S.2d 364, 187 Misc. 146 (1946), was an action to recover damages for personal injuries suffered by the driver of an automobile and passengers therein when their vehicle, in proceeding along a New York State highway, collided with the 31-ft limb of a maple tree that had fallen onto the paved surface from the trunk of the tree located on private property outside the right-of-way at a point 7 ft distant from the pavement. The evidence disclosed that the tree displayed a decayed area reaching from ground level to a point 15 ft above and that such defect was plainly visible from the highway. In finding that the State had constructive notice of such defect, and awarding damages to plaintiffs, the Court ruled that the State was under a duty to maintain areas adjacent to the roadway as well as the main traveled way itself in a condition safe for travel, stating that:

> The State, through its highway employees, was under a duty to make a reasonable inspection of the tree and to take steps to eliminate the dangerous condition, which such inspection would have revealed. The dangerous condition of this tree was never reported, nor was any action taken to eliminate it and such failure to inspect and to take action amounted to negligence on the part of the State for which it is liable to respond in damages for the resulting injuries.

An action was brought in *Miller v. County of Oakland,* 43 Mich. App. 215, 204 N.W.2d 141 (1973), to recover for injuries suffered by plaintiff when a dead elm tree standing alongside the county road over which she was driving toppled onto and crushed the vehicle she was driving. A State statute rendered counties liable for failure to keep county roads in a "condition reasonably safe and fit for travel," but limited such liability "to the improved portion of the highway designed for vehicular travel." The defense was asserted that the complaint was fatally defective in that it did not "pinpoint the location of the tree prior to its fall" (i.e., within or without the right-of-way limits). In ruling against defendant County of Oakland the Court stated that "the legal relevance of this omission is ephemeral" in light of the fact that defendant had actual or constructive notice that the tree "constituted a potential hazard."

Jones v. State, 227 N.Y.S.2d 297, 33 Misc.2d 959 (1962), was an action to recover for injuries suffered by automobile passengers when a large tree located in an area bordering the right-of-way fell on the car in which they were riding. An examination made after the accident established that the tree was afflicted by advanced core decay, swelling and deterioration of the sap tissue, depressed fissures, and discolored bark fungus. Ruling that the State was under a duty to make an inspection of trees bordering its highways "whether the trunks of the trees are inside or outside of the highway bounds," the Court found in awarding judgment for claimants that the State had either actual knowledge or was charged with constructive knowledge of the dangerous condition of the fallen tree.

In *Husovsky v. United States,* 590 F.2d 944 (C.A.D.C. 1978), an action was brought against the United States Government and the District of Columbia by the driver of a motor vehicle, injured as the result of the fall on his vehicle of a substantial portion of a large tree. The facts disclosed that on the day of the accident plaintiff was driving his car along Klingle Street, a road owned and maintained by the District of Columbia, which traversed Rock Creek Park, a public park owned and controlled by the Federal Government, and that the tree, a giant tulip poplar measuring 90 ft in height and weighing 10 tons, stood in the park area at a point 6 ft distant from the edge of the right-of-way of the District of Columbia. Inspection of the fallen portion of the tree disclosed that it was suffering from rot. In affirming judgment rendered against the District of Columbia the Federal Court of Appeals ruled that the fact that the tree was located on land owned by the United States Government did not absolve the District of Columbia from liability for negligence in failing to inspect the tree and ascertain that its condition was dangerous to travelers on the adjacent roadway owned and controlled by the District.

Inabinett v. State Highway Department, 196 S. Car. 117, 12 S.E.2d 848 (1941), was an action brought by a motorist who suffered permanent partial paralysis as the result of the fall of a large oak tree on the vehicle in which she was riding as a passenger. The evidence established that the tree was growing on private land abutting the highway and that the trunk thereof at its nearest point was located 2 in. distant from the right-of-way limits. The evidence further established that signs of decay of the trunk were visible from the highway. In holding the South Carolina Department of Highways liable the Court stated that if the "Department knew, or by the exercise of ordinary care would have known of the condition of the tree . . . it was its duty to remove it, or otherwise protect the safety of persons using the highway."

In respect to the asserted defense that it would have constituted trespass for the Department to enter on private land and remove the tree the Supreme Court of South Carolina said that if the Department "in the exercise of ordinary care . . . should know that a tree is dangerous to the safety of the public in its use of the highway, it is its duty to enter upon the land and remove the danger."

Thus it is seen that the fact that a tree is located on private property abutting the highway does not relieve the governmental entity having jurisdiction and control over the adjacent road of the duty to inspect and take whatever corrective action is required in respect to trees bor-

dering the roadway that constitute a danger to motorists traveling thereupon.

However, as in the case of trees located within the right-of-way, liability can be predicated only upon a showing of actual or constructive notice of the dangerous condition of the tree prior to its fall. Thus, in the following cases recovery was denied on the ground that the evidence failed to establish that the State or governmental subdivision had actual notice or could be charged with constructive notice of the dangerous condition of the tree located outside right-of-way limits that fell and caused the injury-producing accident.

Cases Denying Recovery

Harris v. Village of East Hills, 41 N.Y.2d 446, 393 N.Y.S. 2d 691, 362 N.E.2d 243 (1977), was an action brought to recover for severe injuries suffered when a large limb from a maple tree broke away and crashed through the roof of a motor vehicle being operated by plaintiff. The injuries which he suffered were such as to render him a paraplegic requiring medical attention for the remainder of his life. The tree was located on property of the Village of East Hills situate adjacent to a road owned by the County of Nassau, on which plaintiff was traveling. Both governmental entities were joined as defendants. The New York Court of Appeals affirmed the judgment rendered below in favor of the County of Nassau on the ground that the County had neither actual nor constructive notice of the dangerous condition of the tree.

