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Personal Liability of State Highway Department Officers and Employees

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by John C. Vance, TRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. This report and another published as Research Results Digest 80, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," deal with legal questions surrounding liability for negligence by highway department personnel. It includes legal authority relative thereto.

Because this Digest is also the full text of the agency's report, the statement above concerning loans of uncorrected draft copies of the report does not apply.

RESEARCH FINDINGS

INTRODUCTION

This paper has been written as a companion paper to the research report entitled, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects." It assumes familiarity by the reader with the legal principles therein set forth, including the historical background of sovereign immunity, the present status of the law relating to suits against the state, and the principles that govern tort liability of the sovereign. Thus, this paper can be said to begin where the companion paper ends.

The subject of personal liability of public officials bears a wide reputation for being one of the most vexing problem areas in the law. The difficulties that are inherent have caught the interest and attention of eminent scholars, whose treatment of the subject matter is recommended to the reader (see Appendix).

The wide repute that this subject matter has for being characterized by conflicting decisions and a troublesome lack of uniformity of judicial approach and result is justified, but not entirely so. A close examination of the cases discloses that the conflict in the decisions is more apparent than real, and that a common thread of approach and result can be found in at least a majority of the decisions. The real problem lies in the fact that the cases turn on conceptualizations that are in themselves inherently imprecise, and this, of course, makes for difficulty in application.

The law of personal liability of public officials developed long before the law of tort liability of the sovereign. Cases were brought against public officials (as a poor second best) because the sovereign was beyond reach in the courts. In the long sweep of judicial history, it is only recently (at least in the United States) that the sovereign has been amenable to suit and made to account for the torts of its agents. Quite naturally, some of the principles that developed in connection with the law of personal liability of public officials were later carried over into the law of liability of the sovereign (most particularly the discretionary-ministerial distinction), but it should be borne in mind that the law of tort liability of the individual and of the state developed separately, and there are fundamental distinctions between the two.

Perhaps as good a starting point as any is Dicey's famous dictum that in England "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[1] This statement serves to illustrate the fact that the common law brought to the new country by the colonists did not include a tradition of immunity to suit on the part of public officials.[2] However, in this country public officials were never treated precisely the same as private individuals insofar as liability for their torts is concerned, and a word is in order to explain the very sound reasons why this is so.

Peculiar problems are presented in respect to the liability of a public official for his torts. Considerations are presented that weigh heavily against the easily graspable concept that all men should be equally liable for their torts. Perhaps the most weighty of these is that under our system of government the functions of the executive, legislative, and judicial branches are to be kept separate, and that at some point in the trial of a public officer for tortious conduct in the performance of his official duties, the judiciary, unless restraint is exercised, may trespass upon or even usurp the functions of another arm of government. The distinction between discretionary and ministerial duties, which is the cornerstone of the law of liability of public officials, was designed to protect against the invasion by the judiciary of the powers of the other branches of government. To illustrate, in the discretionary or decision-making process, the public official may draw on information that is not generally available, and to which he has access by virtue of his office. His decision may reflect the special expertise that he possesses by reason of holding such office. Because the court is not privy to the special information he possesses, nor does it have the special expertise, the process of review opens up the hazard of substituting judicial judgment for legislative or executive judgment, in violation of the separation of powers. Under the tripartite form of government there is a shadowland of distinction between functions, and the courts must walk carefully in order not to arrogate to themselves functions that do not belong to them, and which, moreover, they are not particularly qualified to perform. In matters involving the exercise of informed judgment or calling for the employment of special skills there is no reason to suppose that the courts are better qualified to act than those in the other branches of government entrusted with the decision-making process. The discretionary exemption is designed as a restraint against interference with the activities of a coordinate branch of government.

Another reason for treating public officials differently from private persons, insofar as tort liability is concerned, is that public officials are frequently under a duty to act, sometimes accompanied by strong legal or political sanctions for failure to do so, whereas the private individual, generally speaking, is not under such compulsions. It is said that it is unjust to require a public official to make decisions and act upon them and then to penalize him for doing what he is required to do.

Another factor to be taken into consideration is that it is in the public interest to encourage vigorous action on the part of public officials. It is said that if public employees are to live in fear of the wasting of their personal fortunes by constant litigation, a breed of do-nothing public servants will arise. A surprising number of courts have announced the

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[1]Dicey, Law of the Constitution, 193 (9th ed. 1939).
[2]See Harper and James, The Law of Torts, Vol. 2, Sec. 29.8.

opinion (whether true or not) that if public servants are to be subjected to unlimited tort liability it would become impossible to find competent men to enter government service.[3] In any event, against the manifest hardship of sustaining injury without redress must be weighed the social policy of encouraging fearless conduct on the part of public employees. And weighed against this must be the consideration that a grant of broad immunity to public employees might lead to laxity of conduct.

Influenced by these and other policy considerations, the law developed along the lines of conditional immunity for public employees. Various tests evolved to determine whether liability should be imposed, by far the most important of which is the test whether the activity involved is discretionary or ministerial. Before proceeding to a discussion of these tests (most of which take the form of dichotomies), it is necessary to mention briefly a few cases that are outside the mainstream, and appear to proceed on a theory of absolute immunity.

ABSOLUTE IMMUNITY

The cases adopting the theory of absolute immunity are few in number, and almost all relate to the activities of employees at the county level. The rationale developed in these cases is that because a county cannot be held liable for its torts, neither can its agents. Jurisdictions in which this rationale finds expression include Idaho, Iowa, Kentucky, Missouri, and South Dakota.

Thus, in Worden v. Witt, 4 Idaho 404, 39 P. 1114 (1895), county commissioners were held not liable for alleged negligence in maintaining a defective bridge on the grounds, first, that the county was not liable, and second, that the imposition of liability would result in the literal abrogation of the office of county commissioner, because "no sane man would assume the position with such a liability attached." This holding was reaffirmed in Youmans v. Thornton, 31 Idaho 10, 168 P. 1141 (1917), an action against county officials for alleged negligence in bridge construction, wherein it was stated that county "officers are responsible to the state and county for the performance of their official duties, but beyond this their liability cannot be extended."

In holding county supervisors not liable for alleged negligence in bridge construction, the Supreme Court of Iowa in Gibson v. Sioux County, 183 Iowa 1006, 168 N.W. 80 (1918), said that it would be an anomalous doctrine that would exempt a county from liability for the performance of a lawful action in a negligent manner and at the same time impose liability on its agents for precisely the same act. To the same effect is Schwartzwelder v. Iowa Southern Utilities Corporation, 216 Iowa 1060, 250 N.W. 121 (1933), holding a county engineer not liable for alleged negligence in road construction. See also Snethen v. Harrison County, 172 Iowa 81, 152 N.W. 12 (1915).

The same rule was announced in Kentucky in the cases of Schneider v. Cahill, 127 S.W. 143 (Ky. 1910), and Forsythe v. Pendleton County, 266 S.W. 639 (Ky. 1924). In the former it was held that a county road supervisor could not be held liable for alleged negligence in leaving a ditch in the highway open and unguarded because the immunity of the county from tort liability extended to its agents; and in the latter it was held that an action would not lie against a county superintendent for alleged negligence in supervising the operation of a rock crusher for the same reason.

In Missouri the Supreme Court ruled, in an action against county officers for damages resulting from alleged negligence in road construction, that the county was clothed with the State's immunity to suit and its agents were protected from tort liability by the same immunity. Miller v. Ste. Genevieve County, 358 S.W. 2d 28 (Mo. 1962).