The evidence brought out at trial established conclusively that if tests had been made before the accident by tapping the tree it would have been discovered that the rot affecting the fallen limb had produced almost total interior disintegration, and that the tree and limb thus represented a serious threat to motorists on the adjacent highway. In absolving the County of Nassau from liability because of lack of actual or constructive notice the Court of Appeals stated:

> [T]he county maintains regular supervision of their roads through scheduled police patrols. . . . [T]he Nassau County Police Officer assigned to Locust Lane, testified that he regularly patrolled the area and on such patrols, he observed no objective signs of decay on the tree. The evidence produced at trial indicated that the tree was not in such a patently defective condition as would have put a patrolman inspecting the roadway on notice of the potentially dangerous interior condition of the tree. The exterior sign of decay, a cavity in the trunk of the tree, was on the backside of the tree which faced away from the road. The county had no actual notice of the dangerous condition and on the evidence adduced in this case, the jury could have concluded as they did, that there was no constructive notice to the county and thus no liability.

In reversing a judgment of the New York Court of Claims awarding damages to the driver of an automobile injured in a collision with a 40-ft pine tree which had fallen across the traveled portion of a New York State highway from the position where it stood 6 ft distant from the right-of-way on private land, the Supreme Court, Appellate Division, in *Rose v. State,* 126 N.Y.S.2d 417, 282 App. Div. 1099 (1953), ruled that the State could not be charged with constructive notice of the decayed interior condition of the tree because boring would have been required to ascertain such condition. It stated in respect to the duty of inspection of trees bordering State highways:

> It would impose an unreasonable burden upon the State to require it to probe or bore entirely through every tree bordering its highways to ascertain the inside condition when there is no outward, visible indication that the tree is dangerous. There is no evidence in the record or even a suggestion that the State had any actual knowledge of the tree's real condition, or that any complaint had ever been made to the State. We find no evidence of constructive notice to the State which would render the State chargeable with notice of the tree's condition prior to its falling. The mere fact that a tree falls upon a highway . . . and it is then and then only observable that the inside is decayed, does not impose liability upon the State.

Carver v. Salt River Valley Water Users Association, 104 Ariz. 513, 456 P.2d 371 (1969), was an action by a motorist to recover for personal injuries suffered when a tree fell on the vehicle she was driving on a road under the jurisdiction and control of Maricopa County. Joined as codefendant with Maricopa County was the private landowner on whose property adjacent to the highway the tree was growing. Both defendants were charged with negligence in failing to inspect and discover that the tree was in a decayed condition and in failing to remove the same from its dangerous location near the roadway. In affirming the action of the trial court in denying recovery the Supreme Court of Arizona stated:

> If we assume . . . that the reason the tree broke off was its rotted condition, still plaintiff's evidence is wholly insufficient to establish that the defendants knew or should have known of the condition. There is no testimony that the rot was apparent from the outside or that it was not confined to the internal portion of the trunk. Accordingly, there was no evidence which would support a theory that an inspection would disclose the infirmity and that defendants would have known by the exercise of ordinary care of the rotten condition of the tree. The court properly directed a verdict in favor of the defendants.

In a wrongful death action brought to recover damages for the demise of an individual who was killed when a large sycamore standing in the edge of the right-of-way fell across the automobile that he was driving on a highway of the State of Kentucky, the sole question on appeal was whether the State could be charged with constructive notice of the dangerous condition of the tree, which could be detected only by a "walk around" inspection because the decay affecting the tree was not observable from the side of the tree facing the highway. HELD: That the duty imposed to inspect trees bordering the traveled way to determine if they constitute a danger to travelers on the highway does not include the duty to discover evidence of decay which is not observable from a roadside view of the tree. *Commonwealth v. Callebs,* 381 S.W.2d 623 (Ky. 1964).

Mosher v. State, 77 N.Y.S.2d 643, 191 Misc. 804 (1948), was an action

to recover for injuries sustained by plaintiff when the car that he was driving on a New York State highway was struck by the fall of a large limb from a tree located in close proximity to the roadway. In ruling that plaintiff had failed to discharge the burden of establishing either actual or constructive notice on the part of the State as to the dangerous condition of the tree, the Court pointed to testimony of the foreman of the State patrol in charge of tree inspection who stated that he had observed the tree limb in question before the accident and that it showed no sign of decay, and contrasted such testimony with that of plaintiff's witnesses which was characterized by the Court as being "vague" in respect to the existence of any visible evidence of decay or weakened condition.

Albin v. National Bank of Commerce of Seattle, 60 Wash.2d 745, 375 P.2d 487 (1962), involved consolidated actions brought to recover for wrongful death incurred and personal injuries suffered when a falling tree struck and crushed an automobile proceeding along a county road which traversed a heavily wooded mountainous area. In upholding the action of the lower court in dismissing the action brought against defendant county on the ground that the county had neither actual nor constructive notice that the particular fallen tree constituted a hazard to motorists, the Supreme Court of Washington stated:

> There is no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred. It can, of course, be foreseen that trees will fall across tree-lined roads; but short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the way equivalent to the height of the tallest tree adjacent to the highway, we know of no way of safeguarding against the foreseeable danger. At the present time this is neither practicable nor desirable. The financial burden would be unreasonable, in comparison with the risk involved.

Summary

The cases hereinbefore set forth dealing with liability for the fall of trees located either within right-of-way limits or outside the boundaries thereof present two salient questions requiring discussion.

The first question for consideration is whether the duty of care in respect to inspection of trees is limited to the observation of visible external evidence of disease or decay, or whether the duty of care extends to the ascertainment of such internal disease or decay as may eventually lead to fall of a tree across the highway.

The answer to this question appears to be that the State or other governmental entity having jurisdiction and control over a roadway that can be reached by the fall of a tree is charged only with the duty of detecting external evidence of disease or decay that may lead to the fall of the tree across the neighboring highway. Where the question has been squarely presented to the courts it has been held that highway authorities are not under a duty to bore, tap, or drill trees bordering highways to ascertain an internal weakened condition in the absence of external evidence of disease or decay that is readily visible to the naked eye. Cases so holding include *Harris v. Village of East Hills,* p. 11, *supra; Rinaldi v. State,* p. 7, *supra; Rose v. State,* p. 11, *supra;* and *Carver v. Salt River Valley Water Users Association,* p. 11, *supra.*

Liability has been predicated on the negligent failure to detect such external evidence of disease or decay as "swelling and deterioration of sap tissue," "conks," "bark fungus," "depression of fissures," "infestation of insects," as well as the more obvious signs of dangerous conditions exemplified by "dead limbs," "loss of foliage," "cavities" and "holes" in tree trunks. Thus it appears that highway department personnel are charged with at least rudimentary knowledge of those external evidences of arboreal disease that require trees to be earmarked for observation, and, where necessary to the public safety, cutting and removal.