In Dohrman v. Lawrence County, 143 N.W. 2d 865 (S.D. 1966). an action against a county highway superintendent for alleged negligence in failing to post signs warning of a sharp curve in the road, the Surpreme Court of South Dakota held that counties are not liable for their torts in the absence of a statute imposing liability therefore, and because there was no statute imposing liability for the negligence charged, the defendant, as agent of the county, could no more be held liable than could the county itself.

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[3]See, for example, Worden v. Witt, 4 Idaho 404, 39 P. 1114 (1895); Youmans v. Thornton, 31 Idaho 10, 168 P. 1141 (1917); Ten Eicken v. Johnson, 1 Ill. App. 3d 165, 273 N.E. 2d 633 (1971); Hardwick v. Franklin, 120 Ky. 78, 85 S.W. 709 (1905); Schneider v. Cahill, 127 S.W. 143 (Ky. 1910); Miller v. Jones, 224 N.C. 783, 32 S.E. 2d 594 (1945); Osborn v. Lawson, 374 P. 2d 201 (Wyo. 1962).

One case has been found that extends this rationale to an employee of the state, the officer involved being the State Highway Director.[4] Providence Washington Insurance Co. v. Garretsville, 67 Ohio L. Abs. 370, 120 N.E. 2d 501 (1953), was an action for damages resulting from the collapse of a bridge on a state highway. In ruling that the State Highway Director could not be held liable for alleged negligence in failing to maintain and repair the bridge, the Court said:

> If the paramount reason for holding county officials are not liable in damages for their negligence, to private persons, lies in the fact that the county is only a subdivision of the state, engaged chiefly in functions of the state, then it would beyond question follow that an officer of the state itself, engaged solely in the discharge of functions of the sovereign, would not be liable to private persons for damages resulting from negligence in the discharge of their official duties, in the absence of such liability being imposed by statute.

These decisions represent solid holdings, and it is purely argumentative to dismiss them as unsound. Nevertheless, it should be borne in mind that they represent a distinct minority rule. As will appear hereinafter, in the great majority of actions against public officials to impose personal liability for alleged tortious conduct, the courts decline to clothe the official with the immunity to suit of his governmental employer.

LIABILITY ON ORDINARY NEGLIGENCE GROUNDS

At the other end of the spectrum is some isolated authority that appears to view suits against public officials no differently from suits against private persons. For example, in Palmer v. Marceille, 106 Vt. 500, 175 A. 31 (1934), where an action was brought against an employee of the state highway board for alleged negligence in kindling a brush fire the smoke from which obscured plaintiff motorist's vision causing her to crash into another vehicle, the Court took the position that the defendant must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed an injury to another. Such rationale, it must be emphasized, is so far outside the mainstream of cases that it represents almost a sui generis view of the liability of public officials. Of course, if liability is imposed by statute, such as the imposition of a specific duty of care in respect to highways, the determination whether due care has been exercised will be determined according to ordinary negligence principles.[5] However, in the absence of a statute imposing specific duties for breach of which suit is brought, the question of liability, in the overwhelming majority of cases, is made to turn on the rules, tests, and principles immediately hereinafter set forth. Discussion begins with the critically important distinction between discretionary and ministerial activities.

DISCRETIONARY-MINISTERIAL DISTINCTION

The starting point for discussion of the discretionary exemption is the law relating to judges. Since the earliest times judges have been accorded privilege in respect to the performance of their official duties, which, by any definition, are discretionary in nature. The rule was stated by Justice Field, in Bradley v. Fisher, 13 Wall. 20 L. Ed. 646 (1871), as follows:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself...The principle...which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial function, obtains in all countries, where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

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[4] Of course, under certain circumstances, an action against a state officer may be held to be against him eo nomine only, and in fact to constitute an action against the state. This rarely occurs, however, where the action sounds in tort. Scant authority has been found wherein the reasoning has been advanced that a tort action against a state highway officer was tantamount to an action against the state [See Murphy v. Ives, 151 Conn. 259, 196 A. 2d 596 (1963); Anderson v. Argraves, 146 Conn. 316, 150 A. 2d 295 (1959); McDowell v. Mackie, 365 Mich. 268, 112 N.W. 2d 491 (1961).] The theory that an action in tort again against a state highway employee to impose personal liability is an action against the state can be dismissed for the purposes of this paper.

[5] Robertson v. Monroe, 79 N.H. 336, 109 A. 495 (1920).

In the case of the judiciary it is drawing too fine a line, however, to say that the exemption accorded them rests solely on the discretionary nature of their duties, because the protection granted even extends to cases of malice. The same sweeping privilege against malice is accorded to legislators, and certain high-ranking officials of the Federal government. Thus, in Spalding v. Vilas, 161 U.S. 483, 40 L. Ed. 780, 16 S. Ct. 631 (1896), it was held that the Postmaster General of the United States was immune from suit for libel, even though it was alleged that the utterance in question, made in the course of his official duty, was motivated by malice. In affirming the dismissal of a libel suit against the United States Secretary of the Interior, the Court, in Glass v. Ickes, 117 F. 2d 273 (C.A. Dist. Col. 1940), held that an allegation of malice in the complaint was of no materiality, because statements made by the Secretary in the course of his official duties were absolutely and not conditionally privileged. Similarly, The United States Secretary of the Treasury was held to be immune to civil suit for damages, notwithstanding that he acted erroneously in the construction and application of a Federal statute, and it was charged that his action was motivated by malice. Standard Nat. Margarine Co. v. Mellon, 72 F. 2d 557 (C.A. Dist. Col. 1934). Perhaps the most penetrating (and certainly the most discussed) analysis of the reason for the rule of broad privilege was made by Lerned Hand, J., in Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2, N.Y. 1952), which involved a suit against two successive Attorney Generals of the United States, alleging conspiracy inspired by malice to deprive plaintiff, an alien, of his liberty, and seeking damages for false arrest and imprisonment:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practise to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for so doing is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties...There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Whatever the justice of the rule that obtains in respect to judges, legislators, and certain high-ranking Federal officials, it is altogether clear that the privilege in regard to malice does not extend to officers of state government. The state cases holding that the discretionary exemption does not include malice are legion in number and from many jurisdictions.[6] The scant authority to be found in which the rule of privilege against malice was held to be applicable to state officers is limited to defamation actions for statements made in the course of performing official duties.[7]

Thus, discussion of the discretionary exemption at the state level must start with the proposition that the privilege does not extend to cases of malice or corruption, and, by the same token, very probably to cases of wanton and willful carelessness or gross negligence, although the law is not entirely clear in respect to the latter.

Definition

No discussion of the distinction between discretionary and ministerial duties can be undertaken without attempting a definition of terms. However, it should be made clear that no

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[6] As illustrative, see Mower v. Williams, 402 Ill. 486, 84 N.E. 2d 435 (1949); Johnson v. Callisto, 287 Minn. 61, 176 N.W. 2d 754 (1970); Wilbrecht v. Babcock, 179 Minn. 263, 228 N.W. 916 (1930); Sharp v. Kurth, 245 S.W. 636 (Mo. 1922); Hester v. Miller, 8 N.J. 81, 83 A. 2d 773 (1951); Miller v. Jones, 224 N.C. 783, 32 S.E. 2d 594 (1945); Hipp v. Farrell, 169 N.C. 551, 86 S.E. 570 (1915); Templeton v. Beard, 159 N.C. 63, 74 S.E. 735 (1912); Lutes v. Thompson, 193 Okla. 331, 143 P. 2d 135 (1943); Binkley v. Hughes, 168 Tenn. 86, 73 S.W. 2d 1111 (1934); Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918); Lowry v. Carbon County, 64 Utah 555, 232 P. 908 (1924).