The second question for consideration is whether the duty of care in inspection is satisfied by routine examination of trees bordering highways from moving patrol cars, or whether an "on foot" or "walk-around" inspection is required, particularly in the cases of trees afflicted by disease or decay that is not visible from the vantage point of an observer from the "highway side" of the tree.

The New York Court of Appeals met this question head-on in the leading case of *Harris v. Village of East Hills,* p. 33, *supra,* where, in absolving the governmental entity of negligence in connection with the fall of a tree, it stated that "we cannot say that the procedure of inspecting the roadway from the patrol car was unreasonable as a matter of law." Such procedure seems from the recital of facts in other cases to be the usual practise in inspecting trees for signs of dangerous conditions, and the ruling of the New York Court of Appeals appears to reflect the prevailing view as to whether inspection of trees from moving patrol cars satisfies the requirements of due care.

Thus, the duty of care in inspection extends to and includes the detection of all common forms of arboreal disease, but does not extend to the discovery of internal decay, or the weakening of the subterranean root system, absent visible external evidence of progressive disease, that can be ascertained through regular and routine examination of trees bordering highways by trained observers cruising in moving patrol cars.

Before leaving the matter of liability for the fall of trees it may be noted that no case has been found imposing liability for the fall of trees or limbs during a period of high winds absent a showing of actual or constructive knowledge that the tree was in weakened condition due to disease or decay prior to the onset of the winds producing the fall. And it needs no statement that if winds reach hurricane dimensions the rules of law governing liability for Acts of God control the question of liability.

Next for consideration are cases dealing with liability for accidents caused by vehicles striking low hanging tree limbs protruding over the roadway.

The cases are few in number in which liability for overhanging tree limbs has been litigated. This is probably for the reason that to permit the limb of a tree growing either in the right-of-way or on adjacent land to protrude over the highway in such manner as to come in contact with a moving vehicle presents a clear case of negligent conduct. Illustrative of the cases uniformly holding the State or its subdivisions liable for failure to take corrective action in respect to such obstructions are the following.

In *Valvoline Oil Co. v. Inhabitants of Town of Winthrop,* 235 Mass. 515, 126 N.E. 895 (1920), an action was brought to recover for damage to plaintiff's wagon caused by collision with the limb of a tree overhanging a public street in the Town of Winthrop. The facts disclosed that the trunk of the tree was located in the sidewalk and that the limb causing the damage protruded out over the street for a distance and at a height not specified. In reversing the action of the intermediate court in setting aside a judgment of the trial court in favor of the plaintiff, the Supreme Judicial Court of Massachusetts stated that the limb "had grown over the traveled part of the way so near the surface of the street that it could be found to be an obstruction to persons traveling thereon. In these circumstances the limb could be found to be a defect which it was the duty of the town to remedy.... We are of the opinion that there is no sound distinction between the liability of a city or town for failure to guard against defects caused by trees within the limits of a highway which are old and decayed, and those which, although sound, in course of time cause a defective condition of a highway by growth. Anything in the state or condition of a highway which renders it unsafe for ordinary travel is a defect."

Lapchenko v. State, 153 N.Y.S.2d 364, 2 Misc.2d 478 (1956), was an action against the State of New York to recover for damages to a tractor-trailer and for personal injuries suffered by the driver thereof in a collision with the limb of a tree overhanging a State highway. The facts established that the driver of the tractor-trailer was proceeding at a reasonable rate of speed when he was forced to pull to the edge of the paved surface to allow room for the passage of an oncoming vehicle, and that in so doing the top of the trailer struck the limb of a maple tree overhanging the highway, causing the tractor-trailer combination to jackknife and throw the driver onto the roadway. The height of the limb above the roadway was not specified, but it was established that the height and other dimensions of the tractor-trailer unit were within the statutory limitations. In awarding damages both for the demolition of the tractor-trailer and for the personal injuries suffered by the driver the New York Court of Claims stated:

> It is well established that the State is under a duty to make a reasonable inspection of trees along its highways, and to trim and remove such trees or portions thereof which constitute a danger to users of State highways. This applies whether the trunks of the trees are inside or outside of the highway bounds. The State failed in its duty to discover and remove the obstruction. Such failure is negligence which was the proximate cause of this accident.

In *Bimonte v. Town of Hamden,* 6 Conn. Cir. 608, 281 A.2d 331 (1971), an action was instituted by the owner of a moving van against the Town of Hamden to recover for damage to his vehicle caused by collision with the limb of a tree overhanging a municipal street. HELD: That sufficient evidence was produced to enable the trial court to find that the overhanging limb constituted a highway defect and that its existence had continued for a sufficiently long period to charge the Town with constructive notice of the dangerous condition.

Likewise, in *Northern Haulers Corporation v. State,* 207 N.Y.S.2d 39, 12 App. Div.2d 567 (1960), it was held in an action brought by the owner of a tractor-trailer to recover for damage to his vehicle caused by collision with the limb of a tree protruding over the highway that sufficient evidence was produced to enable the trial court to find that the action of the State in permitting the overhang of the limb without any signing or warning constituted negligent conduct, and that the State could properly be charged with constructive notice of the hazardous condition by reason of its long-continued existence.

In *Robert Neff and Sons, Inc. v. City of Lancaster,* 21 Ohio St. 31, 254 N.E.2d 693 (1970), an action was brought by the corporate owner of a livestock trailer against the City of Lancaster to recover for damage to its vehicle caused by collision with the limb of a tree protruding over a City street. Liability was sought to be predicated under the terms of a State statute requiring Ohio municipalities to keep their streets "free from nuisance." Rejecting the contention that the statute had reference only to the surface of streets and not the airspace above them the Court ruled that an overhanging tree limb which endangers the safety of motorists constitutes a nuisance within the meaning of the statutory language.