[7] See Matson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952), a libel action against the Attorney General of Pennsylvania; and Adams v. Tatch, 68 N.M. 446, 362 P. 2d 984 (1961), a slander suit against a member of the New Mexico State Highway Commission.

satisfactory definition of the words "discretionary" and "ministerial" has ever been formulated, or probably ever will be. This is for the reason that almost any action, other than a reflex action, involves a certain amount of discretion,[8] and it is virtually impossible to describe in general terms where the continuum of discretion breaks off and ministerial activities begin.

The definition that seems to be most favored by the courts (in terms of frequent iteration) appears in Shearman and Redfield on Negligence (3d ed.) Sec. 156:

> The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task, in other words is simply ministerial - he is liable in damages to any one specially injured either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be extended or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed...

Taking into consideration the fact that almost any action involves some element of decision-making, the real question becomes what decisions can be classified as being discretionary in nature, and what decisions can be classified as being ministerial in nature. However, because the cases concentrate on the nature of the acts involved, and all but eliminate decision-making as an element of the carrying out of rote functions, discussion must be along the lines of attempting to classify what acts fall into the ministerial category. It is needless to say that there are many instances in which the same act could be reasonably classified as either discretionary or ministerial, and hence the most that can be done in analyzing the cases is to attempt to delineate broad categories of activity.

The planning-operational dichotomy adopted by the Federal courts in interpreting the discretionary exemption of the Federal Tort Claims Act (discussed in the aforementioned companion paper), serves better than other test to explain the results in the cases. Hence, this dichotomy is used in seeking to classify the cases and separate discretionary from ministerial acts.

DESIGN ACTIVITIES

It would appear at first impression that matters pertaining to the planning for and design of highways are necessarily discretionary in nature. This is borne out by the cases.

Perhaps the leading case enunciating this rule is Smith v. Cooper, 256 Ore. 485, 475 P. 2d 78 (1970). This was a wrongful death action brought against certain officers and employees of the Oregon State Highway Commission alleging that plaintiff's decedent was killed when the vehicle in which he was riding went off the highway due to the negligence of defendants in designing a tight unbanked curve, painting a center stripe to indicate that traffic was to continue straight ahead, failing to post signs warning of the dangerous condition of the road, and failing to erect a guardrail at the edge of the turn where the fatal accident occurred. In applying the discretionary-ministerial test to determine liability, the Supreme Court of Oregon stated that a line "differentiating ministerial functions from those which are discretionary has never been clearly drawn," pointed out that the difficulty with all "attempts to state the distinction between 'discretionary' and 'ministerial' is that all, or almost all, acts performed by government employees involve some judgment or choice," and concluded that the distinction between the terms "must necessarily be arbitrary." Nevertheless, in holding that no cause of action was stated, the Court came down squarely on the side of the conclusion that planning and design activities are discretionary, making the flat ruling as follows:

> We hold that state employees are generally immune from liability for alleged negligence in planning and designing highways.

Smith v. Cooper, supra, was followed in Weaver v. Lane County, 10 Ore. App. 281, 499 P. 2d 1351 (1972), an action to recover for injuries sustained in a two-car collision allegedly caused by the negligent failure to design two roads so as to intersect at a safe angle, the

[8]The Court said in Sava v. Fuller, 57 Cal. Rptr. 312 (1967) that: "He who says that discretion is not involved in driving a nail has either never driven one or has had a sore thumb, a split board, or a bent nail as the price of attempting to do so."

Appellate Court holding that a verdict was properly directed below for defendant, a county engineer, because his duties in respect to highway design were discretionary in nature and the performance thereof was protected by the discretionary exemption.[9]

The following are specific aspects of the design function that have been held to be discretionary.

Elevation of Grade

Wilbrecht v. Babcock, 179 Minn. 263, 228 N.W. 916 (1930), is a much cited case involving liability for alleged negligence in establishing the grade of a highway. The complaint charged that defendant, the Minnesota State Commissioner of Highways, caused a road to be constructed along the line of plaintiff's land; that plaintiff's land paralleling the highway was level except for occasional slight ridges and depressions; that surface water resulting from heavy rains and melting snow escaped through these depressions while the land was in its natural condition; that defendant caused the road to be constructed at an elevation of 1-1/2 feet above the natural surface of the ground; and that the embankment so constructed prevented the surface water from following its natural course along the depressions, and caused it to accumulate in large quantities on plaintiff's land.

It was argued that the facts brought defendant within the rule that a public officer is liable for his negligence in the performance of ministerial duties. In rejecting this contention, the Court pointed out that the legislature did not specify the grade of the highway, but left all details in respect to its design to the judgment and discretion of the Commissioner, for the exercise of which he could not be held liable in damages to private persons.

A similar result was reached in Hjorth v. Whittenburg, 121 Utah 324, 241 P. 2d 907 (1952), an action against the Utah State Road Commissioners for damages to plaintiffs' land caused by the redesign and raising of the grade of the highway. Plaintiffs asserted that unless they were permitted to recover against defendants they were foreclosed from any redress because of the State's immunity to suit. Stating that recovery could be had against the Commissioners for negligence in the performance of ministerial duties, the Court held that the act complained of was one involving the exercise of discretion and hence the Commissioners were immune from personal liability.

Erection of Guardrails

An action was brought in Hines v. Carroll, 186 Okla. 555, 99 P. 2d 113 (1940), against county commissioners to recover damages for injuries sustained in an automobile accident allegedly due to the negligence of the commissioners in failing to install guardrails on a bridge. The question before the Court was whether the omission to provide guardrails pertained to the performance of discretionary or ministerial duties. In holding that such design decision was discretionary, the Court said that if the omission of guardrails constituted an act of negligence on the part of the commissioners they were answerable only to the county by whom they were employed, and not to private persons.

Installation of Culverts

It was argued on appeal in Lutes v. Thompson, 193 Okla. 331, 143 P. 2d 135 (1943), that failure of defendant county commissioners to install culverts in construction of a highway, which omission caused surface water to be impounded on plaintiff's land, was the breach of a ministerial duty for which defendants were liable. In rejecting this contention and holding that the decision not to install culverts was made in the exercise of discretion, the Supreme Court of Oklahoma said that the "omission of the culverts could have been nothing other than the exercise of faulty judgment, and such omission did not constitute actionable negligence."

Installation of Traffic Control Devices

The complaint alleged, in Johnson v. Callisto, 287 Minn. 61, 176 N.W. 2d 754 (1970), that plaintiff was injured in a head-on collision with an automobile attempting to pass a third car at the crest of a hill, and that the accident was due to the negligence of defendant, the Minnesota State Commissioner of Highways, in failing to provide "no passing" line markings at the brow of the hill. The Supreme Court of Minnesota upheld the action of the lower court in ordering dismissal of the suit, on the ground that the installation of traffic control markings, signs, and devices was a matter within the discretion of the Commissioner. It stated

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[9]See the further Oregon decision of Leonard v. Jackson, 6 Ore. App. 613, 488 P. 2d 838 (1971), likewise holding that highway design is a protected discretionary function.

that he was not liable for mere errors of judgment in the determination of matters involving discretion.

Bridge Location and Relocation

It was held in Templeton v. Beard, 159 N.C. 63, 74 S.E. 735 (1912), that no cause of action was stated against county highway officials for alleged negligence in failing to cause a bridge to be constructed at a specific location, because the decision of the officers in respect to the location and construction of bridges is one involving the exercise of discretion. And in Harmer v. Peterson, 151 Neb. 412, 37 N.W. 2d 511 (1949), it was held that county commissioners were not liable for damages to plaintiff's land caused by moving a bridge and reconstructing a channel across plaintiff's land, because the decision of the commissioners in respect to the removal and relocation of the bridge was one made in the exercise of discretion.

Thus, it is seen that the cases very generally hold that matters pertaining to the planning for and design of highways are discretionary in nature. This is a concept easily grasped.[10] More difficult problems arise in connection with the question whether maintenance activities are to be classified as discretionary or ministerial.

MAINTENANCE ACTIVITIES

The statement is frequently to be found in the cases that design activities are discretionary and maintenance activities are ministerial. The generalization in respect to design functions is valid, but the generalization in respect to maintenance functions is invalid. There are many aspects of maintenance activities that are generally held to be discretionary. That is to say, decisions in respect to the need or necessity for repairs, the time and place of making repairs, the materials to be used, and the method of making repairs, are widely held to be discretionary in nature. It is only after the course of repairs is actually undertaken that maintenance activities fall generally within the category of ministerial functions. Thus, although the statement holds that design activities are discretionary, the second half of the aforementioned dictum must be rejected as being overly broad. It is important to understand that maintenance activities at the planning stage, as opposed to maintenance activities at the operational stage, are generally held to be within the discretionary exemption.[11]

Maintenance Activities at the Planning Level

The following cases illustrate that maintenance operations at the planning level, as distinguished from the operational level, are treated as being discretionary in nature.

Repair of Ruts or Potholes

Lusietto v. Kingan, 107 Ill. App. 2d 239, 246 N.E. 2d 24 (1969), is a leading case involving liability for maintenance activities at the planning level. It appeared that plaintiff's intestate was killed when the automobile that he was operating struck a large hole in

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[10] No cases have been found dealing with the liability of individuals that explore such fine points as the "exhaustion of discretion," or suggest a duty on the part of individuals to review design decisions in the light of "changed conditions" after the design plan has gone into effect. Although such matters are dealt with and influence the result in a few of the cases involving liability of the state for design defects (see companion paper), it should be remembered that different equities are being balanced when the state, as the defendant, is being viewed in the capacity of a distributor of loss, and when the public servant, as defendant, is being viewed in the capacity of the sole source of indemnification for loss. The fact that financial ruin for the individual defendant is a consequence not in the least unlikely is a matter to which the courts have not been insensitive, and have so made plain in unmistakable and often forceful terms in many decisions. As before stated, the law relating to liability of public officials does not and cannot be made to parallel and equate with the law relating to tort liability of the state.

[11] It should be noted at this point that there are set forth in the companion paper, entitled "Liability of State Highway Departments for Design, Construction and Maintenance Defects," a few cases involving state liability that appear to reach a different result. No attempt is made at reconciliation. Subservience to the loose aphorism that maintenance activities are ministerial cannot void the logic that discretion is involved in planning. The cases involving personal liability that proceed on the theory that maintenance activities at the planning stage are discretionary are based on sound reasoning. See also comment in n. 10 supra.

the highway and careened off the road. Suit was brought against the Illinois Maintenance Supervisor having jurisdiction over the road in question, charging negligence in failing to repair the defect in the highway. Because this case involved a very ordinary type of maintenance activity (i.e., the repair of a rut or pothole in the road), the language of the Appellate Court in ruling in favor of the Maintenance Supervisor is worth studying in some detail. Referring to the defendant's responsibilities in respect to maintenance and repair of the highways under his jurisdiction, the Court said:

> ...the defendant's duties were not ministerial, they were governmental in character and required the exercise of discretion and judgment. With regard to holes in the highway, the defendant must exercise discretion and judgment as to which holes to fill and which holes not to fill; of the holes to be filled, which holes are to be filled first. He must perform all of this within the limitations of available manpower, equipment and finances. It is a well established principle of the common law that an immunity exists in favor of public officials when they are exercising their official discretion on matters which are discretionary in nature and not ministerial...
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> To hold the defendant liable in this case would be productive of many problems. Who, in the chain of command concerning state highways would be responsible? As orders filter down and reports filter up, would each individual in line be personally responsible? What if budget deficiencies due to insufficient legislative appropriations required a restriction in repair work so that only half the holes in the State's highways could be filled? Moreover, it is common knowledge that no highway is without imperfections. If every rut, hole, or blemish on the highway were to create the possibility of personal liability against one or more employees of the State Highway Department, it would be impossible to find employees willing to serve under such conditions.

The case of Ten Eicken v. Johnson, 1 Ill. App. 3d 165, 273 N.E. 2d 633 (1971), is virtually on all fours with Lusietto v. Kingan, supra. The action in this case was against the Commissioner of Streets of the City of Chicago, alleging negligence in failing to repair a rut in a city street, collision with which caused plaintiff's automobile to veer into a pillar beacon to his injury. Here again the Appellate Court ruled that decisions in respect to the repair of highways are discretionary, hence the Commissioner could not be found liable on the theory that failure to maintain the streets of Chicago in a state of good repair was the breach of a ministerial duty.

To the same effect is Sells v. Dermody, 114 Iowa 344, 86 N.W. 325 (1901), wherein the Supreme Court of Iowa ruled that failure to repair a large hole in the highway was not the breach of a ministerial duty, because it is a matter of discretion when and where repairs are necessary and what work shall be done in order to effect repairs.

Bridge Repair

The applicability of the discretionary-ministerial dichotomy to the maintenance activity of bridge repair was under consideration in the well-reasoned case of Ham v. Los Angeles County, 46 Cal. App. 148, 189 P. 462 (1920). This was a wrongful death action brought against county road commissioners alleging negligence in failing to make repairs to a bridge damaged by flood waters. The California Court's discussion of the distinction between discretionary and ministerial activities is frequently invoked and relied upon by other courts, hence it is worth quoting at some length.

> The main perplexity in the case of public officials...whose responsibilities include and blend almost indefinably the judicial, legislative, and administrative functions is to determine where the ministerial and imperative duties end and the discretionary powers begin. It is said by some of the authorities that a public official is absolved from liability for negligence if the act is such as to involve "any discretion on his part either as to its performance or the manner of its performance." This statement of the law obviously requires some modification, as it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail. It would seem a fair application of the rule would be that any duty is ministerial which unqualifiedly requires the doing of a certain thing. To the extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance be discretionary. Words and Phrases (Second Series) gleans from the numerous authorities cited the following definition:

"A 'ministerial' act is one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the thing being done."

Applying this definition to the matter of bridge repair, the Court concluded that:

...it was a matter of discretion with the supervisors, not only as to the method of repair which they might adopt, but as to when the repairs should be made, or whether made at all...The character of the damage and the material of the bridge might suggest the advisability of replacing it with a more substantial structure of steel or concrete. We are satisfied that the discretionary powers and duties of the supervisors in the matter of replacing the bridge, absolved them from liability...