In *Mayor and Aldermen of the City of Savannah v. AMF, Inc.,* 295 S.E.2d 572 (Ga. App. 1982), likewise involving damage to a trailer caused by collision with the limb of a tree extending over a City street, the Court ruled that the protuberance of a tree limb over a municipal public thoroughfare at such height as to come in contact with a moving vehicle constituted a nuisance for which the City was answerable in damages.

And in *Green v. Borough of Freeport,* 218 Pa. Super. 334, 280 A.2d 412 (1971), defendant municipality was held liable to a passenger in a van standing 10 ft high who was injured when the vehicle struck a tree limb extending over the street at a height of 7 ft 10¾ in. from the surface, on the ground that the limb constituted an obstruction of the public way which the municipality was under a duty to remove and for failure to do so was liable in damages.

Thus, the cases dealing with overhanging limbs make clear that to allow branches of trees to grow over the traveled way at such height as to come in contact with a moving vehicle is thoroughly inconsistent with the duty to maintain highways and streets in a condition reasonably safe for public travel.

Next for consideration are cases dealing with the question whether a duty exists to cut vegetation growing either in the right-of-way or on adjoining property that obscures the view of posted traffic warning signs and signals, dangerous intersections lying ahead, or such other roadway conditions as are rendered hazardous by impairment of the line of sight.

DUTY TO CUT OR REMOVE VEGETATION OBSCURING HIGHWAY VISIBILITY

The cases are divided on the question whether a common law duty exists to cut or remove vegetation which obscures highway visibility. Notwithstanding the dangers obviously inherent in blotting out views of upcoming intersections, or the problems presented to careful drivers accustomed to obeying the message of "STOP", "YIELD RIGHT-OF-WAY", or other signs warning that special driving precautions should be taken, the rule has been announced in a number of cases that highway agencies are not under a duty to trim, cut, or remove vegetation impairing highway visibility, in the absence of legislation expressly imposing such duty.

The reasoning of the courts advanced in support of such position is almost invariably tied to economic considerations. That is to say, the courts adopting this rule have expressed the general concern that an undue burden would be thrust upon government agencies, in particular on financially distressed county and municipal governments, if liability were imposed for failure to cut weeds, grass, and other vegetation growing in countless numbers of areas lying within the multitudinous complex of the nation's highways and streets. Courts adopting this view have, generally speaking, thus taken the position that the financial burdens that would be required to be shouldered by taxpayers outweigh the risks involved for individual drivers in not requiring that obstructive vegetation be eliminated. The following cases illustrate.

Cases Denying Existence of Common Law Duty to Cut Obstructive Vegetation

In *Hidalgo v. Cochise County,* 13 Ariz. App. 27, 474 P.2d 34 (1940), plaintiffs were occupants of a truck, who were injured when their vehicle collided with another car at an intersection. Suit was brought charging that the proximate cause of plaintiffs' injuries was the negligence of Cochise County, proprietor of the road on which they were traveling, in failing to cut weeds, growing in the ditch of the right-of-way, which allegedly obscured sight of the intersection to such an extent that neither of the operators of the two vehicles involved in the collision were able to see the intersection and observe that another vehicle was approaching the same and about to make entry. Recovery was denied by the intermediate Court of Appeals on the ground that the County was not liable for injuries resulting from obstructive vegetation growing in the right-of-way, absent a statute expressly imposing the duty to cut such vegetation. A State statute rendering it unlawful to grow certain noxious weeds (including in the statutory enumeration thereof the same weeds that were located in the right-of-way) was held not to be applicable, on the ground that the enactment of the statute was for the purpose of protecting the interests of farmers and ranchers, and was not intended to promote safety on the public highways. The Court supported its ruling that the County was not under a common law duty to cut weeds obscuring the view of an intersection with the statement that to "rule otherwise would be to hold, literally, that hundreds of county road intersections are inherently dangerous and to impose an imponderable responsibility upon the counties."

The Supreme Court of Arizona approved the result reached by the Court of Appeals in *Hidalgo v. Cochise County, supra,* in a case involving the question of the duty of municipalities to cut vegetation growing in city streets so as to provide adequate sight distance. The facts in *Boyle v. City of Phoenix,* 115 Ariz. 106, 563 P.2d 905 (1977), were that a bicyclist was injured when his view of an intersection was so impaired by the growth of 6-ft high weeds in the right-of-way of a City street that he was unable to see a car approaching the intersection from another direction, and was struck as he made entry thereunto. In affirming the action of the trial court in granting summary judgment for defendant City, the Supreme Court said:

> Our Court of Appeals has held that in the absence of a statute, a highway authority is not liable for personal injuries because it has allowed the view of an intersection to be obscured by weeds or bushes which have grown up in a portion of the street or along its boundary.... This is the rule in the majority of jurisdictions which have dealt with the question.... The plaintiff has not cited any statute upon which such a duty can be predicated.... The question of whether a highway authority should be obligated to expend public funds to maintain an unobstructed view at intersections is one properly addressed to the legislature. It having been established as a matter of law that the defendant ... owed no duty to the plaintiff, granting the motion for summary judgment was proper.

In declining to impose the duty on a municipality to cut vegetation growing in the right-of-way of its streets, and holding that a complaint in a suit to recover for personal injuries sustained in an intersectional collision allegedly caused by such failure did not state a cause of action, the Supreme Court of Mississippi, in *Owens v. Town of Bonneville,* 206 Misc. 345, 40 So.2d 158 (1949), stated:

> We cannot close our eyes to the fact that throughout this state and, in fact, throughout all the states of the Union, in the improvement and beautification of streets it is common practice for municipalities to set apart in wide streets neutral grounds extending from corner to corner down the center of such streets, and to improve and maintain a strip of such streets for public travel on either side of such neutral grounds, and that these neutral grounds are planted with shrubbery, flowers, and even trees which have a tendency to obstruct the vision of travelers at intersections. There is no difference in principle whether vision be obscured by high grass, weeds and bushes, or by flowers, shrubbery and trees, and we decline to be the first court to hold that a municipality is liable in damages resulting from the collision of two automobiles when the vision of the drivers is obscured at such intersection.