Likewise involving bridge repair and maintenance at the planning level is Binkley v. Hughes, 168 Tenn. 86, 73 S.W. 2d 1111 (1934). This was a wrongful death action alleging that a truck broke through the defective flooring of a bridge, precipitating the driver's fatal plunge into a stream below; that it was the duty of defendants, as county road commissioners, to keep the bridge in a state of good repair; that the commissioners knew the bridge was in an unsafe condition and negligently failed to take any action to render it safe for travel. In upholding the action of the trial court in sustaining a demurrer to the complaint, the Supreme Court of Tennessee rejected the argument that the defendants were guilty of a breach of a ministerial duty in failing to repair the bridge, stating that "the determination as to the size, character, strength, and capacity of a bridge is one as to which individuals might differ, and which, therefore, calls for the exercise of judgment and discretion on the part of those charged with its construction and maintenance."

The same result was reached in Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079 (1896), which also involved injuries proximately caused by the failure to repair a defective bridge flooring. In ruling in favor of defendants, town highway commissioners, the Supreme Court of Illinois said the repair of bridges "is a duty which unquestionably involves the exercise of judgment and discretion, as to the time, method, and means, and it is readily distinguishable from such ministerial duty as merely involves the following of specific directions and instructions." The Court added the following interesting observation:

It would be against reason to elect commissioners to use their best judgment, and then sue them for doing it. We do not think the commissioners, who in good faith and to the best of their ability have expended the means at their command where they seemed to them most needed, can be called upon to justify their judgment to the satisfaction of a jury at the peril of their savings.

Repair of Other Highway Facilities

The reasoning that maintenance activities at the planning level are discretionary in nature, of course, has application to the repair of highway facilities in general. Thus, in Pluhowsky v. City of New Haven, 151 Conn. 337, 197 A. 2d 645 (1964), the Supreme Court of Errors of Connecticut held that no error was committed by the lower court in ruling that the duty of defendant city superintendent of streets to take steps to repair a defective catch basin was one involving the exercise of discretion, thus absolving defendant from liability for a motor vehicle accident caused by water accumulation on the streets due to failure to repair the clogged catch basin.

Selection of Materials to be Used in Maintenance Operations

The decision as to which materials are to be used in maintenance operations is one made at the planning stage, and, therefore, is protected by the discretionary exemption. This was illustrated in Coldwater v. State Highway Commission, 118 Mont. 65, 162 P. 2d 772 (1945), the complaint in which alleged, inter alia, the following: that defendants, members of the Montana State Highway Commission, were under a ministerial duty to construct and maintain safe roads; that defendants caused oil to be applied to the highways for the purpose of sealing the same, which was highly unsuitable for use on roads because it became exceedingly slippery when wet; that because of such dereliction of ministerial duty, plaintiff skidded off the highway and was seriously injured. In upholding the trial court's action in sustaining demurrers to the complaint, the Supreme Court of Montana ruled that defendants' judgment as to the materials to be used in surfacing the roads was a discretionary matter. It indicated that defendants were at most guilty of errors of judgment, for which they could not be held liable in a suit at the hands of a private individual.

Removal of Ice and Snow

It has been held that determinations in respect to the removal of ice and snow from the highways fall within the ambit of protected discretionary decision. See Derfall v. Town of West Hartford, 25 Conn. Sup. 302, 203 A. 2d 152 (1964), an action to recover damages for injuries received by plaintiff when the bus in which she was riding skidded on an icy street and collided with a tree. The complaint alleged that it was the duty of defendant, superintendent of streets, to keep the roads safe for travel by the removal of ice and snow, or in the alternative sanding the streets, neither of which was done. The Appellate Court, in affirming the lower court's action in sustaining a demurrer to the complaint, said that "no liability would attach to the defendant...for his negligence in the performance of a public duty requiring the exercise of discretion."

Thus, it is seen that maintenance activities carried out at the planning level tend rather uniformly to be characterized as falling within the discretionary exemption. As is next shown, cases involving maintenance activities at the operational level frequently reach a different result.

Maintenance Activities at the Operational Level

The great majority of the cases holding public officials liable for the breach of ministerial duties deal with situations where maintenance activities are carried out at the operational level. That is to say, decisions in respect to the need or necessity for maintenance activities have been made, and the time, place, means and methods of carrying out such activities decided upon. The negligence charged relates to affirmative conduct being carried out in implementation of decisions made at the protected planning stage.

It cannot be emphasized too strongly that in many of the decisions in which public officials have been held liable for breach of ministerial duties, the negligence charged was obvious. The great majority of the suits that have been brought against highway officers and employees have resulted in judgments favorable to them, on the ground that the activity involved was one involving the exercise of judgment and discretion. In the minority of the suits that have gone against such officers and employees, the facts very generally reflect a plain lack of ordinary and reasonable care in carrying out more or less rote functions. In other words, the courts have not been unsympathetic towards public employees who have faithfully attempted to carry out the duties imposed upon them. The cases in which liability has been imposed tend to run to situations where the public has been exposed to unreasonable risks that could have been avoided by the exercise of ordinary care in performing routine maintenance functions.

The following cases illustrate:

A leading case involving the rule of ministerial liability at the operational level is Doeg v. Cook, 126 Cal. 213, 58 P. 707 (1899). This was an action to recover damages for personal injuries sustained by plaintiff as a result of falling at night into an open culvert in the highway, which, defendants, in charge of the town streets, had failed to guard against by lighting, rails, barriers, or other devices protective of persons using the streets during the nighttime. In ruling for the plaintiff the Court stated that no discretionary duties were involved, but found, on the other hand, that the duty to protect against the evident danger was absolute, certain, imperative, and merely the execution of a set task. Such duty, the Court said, being ministerial in nature rendered the defendants liable for their failure to take precautions that were obviously necessary.

Tholkes v. Decock, 125 Minn. 507, 147 N.W. 648 (1914), is another much cited case, involving a similar fact situation. It appeared that defendants, a road overseer and his employee, undertook highway repairs in the course of which they caused a culvert to be removed, and left the excavation created by such removal open and exposed during the nighttime, without lights, guards, or warnings of any kind to the traveling public. As a result, plaintiff drove his automobile into the excavation, and received injuries for which he brought suit for damages. The Court found that defendants were guilty of breach of a ministerial duty, and emphasized the serious character of the negligence involved as follows:

> The authorities seem to differentiate to some extent between acts of nonfeasance, that is a failure to make repairs when needed, and positive acts of negligence in making such repairs, or misfeasance. We do not deem it necessary to discuss this phase of the question. It is unnecessary. We have here affirmative misconduct, and, according to the allegation of the complaint, gross negligence on the part of the defendants; in attempting to repair the road in question they removed a culvert therein, and left exposed overnight without warnings of any kind

the trench across the roadway, which was a trap to those traveling upon the road and inevitably likely to cause them serious injury. In such a case there can be no serious question of liability.

In State v. McRae, 169 Miss. 169, 152 So. 826 (1934), the Court emphasized that the planning stage in respect to the need for and making of repairs was over, and that the negligence charged took place during the affirmative act of making repairs. This case also involved leaving a ditch across the highway unprotected at night by lights or other warning devices, and plaintiff sustained injuries upon driving his automobile into the opening. The Court carefully stated that if defendant had been engaged in "determining the necessity of repairs" he would have been engaged in the performance of discretionary activities for which he would not have been liable, but that the act of "tearing down and rebuilding" was a ministerial function for negligence in the performance of which he was liable to plaintiff.