In upholding the action of the lower court in sustaining a demurrer to a complaint filed by a motorist injured in an intersectional automobile

collision, which complaint charged the State Highway Department with negligence in failing to cut vegetation growing in the right-of-way, thereby causing blockage of view of the intersection, the Supreme Court of South Carolina in *Stanley v. South Carolina State Highway Department,* 249 S. Car. 249, 153 S.E.2d 687 (1967), ruled that the complaint failed to state a cause of action because the State's waiver of immunity to suit was, by statute, limited to injury caused by "a defect in any State highway" and that the failure to cut vegetation did not constitute or produce a "defect" in a State highway, within the meaning of the statutory language.

Barton v. King County, 18 Wash.2d 573, 139 P.2d 1019 (1943), was an action to recover damages for injuries received in a collision between a motorcycle and a truck at an intersection wherein the complaint alleged that the cause of the accident was the fact that vision of the "T" intersection was obscured by high vegetation growing within the right-of-way limits of roadway maintained by defendant King County. The appellate court, describing the matter before it as being "novel," said that "the only question for determination is whether the county was negligent in failing to keep the natural growth on the unimproved portions of the highway cut down so that it would not obscure the vision of travelers approaching the intersection." In holding that the county was not under such duty and remanding with direction to dismiss the Court laid chief emphasis on the fact that a contrary ruling would result in imposing liability on counties of the State of Washington for accidents occurring at "thousands of county road intersections" where visibility was impaired by reason of untrimmed or uncut vegetation.

Walker v. Bignell, 100 Wisc.2d 356, 301 N.W.2d 447 (1981), was an action brought against two municipalities to recover damages for personal injuries sustained in a two-car vehicle collision at an intersection, which accident was alleged to have been caused by the obstruction of visibility of the intersection due to growth of weeds, grass, and brush. After discussing the opposing results which had been reached by courts of last resort in other jurisdictions in respect to the question under consideration, and in opting for the view taken by certain courts that municipalities are not under a common law duty to cut vegetation impairing roadway visibility, the Supreme Court of Wisconsin said:

> [A]s a matter of public policy, municipalities should not be exposed to common law liability under the circumstances present in this case. Exposure to such a liability would, we feel, place an unreasonable and unmanageable burden upon municipalities such as the defendants herein, not only in terms of keeping areas adjacent to every highway intersection clear of visual obstructions at whatever intervals are necessitated by the vicissitudes of Wisconsin's climate, but also in terms of the potential for significant financial liability owing to the unfortunate propensity of motorists to have intersection accidents. In addition, because the height and density of vegetation would become a factor in nearly every intersection accident case, municipalities would inevitably be drawn into considerably more litigation, with its attendant costs and demands. To require the defendants to do battle with roadside vegetation under penalty of liability for common law negligence would be to place upon them a burden they should not be made to bear.

After thus ruling that municipalities are not under a common law duty to cut obstructive roadside vegetation, the Court remanded for a hearing on certain factual matters the determination of which would be decisive as to whether or not the provisions of the State highway beautification legislation would be applicable, and by the specific terms thereof, impose a duty to remove obstructive roadside vegetation.

Thus it has been seen that in a significant number of cases the view has been adopted that no common law duty exists to cut vegetation impairing highway visibility. However, in other cases it has been held that the duty of the State and its subdivisions to maintain highways and streets in a condition reasonably safe for public travel, carries with it the obligation to cut or trim vegetation, growing either within the right-of-way limits, or on adjacent private property, that obscures visibility of road junctions, STOP or YIELD signs, or other traffic warning signals erected and installed for the purpose of protecting the motoring public in its use of highways and streets. The following cases announce such rule.

Cases Affirming Existence of Common Law Duty to Cut Obstructive Vegetation

In holding that a jury question was presented as to whether a township had violated its duty to maintain town roads in a condition reasonably safe for public travel by allowing the visibility of a STOP sign to become obscured by vegetative growth, the Court, in *Sanchez v. Lippincott,* 455 N.Y.S.2d 457, 89 App. Div.2d 372 (1982), an action to recover for injuries incurred in an intersectional motor vehicle collision, stated the applicable rules of law to be as follows:

> A governmental body is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition and liability will flow for injuries resulting from a breach of that duty.... The duty to maintain highways in a reasonably safe condition extends not only to the road surface and shoulders but also applies to other conditions which could reasonably be expected to result in injury and damages to the public. This encompasses an obligation to prevent a dangerous condition from developing at intersections, by trimming growth within its right-of-way to assure visibility of stop signs and other traffic.... The Town's duty ... stems from the common law.

Town of Belleair v. Taylor, 425 So.2d 669 (Fla. App. 1983), was an action brought against a municipality to recover for injuries suffered when plaintiff motorcyclist crashed into a car emerging from private property onto a town street, the alleged cause of the accident being that plaintiff's vision of the other vehicle was impaired by the height of the shrubbery that the Town had planted in the median strip, and failed to keep trimmed in such manner as not to interfere with the sight distances of those using the roadway. In sustaining recovery granted below for the plaintiff the Court said that "the town constructed and maintained the median and the foliage upon it, and that being so the town knew or should have known that failure to maintain it would create conditions dangerous to the public. Whether the town discharged its responsibilities properly or improperly was for the jury to decide, and the trial court did not err in denying the town's motion for directed verdict and in

refusing to overturn the jury's final verdict insofar as it relates to the town's liability."

Suit was instituted in *Armas v. Metropolitan Dade County,* 429 So.2d 59 (Fla. App. 1983), to recover for injuries suffered in an intersectional motor vehicle collision. The complaint alleged that the accident was caused by the negligent failure of both defendant Dade County and defendant City of Miami to cut back vegetation growing on private property adjacent to the City's right-of-way, which vegetation obstructed view of the County's "STOP" sign alerting motorists to the presence of the intersection ahead. In reversing summary judgment granted in favor of both defendants, the Court ruled that (1) the City's duty to maintain its streets in a condition reasonably safe for public travel carried with it the obligation to cut back foliage which created an obstruction to roadway visibility, notwithstanding that the foliage was growing on private property adjacent to the City's right-of-way, and (2) that the County's duty in respect to the "STOP" sign erected and maintained by it included the obligation to remove vegetation obstructing the motoring public's view thereof, although located and growing on adjacent privately owned property.

Where a complaint charged the City of Columbus with a nuisance in maintaining a STOP sign at an intersection in such manner as to be obscured from view by vegetation, and where allegations were made in the complaint that the police and members of the city council had actual knowledge that several accidents had occurred at the intersection by reason of the fact that the STOP sign was hidden from view by the vegetation, the complaint stated a valid cause of action in a suit brought by plaintiff to recover for injuries suffered in a two-car collision at the intersection, and the action of the trial court in dismissing the complaint constituted reversible error. *Coppedge v. Columbus,* 134 Ga. App. 5, 213 S.E.2d 144 (1975).

Bentley v. Saunemin Township, 83 Ill.2d 10, 413 N.E.2d 1242 (1980), was a wrongful death action brought by the administrator or decedent who was killed when the automobile in which she was riding as a passenger collided with another car at an intersection. The evidence established that a STOP sign signalling the danger of the intersection ahead was obscured from view by branches of a tree which hung to the ground at the edge of the Township road on which decedent was traveling. Whether the tree was located within or without the right-of-way limits of the town road was not specified by the Court. In ruling that defendant Township was guilty of negligence in allowing the traffic sign to be hidden from view the Supreme Court of Illinois stated briefly that "it cannot be seriously questioned that defendant owed plaintiff's decedent a duty of reasonable care in maintaining the sign" and that "failure to do so here is negligence as a matter of law."

A similar result was reached in *First National Bank in DeKalb v. City of Aurora,* 71 Ill.2d1, 373 N.E.2d 1326 (1978), wherein the Supreme Court of Illinois ruled that a complaint in an action to recover for injuries sustained in an intersectional collision which alleged negligence on the part of defendant City in allowing the foliage of a large tree to obstruct vision of the intersection stated a valid cause of action, notwithstanding that it failed to allege specifics about the location of the tree, such as whether it stood inside or outside the right-of-way limits of the City street on which decedent was proceeding prior to the accident.

In holding that the lower court erred in granting summary judgment for defendant County in an action brought to recover for injuries sustained in a two-car collision at an intersection allegedly caused by the negligence of the County in failing to cut weeds obstructing the injured motorist's view of the intersection, the Court, in *Hurst v. Board of Commissioners of Pulaski County,* 446 N.E.2d 347 (Ind. App. 1983), said that "the issue of whether part of the county's duty of maintaining reasonably safe roads includes mowing weeds along the road is a question upon which reasonable minds might differ and therefore properly a matter for the jury. Also, a jury should be allowed to determine whether the county knew or should have known that the weeds were a problem, a prerequisite to liability."

Plaintiff, in *Stewart v. Lewis,* 292 So.2d 303 (La. App. 1974), was injured in an intersectional collision with another automobile which took place on a Louisiana State highway. Plaintiff testified at trial that she was unable to see the other vehicle as she approached the intersection because of vegetation growing alongside the right-of-way. In holding that the proximate cause of the accident was the negligence of the State in allowing vegetation to obscure visibility at the intersection, the Court said that its "examination of the record convinces . . . that the defendant, the Louisiana Department of Highways, was negligent in permitting bushes and other vegetation to grow along the highway approaches to the intersection in such manner that they obstructed the vision of the drivers of the vehicles involved in the accident, and, hence, was the proximate cause of the accident."

It needs no statement that the foregoing cases which announce the rule that a common law duty exists to cut obstructive vegetation are in direct and irreconcilable conflict with those cases previously set forth herein which adhere to the position that the duty exists only where imposed by terms of statute.

Duty to Cut Vegetation Established by Statute

In a few cases the duty to cut obstructive vegetation has been held to have been created by the terms of statute. In none of these cases did the statutory language establish the duty in clear and certain terms. To the contrary, words of general import were used and interpreted by the courts to embrace within their meaning the specific duty to trim or remove vegetation impairing highway visibility. The following cases illustrate.

Dudum v. City of San Mateo, 167 Cal. App.2d 593, 334 P.2d 968 (1959), was an action brought to recover for personal injuries suffered when the automobile plaintiff was driving collided with another vehicle at an intersection of certain streets within the municipal limits of the City of San Mateo. The complaint alleged that the accident occurred by

reason of the fact that plaintiff was unable to see a "STOP" sign placed at the intersection, because it was obscured from view by the foliage of a large tree growing on private property adjacent to the intersection. Liability of the City was sought to be predicated on a statute rendering municipalities accountable for maintaining "public property" in a "dangerous condition."

The City of San Mateo defended on the ground that the tree in question was not located on public property but on private property, and, therefore, the City could not be held liable under the terms of a statute relating to "public property" only. In rejecting this argument, and reversing a judgment entered below granting summary judgment in favor of the City, the Court stated:

> Respondent . . . stands upon the fact that the tree which obscured plaintiff's view of the sign grew upon private property. . . . [T]he city argues that the dangerous condition resulted solely from the privately owned tree. But . . . the tree obscures the sign only because of the location chosen for the sign by the city. The position of public property in relation to other public property . . . may create a dangerous condition of public property. Clearly the placing of a stop sign in a location where view of it was blocked by another item of public property, whether a light standard, another sign, or a public building, would present a like fact situation as to whether a dangerous or defective condition of public property existed. Indistinguishable is a situation wherein a stop sign is so placed that private property wholly obscures it from the view of those it is intended to warn. In such situation, the placing of the stop sign in the obscured position . . . causes the dangerous or defective condition of the sign.