To the same effect is Mott v. Hull, 51 Okla. 602, 152 P. 92 (1915), wherein defendant township highway commissioners were held liable for injuries suffered by plaintiff when he drove his automobile at nighttime into an excavation made in the highway for a culvert that had been left by the commissioners unlighted and without guards. The Supreme Court of Oklahoma said that decisions in respect to the necessity for, location, size, and construction of the culvert were discretionary matters, but that the work of installation was ministerial in character, and defendants were liable for their negligence in leaving the excavation unprotected.[12]

Other cases in which highway officers and employees were held liable for affirmative misconduct during the course of making actual repairs include Robinson v. Rohr, 73 Wis. 436, 40 N.W. 668 (1888), wherein the Supreme Court of Wisconsin allowed recovery against city street commissioners for their negligence in permitting the fall of a derrick on a pedestrian during the course of making repairs to a bridge. See Wrightsel v. Fee, 76 Ohio St. 529, 81 N.E. 975 (1907), in which defendant road supervisor was held liable for constructing a ditch in such negligent manner as to cause water to be cast on plaintiff's lands. See also Lowry v. Carbon County, 64 Utah 555, 232 P. 908 (1924), an action against county commissioners to recover for personal injuries suffered as a result of blasting operations that took place in grading and leveling an existing road, wherein the Court conceded that defendants could not be held liable for "the adoption of unsafe plans for the construction of a road or bridge, for errors of judgment in the selection of materials, structures, routes, or grades of a highway," but distinguished such non-actionable negligence from the instant case on the ground that the defendants were "actively engaged" in the affirmative conduct that produced the injury.

To sum up, in the usual case where highway personnel have been held liable, or the case has been allowed to go to the jury on the question of negligence, the improper conduct took place after the planning stage was over and the defendants were actively engaged in the performance of maintenance activities, during the course of which they failed to exercise ordinary care, or worse, actively created a situation that was dangerous to highway users. The cases in which liability has been imposed share the commonality of being cases of obvious negligence; and the cases that have been remanded for trial are ones in which the facts clearly indicate that the jury could find negligence. The fact of the matter seems to be that the cases resulting in liability appear to be cases that could not have been decided otherwise.

OPERATION OF VEHICLES

The operation of motor vehicles presents a special situation, and as might be expected, the general rule is that the operation of motor vehicles constitutes the performance of a ministerial duty. In other words, highway department employees are held to the same standard of care as all other individuals operating motor vehicles on the highways. This was exemplified in Mathis v. Nelson, 79 Ga. App. 639, 54 S.E. 2d 710 (1949), where the operation of a tractor and drag machine on the highway was held to be the performance of a ministerial as distinguished from discretionary function, thus permitting liability to be imposed for damages suffered by plaintiff when his automobile collided with the machine being driven on the wrong side of the road. Similarly, state highway commission employees operating a sweeper were held in Miller v. Jones, 224 N.C. 783, 32 S.E. 2d 594 (1945), to be engaged in the performance of a ministerial duty, and therefore were liable for damages to plaintiff's stock in trade caused by dirt and dust being blown into his store by the operation of the sweeper.

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[12]It hardly needs statement that in order to impose liability for failure to correct a dangerous condition, there must be actual or constructive notice thereof, and sufficient time and adequate means to take curative or protective action. See to this effect Smith v. Zimmer, 45 Mont. 282, 125 P. 420 (1912) [on rehearing].

However, a departure from the general rule has been found in two cases which hold that the operation of a snowplow cannot be classified as a ministerial activity.

Mower v. Williams, 402 Ill. 486, 84 N.E. 2d 435 (1949), was an action brought by husband and wife to recover damages for injuries suffered by them when their automobile collided at an intersection with a snowplow being operated by a state highway maintenance employee. In attempting to establish negligence on the part of defendant, plaintiffs insisted that the job of operating a snowplow could not be classified as other than a mere ministerial duty. The Supreme Court of Illinois rejected this contention, and squarely held that defendant was engaged in an exempt discretionary activity. In explanation of such holding, the Court said:

> The removal of snow and ice from one of the main traveled highways is absolutely essential to the welfare and safety of the traveling public. There are few, if any, functions of public responsibility which require more prompt and effective action on the part of those charged with such duty. That the removal of such snow and ice is a governmental as distinguished from a ministerial function, appears as a reasonable proposition when circumscribed by conditions necessitating the overcoming of the hazard of snow and ice, with its attending danger to life and property, especially when it is of such magnitude that private means are not adequate to deal with the problem, and when the public welfare demands and the public relies on the State to meet the problem. The defendant, as an agent of the State, was charged with a duty that was no way fixed as to time, mode or occasion and his duty was not ministerial in character.
>
> The defendant, having been engaged in duties of a governmental character, requiring the exercise of discretion and judgment, he is not liable for defects in that judgment in carrying out his duties.

The same result was reached in Osborn v. Lawson, 374 P. 2d 201 (Wyo. 1962), a wrongful death action involving a head-on collision between an automobile being driven by plaintiff's decedent and a snowplow being operated in the lane against the on-coming traffic by a maintenance employee of the Wyoming State Highway Commission. Stressing that the removal of snow from the highways was a significant government function in the severe winter climate of Wyoming, the Court squarely rejected plaintiff's contention that defendant was performing a mere ministerial duty. The defendant was held immune from liability notwithstanding a virtual concession by the Court that the method of operating the snowplow was in fact negligent.

These appear to be isolated cases, and the rule is otherwise firmly established that highway employees operating motor vehicles on the highway are held to the same standard of care as other persons operating vehicles on the highway; i.e., the duty in the operation of such vehicles is one of reasonable care and is ministerial in character.

EXCESS OF JURISDICTION

Before taking leave of the discretionary-ministerial distinction and proceeding to a discussion of the other tests used by the courts to determine personal liability, it needs to be pointed out that the discretionary exemption appears quite clearly not to extend to a situation where the public official has acted in excess of his jurisdiction. In the case of highways, this would occur most often where there has been a trespass to property (as, for example, land lying outside of the right-of-way). In other words, the limits of discretion end at the boundary where the absolute rights of property begin. Put another way, there can be no discretion in exceeding the limits of jurisdiction, or acting outside the scope of duly constituted authority. The rule, sometimes referred to as the "jurisdictional facts doctrine," then is that a public official acts at his peril in determining the scope of his jurisdiction and is not protected where jurisdiction has been exceeded.

Thus, in Nelson v. Babcock, 188 Minn. 584, 248 N.W. 49 (1933), the Minnesota Commissioner of Highways was held personally liable where in improving a highway he trespassed upon land lying outside the right-of-way, the Minnesota Supreme Court stating that "the evidence and conceded facts permitted the jury in finding that in the trespass on plaintiff's land defendant committed acts outside the scope of his authority. When he went outside the boundaries of the right-of-way upon plaintiff's land and damaged it or destroyed its former condition and usefulness, he must be held to have designedly departed from the duties imposed on him by law."

Similarly, in Cowgill v. Hurley, 27 Del. 151, 86 A. 731 (1913), defendant road supervisor was held liable for trespassing in the construction of a new road in excess of the authorized 30-foot right-of-way.

See to the same effect, Webster v. White, 8 S. D. 479, 66 N.W. 1145 (1896), holding township officers who trespassed upon land in an attempt to locate a section-line highway on a line other than its proper location personally liable in damages for the unauthorized trespass.

The so-called "jurisdictional facts doctrine" has been a troublesome one in connection with the actions of public officials in different types of government service,[13] but its application to highway-related activities seems in general to be limited to actions of trespass, intentional or otherwise, on real property, and the consequences there are so plain that no further time need be spent in discussion of the rule.