A similar result was reached in *De LaRosa v. City of San Bernardino,* 94 Cal. Rptr. 175, 16 Cal. App.3d 739 (1971), construing the same statutory provisions. In this case the complaint averred that a nocturnal intersectional collision in which plaintiff was injured was caused by the obstruction of plaintiff's view of a "STOP" sign by the presence of a 30-ft walnut tree and shrubbery growing on private property adjacent to the city street. In holding that a jury question was presented as to whether a "dangerous condition" had been created for which the City was unaswerable in damages, the Court said:

> There was evidence that the walnut tree and shrubbery on the west side of [the city street] impaired the visibility of the stop sign to such an extent that it was barely visible during the day and could not be seen . . . at night; there was evidence of numerous accidents at the intersection. . . . Although the evidence indicated that the walnut tree and shrubbery were growing on adjacent property, it could reasonably be inferred from the evidence that their proximity to the highway and intersection exposed motorists to a substantial risk of harm. Condition of public property may be dangerous where the condition of adjacent property exposes those using public property to a substantial risk of harm.

It was also held in *Bakity v. County of Riverside,* 90 Cal. Rptr. 541, 12 Cal. App.3d 24 (1970), that the fact that trees obstructing the view of an intersectional "STOP" sign were located on private property adjacent to the right-of-way did not relieve the governmental entity responsible for visibility of the STOP sign from liability for permitting a "dangerous condition" to exist. In sustaining a verdict and judgment entered thereupon in favor of plaintiff, in an action brought against Riverside County to recover for injuries suffered by plaintiff in the collision, the Court said:

> In the present case the jury could reasonably have found the existence of a dangerous condition at the intersection. There were tangerine trees at the southeast corner of the intersection which obstructed the view of approaching vehicles within 100 feet of the intersection. While the record is unclear whether the trees were on or off the county right-of-way, assuming they were growing on adjacent property, the jury could nevertheless have reasonably inferred that by reason of their proximity to the intersection they exposed motorists using the highway to a substantial risk of injury.

It was ruled by the Supreme Court of Tennessee in *Fretwell v. Chaffin,*652 S.W.2d 755 (Tenn. 1983), that the provisions of the Tennessee Tort Liability Act imposing liability on governmental entities for "any injury caused by a defective, unsafe, or dangerous condition of any street" extended to and included a situation where visibility of a STOP sign at an intersection was obscured by uncut vegetation and such condition led to an intersectional collision between two motor vehicles.

Construing the provisions of the Texas Tort Claims Act permitting claims against a municipality arising from the "absence, condition or malfunction of a traffic or road sign," the Supreme Court of Texas, in *Lorig v. City of Mission,* 629 S.W.2d 699 (Tex. 1982), ruled that the obstruction of a STOP sign from view by trees or branches was a "condition" of the sign within the meaning of that word as used in the Tort Claims Act, and, accordingly, a complaint alleging that the failure of the City of Mission to remove trees and branches obstructing the view of a STOP sign was the proximate cause of an intersectional motor vehicle collision, stated a valid cause of action against the City under the terms of the Act.

The ruling of the Supreme Court of Texas in *Lorig v. City of Mission, supra,* was applied in *Kenneally v. Thurn,* 633 S.W.2d 69 (Tex. App. 1983), by the intermediate Court of Appeals to render the City of San Antonio accountable under the Tort Claims Act to a motorist injured in an intersectional collision by reason of the City's failure to correct the "condition" of a STOP sign being obscured from view by the presence of crape-myrtle bushes growing on private property adjacent to the intersection.

Under the statute law of Kansas rendering the State liable in a civil action for injury or damages incurred as the result of a "highway defect" in the State road system, the failure of the State Highway Commission to cut or remove vegetation obscuring a "STOP" sign at an intersection rendered the sign a "highway defect" within the meaning of the statutory

language, thereby imposing liability on the State for death occurring and personal injuries suffered in an intersectional collision between three automobiles caused by the fact that none of the operators of the vehicles involved was able to see a STOP sign erected by the State Highway Commission warning of the peril created by the junction of roads. *Brown v. State Highway Commission,* 202 Kan. 1, 444 P.2d 882 (1968).

Thus it appears that language of statute imposing liability for allowing the existence of "dangerous" or "defective" highway conditions is sufficient to carry with it liability for failure to cut or remove vegetation that effectively obstructs visibility on the highways.

Before leaving the matter of obstructive vegetation it is to be noted and emphasized that, as in the case of trees, liability is not avoided by reason of the fact that the injury-producing vegetative growth is located on private property adjacent to the highway, rather than within the limits and confines of the right-of-way itself.

CONTRIBUTORY NEGLIGENCE

The history of the defense of contributory negligence in the cases that are the subject matter of this paper can be summed up in the statement that the plea has been successfully asserted in but a small minority of the cases. The defense of contributory negligence is ordinarily not germane to the situation of a motorist entering an intersection made blind by reason of the fact that the road junction itself, or traffic signs warning of the danger ahead, are obscured from view by vegetation, or the case of a motorist killed or injured when a tree, suddenly and without warning, crashes on or in front of the vehicle that he is operating. It is obvious that in cases such as these there is little chance that negligence on the part of the operator of the vehicle can be asserted and successfully proved.

However, in certain other situations the defense will be appropriate, and in such cases the usual rules apply, which is to say that in jurisdictions wherein the contributory negligence doctrine obtains proof of negligence on the part of the driver of the vehicle involved in the accident operates as a complete bar to his recovery notwithstanding proof of negligence on the part of the State in the discharge of its duty to maintain the highway in a condition reasonably safe for public travel. Cases so holding include the following:

Hulett v. State, 164 N.Y.S.2d 929, 4 App. Div.2d 806 (1957);
McGough v. Edmonds, 1 Wash. App. 164, 460 P.2d 302 (1969);
Jenkins v. City of Alexandria, 324 So.2d 924 (La. App. 1975);
Slavin v. City of Tucson, 17 Ariz. App. 16, 495 P.2d 141 (1972).

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 accidents involving trees, shrubbery, and obstructive vegetation present no special problems in applying the doctrine of comparative negligence.