PUBLIC DUTY-PRIVATE DUTY DISTINCTION

There are a number of cases that enunciate a distinction between public duties and private duties. The rationale announced is that a public official is not liable for the breach of a duty owing to the public, but is liable for the breach of a duty owing to private individuals. The distinction was noted at an early date in Cooley on Torts, Vol. 2, p. 576 (Callaghan, 3d Ed.), and Judge Cooley's statement of the rule has been frequently quoted by the courts, as follows:

> The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.

Thus, the public-private duty dichotomy is an alternative to the discretionary-ministerial dichotomy in determining the personal liability of public officials for alleged misconduct in the performance of their duties. The public-private duty concept has been adverted to in a number of decisions, but more often by way of dictum, or in the course of general discussion of the theory of public officials' liability, than as a precise ground of holding dispositive of the issues raised in the case. There are but a handful of highway cases in which the public-private duty concept has been used to determine the result.

Lusietto v. Kingan, 107 Ill. App. 2d 239, 246 N.E. 2d 24 (1969), one of these, has already been discussed, and it was pointed out therein that the ruling in favor of the defendant was premised on the ground that his duties were discretionary rather than ministerial in nature. However, this case was decided on dual grounds. The Court made it crystal clear that the ruling in favor of defendant was equally premised on the ground that his duties were found to be owing to the general public rather than to a private individual, and hence he was not liable to suit at the hands of a private person. The Court stated in this respect that "the defendant in the case is not liable to the plaintiff for two reasons, either of which would be sufficient."

For convenience sake, the facts are recapitulated briefly. Plaintiff's intestate was killed when the automobile he was operating struck a large hole in the highway and careened off the road. Suit was brought against the Illinois Maintenance Supervisor, charging negligence in failing to repair the rut or hole in the highway. Since the theory and impact of the public-private duty concept was dealt with at greater length in Lusietto than in any other highway decision, the language of the Court is worth examining in some detail.

> We believe that the law is clear that a state highway employee may be sued and held individually liable for certain negligent acts committed by him in the course of his employment...In order for a negligent act to give rise to liability, however, it is a well established rule that a legal duty must exist in favor of the person whose conduct produces the injury. In [citation of cases omitted] relied on by the plaintiff, the defendants in each case were operating motor vehicles on the public highways in a negligent manner. What the opinions said in those cases, in effect, was that the fact of governmental employment could not be used as a shield. The duty imposed on those defendants was held to be the same duty imposed on all other persons operating motor vehicles on the public highways. We believe this to be sound law.

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[13] See, e.g., the leading case of Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891), per Holmes, J.

> In the instant case, however, the plaintiff is asking that we predicate the defendant's liability solely on the basis that he is a government employee. That is to say, that as a Maintenance Supervisor of the State Highway Division, he owed a duty to the plaintiff to maintain that portion of the highway where the accident occurred and to have either filled the particular hole that caused the injury or to have posted or barricaded it in some way. With this contention, we cannot agree.
>
> We believe that the plaintiff and the trial court in this case have misconstrued the matter by attempting to impose the State's duty to maintain the highways upon the defendant. In fact, the defendant's duty to supervise the maintenance of a certain portion of the State's highways assigned to him by the State Highway Division is a condition of his employment, a violation of which may give rise to such lawful sanctions as his employer may choose to exercise against him. However, unless a violation of a condition of his employment is simultaneously and independently of such condition also a violation of some duty owed to an individual, such violation will not give rise to legal liability to an individual...
>
> Applying this distinction to the present case we are of the opinion that the defendant's duty to maintain the highway in question was a duty owed to the public generally and not to an individual.

Rose v. Mackie, 22 Mich. App. 463, 177 N.W. 2d 633 (1970), was also squarely decided on the ground that the highway activity sub judice was a public rather than a private duty. Whereas Lusietto v. Kingan involved maintenance, Rose v. Mackie involved design. The case arose out of head-on automobile collision due, according to the allegations of the complaint, to the faulty design of the highway in narrowing suddenly and without warning from a three-lane to a two-lane road. Defendant, the Michigan State Highway Commissioner, countered by asserting that no claim for relief had been stated because his duty (if any) to redesign or reconstruct the highway at the point where the accident occurred was one owing to the general public, and not to any private persons, including plaintiffs. The Court sustained this position, reversing and remanding for entry of an order granting defendant's motion to dismiss. In other words, the Court held that since no duty was owed to plaintiffs as private persons no cause of action was stated for the breach of a duty running to them from the Highway Commissioner.

A similar result was reached in Genkinger v. Jefferson County, 250 Iowa 118, 93 N.W. 2d 130 (1958), a wrongful death action wherein the complaint alleged that the decedent was killed when the automobile she was operating passed through an unmarked "T" intersection and crashed into a drainage ditch newly constructed at the terminal end of the highway in the intersection. Negligence was charged on the part of the county engineer in (a) failing to post warning of the presence of the "T" intersection, (b) failing to warn of the termination of the road on which decedent was traveling at the intersection, and (c) failing to erect a guardrail or barrier protecting against the excavation. In affirming judgment entered below for the county engineer, the ground of decision was made to rest squarely on the ruling that no duty was owing to the decedent as an individual, the Iowa Supreme Court stating that the duty of the county engineer in respect to signing, and erection of protective rails or barriers, was "one owing to the general public, and not to any certain individual or this decedent."

A like ruling was handed down by the Supreme Court of Colorado in Richardson v. Belknap, 73 Colo. 52, 213 P. 335 (1923). It appeared from the complaint that plaintiff was injured and his wife met her death when the automobile in which they were traveling as passengers ran off the road at the approaches to a bridge. The negligence charged against defendants, members of the board of county commissioners, was in failing to erect guardrails at the scene of the accident. A demurrer interposed by the defendants was sustained by the trial court, and the sole question on appeal, as stated by the Court, was "whether the county commissioners are liable, as individuals, for injuries caused by their failure to maintain and keep in repair a public highway."

After stating it to be the general rule that where a duty imposed upon an officer is to the public, nonperformance is a public not a private injury, and must be redressed, if at all, by public prosecution, the Court, in upholding the action of the trial judge in sustaining the demurrer, said that "it necessarily follows that, since the duty the defendants are charged with violating is a duty to the public, the plaintiff cannot maintain an action against them in his own behalf."

Thus, the foregoing cases announce the rule that whether the negligence charged relates to the design or maintenance function, if the duty alleged to be breached is one owing to the

general public, and not to private individuals, no cause of action lies for failure to perform such duty. The issue of liability or non-liability is made to turn on the nature of the duty.

This poses the critical question of the precise nature of the distinction between public and private duties. On this question, unfortunately, no firm answer can be given. Neither the courts nor the commentators have succeeded in providing a definitive statement of the distinction between public and private duties. Attempts to state the difference are invariably couched in terms of generalities, and the net result is that the line of demarcation is no more clear-cut than that between discretionary and ministerial duties. It is not an unfair observation to say that the public-private duty dichotomy (like the discretionary-ministerial dichotomy) has been used by the courts as a means of stating rather than arriving at the result.