CONCLUSION

The conclusions to be drawn from the herein review of the apposite case law pertaining to the liability of the State for injury or damage caused by the presence of trees, shrubbery, or other vegetative obstruction located either in the right-of-way or on private land adjacent thereto may be summarized in the rules as follow:

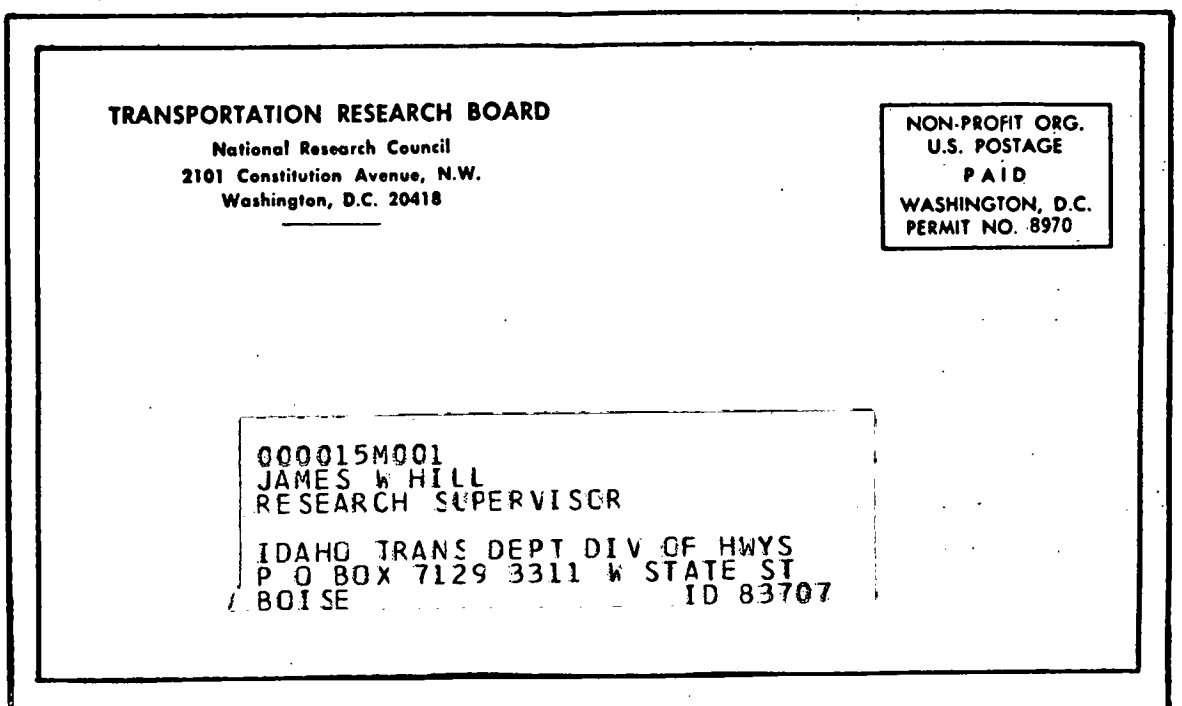
1. Permitting a tree or stump to stand within the right-of-way limits does not constitute negligence as a matter of law.
2. Where injury or death occur as the result of a motor vehicle collision with a tree or stump left standing in the right-of-way a jury question is presented as to whether allowing the tree or stump to stand in its particular position with relation to the paved surface of the roadway constituted negligent conduct on the part of the State.
3. Where injury or death result from the collision of a motor vehicle with a tree or stump standing outside the right-of-way but in close proximity thereto a jury question is presented as to whether the State was guilty of negligence in failing to guard against the hazard by means of rails, barriers, warning signs, or by entering upon the land and removing the hazard, particularly where prior accidents have occurred involving the same tree or stump.
4. Where injury or death result from the fall of a tree located either in the right-of-way or on adjacent private land, a jury question is presented as to whether the State was guilty of negligence in failing to ascertain that the tree was in such dead, diseased, or decayed condition as to render its fall likely, but the State cannot be found guilty of negligence absent a showing that it was in receipt of actual notice, or could on the facts be charged with constructive notice, that the tree was in such condition as to pose a threat to highway users, and, at the same time, was accorded a reasonable opportunity to take corrective action to remedy the dangerous condition.
5. Absent special circumstances the action of the State in permitting a tree limb to overhang the roadway at such height as to come in contact with a moving vehicle constitutes negligence rendering the State liable in damages.
6. Although there is authority to the contrary the rule has been announced in a number of cases that the common law duty exists to cut or remove vegetation growing either within the right-of-way or on adjacent private land that obscures the visibility of traffic signing erected for the protection of motorists, or impairs the line of sight of road conditions ahead that require motorists in the exercise of due care to reduce speed and maintain a proper lookout.

And the duty to cut or remove vegetation obscuring highway visibility has also been found in language of statute imposing liability for failure to correct "dangerous conditions," "highway defects" or words of like general import. The cases construing such broad and general provisions of statute to include the specific duty of cutting or removing obstructive vegetation are bottomed on and find their rationale in the common law duty to maintain highways in a condition reasonably safe for travel by motorists using ordinary care. Because such rule obtains in all jurisdictions, it would appear that even in States adopting the rule that there is no duty to eliminate obstructive vegetation absent legislative direction so to do, that the enactment of statute law expressly imposing liability for "dangerous" or "defective" highway conditions (or words of like tenor) may be sufficient to carry with it liability for failure to cut or remove obstructive vegetation. In other words, legislative intent to impose such duty can be found in words of general import, and direct reference to obstructive vegetation is not essential to the imposition of the duty to control the same in such manner as to render use of the highways reasonably safe for travelers exercising ordinary care.

It may be noted as a final word that the presence of trees, shrubbery and vegetation in rights-of-way and neighboring lands is an inescapable and inevitable reality. It follows that judicious management of the same is an unavoidable and continuing obligation and responsibility of State highway departments. Avoidance of liability for the natural and inherent hazards thereby presented is best accomplished by faithful adherence to the sometimes stringent standards of due care announced and described by the courts in the cases hereinbefore considered and set forth.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, local highway agencies, and others involved in suits regarding liability for negligence associated with the presence of trees or shrubbery in accident cases. 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 the determination of negligence on the part of the State or other highway agencies in regard to accidents with, or caused by, trees and other vegetation.



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