However, a comparison between the public-private duty concept and the discretionary-ministerial concept is entirely valid and yields instruction. The cases seem to indicate that the two are almost entirely similar in operative effect, notwithstanding the obvious conceptual distinction. The distinction is that the one centers on the nature of the duty or obligation owed, whereas the other focuses on the character of the acts performed in carrying out the duty or obligation. Because the existence of a duty cannot be made to depend on the nature of its performance, the conceptual distinction is apparent. However, a moment's reflection rather clearly indicates that matters generally agreed to be discretionary, such as the weighing of policy factors and the making of high-level judgments, lend themselves readily to being characterized as duties owing to the public, whereas performances of rote functions or set tasks ordinarily described as ministerial are not of such dignity as to be characterized as obligations affecting the public welfare or duties owing to the community at large. There is no common sense problem in relating discretionary duties to public duties, and ministerial duties to private duties.

Of greater persuasion, however, is the fact that in terms of logic, if the public-private and discretionary-ministerial concepts are not to be equated, they can run into head-on conflict when applied to a given fact situation, depending on which is given priority. To illustrate, if the public-private duty concept is given priority, as applied to a given set of facts, a ministerial act performed in the course of carrying out a public duty would result in non-liability, and a discretionary act performed in carrying out a private duty would result in liability. Conversely, if the discretionary-ministerial concept were given priority, then a private duty performed in carrying out a discretionary act would result in non-liability, and a public duty performed in carrying out a ministerial act would result in liability.

This, of course, produces an utterly illogical result. Two legal concepts both designed to produce the same result (i.e., determine in a given situation whether there is liability or non-liability) will bring about opposing results. Such irrationality of result is not to be countenanced, and in order to achieve harmony rather than disharmony between the two concepts it becomes logically necessary that the public-private duty concept be equated with the discretionary-ministerial concept. The cases readily lend themselves to this conclusion; i.e., witness that in Lusietto v. Kingan the Court reasoned from both concepts in order to arrive at the result. It is difficult to conceive a situation in which the dialectic so employed would not be appropriate.

Thus, it may be said that wherever the argument is made that an act is discretionary, the argument can equally be made that a public duty is involved, and wherever the argument is made that a duty is ministerial, the argument can equally be made that a private duty is involved. The two concepts are interchangeable and mutually supportive one of the other. This obviously gives the defense lawyer two strings to his bow in arguing privilege.

MISFEASANCE-NONFEASANCE DISTINCTION

It may have been noted by the reader that in the preponderance of the cases previously set forth wherein the public official was held to be not liable on the ground that the activity involved was discretionary, the negligence charged was one of omission or failure to act, rather than negligence charged in the course of pursuing an affirmative course of conduct. This, in the great majority of the cases, was simply because the decision to act or not to act was held to be privileged as being discretionary. However, in a small number of cases, the rule has been announced that nonfeasance in and of itself is a defense to an action involving personal liability of an officer. This is distinctly a minority rule (the origins of which are traceable back to the beginnings of tort law[14]), but there is eminent authority that has either ad-

[14]The classic example is that of non-actionable failure to go to the aid of those injured or in distress. Liability may, of course, arise if the Good Samaritan role is actively pursued.

hered thereto, or recognized the existence of the rule by dictum. Hence, it requires discussion.

Possibly the most well-known statement of the rule appears, by way of dictum, in Moynihan v. Todd, 188 Mass. 301, 74 N.E. 367 (1905). This was an action to recover damages for personal injuries suffered as a result of blasting operations that took place during the course of making street repairs. In discussing the general theory of liability of public officials, the Supreme Judicial Court of Massachusetts used language (that has been much quoted) as follows:

> ...it has always been held in the American courts that...a public officer, while performing a duty imposed solely for the benefit of the public, is not liable for a mere failure to do that which is required by statute. Negligence that is nothing more than omission or nonfeasance creates no liability...the principle which underlies the rule that public officers...are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for nonfeasance...(Emphasis added.)

The cases in which the nonfeasance doctrine, as enunciated in Moynihan, supra, has been squarely applied to relieve highway officials of personal liability are but few in number. Acknowledgment of the rule, as in Moynihan, is most often made by way of dictum or in the course of general discussion. Of the cases well in point, none would seem to be more significant than Stevens v. North States Motor, Inc., 161 Minn. 345, 201 N.W. 435 (1925). This was an action to recover damages for failure to remove a log from the highway, or to give warning of its presence. It was alleged that defendant county commissioners had knowledge of the hazard several days prior to the injury sustained by plaintiff when the automobile in which he was traveling collided with the obstruction. In upholding the action of the trial court in sustaining a general demurrer to the complaint, the Minnesota Supreme Court found it necessary to distinguish one of its prior decisions, and did so on the ground that the earlier case involved misfeasance, whereas the instant case was one of nonfeasance only. The Court said:

> The case [citation omitted] relied upon by appellant, was a case of misfeasance on the part of the overseer in repairing a culvert in a public highway. It was not a case of nonfeasance like unto the case at bar. There, the overseer undertook to repair a culvert, and, while so doing, went beyond his duty in that he left a pitfall in the culvert overnight, an independent tort for which he was personally liable, the same as would any other person, in no way connected with the highway, have been. The leaving of such a mantrap was no part of the overseer's duty. True, it was done while the overseer was in the act of repairing the culvert, but the act of leaving the pit open and unprotected overnight was not a part of his official duties. It constituted misfeasance as distinguished from nonfeasance, and therein lies a distinction between that case and the one at bar.

Stevens was followed in Gieffer v. Dierckx, 230 Minn. 34, 40 N.W. 2d 425 (1950), an action for damages resulting from failure to post signs or erect a barrier protecting against the hazard of a destroyed bridge, in which the Court held that the omission to take precautionary measures did not constitute actionable negligence because public officers, although liable for misfeasance, are not liable for nonfeasance.

Binkley v. Hughes, 168 Tenn. 86, 73 S.W. 2d 1111 (1934), was a wrongful death action brought against county road commissioners for alleged negligence in failing to repair a bridge, or give warning that it was in unsafe condition, the complaint alleging that defendants had full knowledge that the bridge was not safe for vehicular travel. Decedent was killed when the truck that he was operating broke through the bridge and plunged into a stream below. A demurrer to the complaint was sustained by the trial court. The Supreme Court of Tennessee conceded that the road commissioners would be liable for misfeasance in the performance of their official duties, such as, if they "should dig a ditch from the highway onto the premises of an adjoining landowner so as to drain water from the road onto such land whereby it was damaged," but went on to state that it was "committed to the general rule that, in the absence of statute for mere failure to perform an official duty, the commissioners are not personally liable." In affirming the lower court's action in sustaining the demurrer, the Court rested its decision, inter alia, on "the hypothesis that for nonfeasance in the performance of a public duty the official is not liable to third persons."

To cite, by way of example, a non-highway case applying the rule, Smith v. Iowa City, 213 Iowa 391, 239 N.W. 29 (1931), was an action against a municipality and the individual members of a city park board to recover damages for injuries to a minor child sustained by reason of the alleged negligence of the defendants in failing to keep a piece of amusement machinery in

the city park in a state of good repair. In affirming judgment entered below for both the city and the individual park board members, the Supreme Court of Iowa emphasized that the latter were "guilty, if at all, of nonfeasance only," and said that it "would be an anomaly in the law which would relieve the municipality from liability for the nonfeasance of its officers and without regard thereto subject such officers individually to liability therefor."

The rule that public officers cannot be held liable for mere nonfeasance has, of course, been expressly repudiated in some decisions. For example, in the early case of Doeg v. Cook, 126 Cal. 213, 58 P. 707 (1899), an action to recover damages for injuries due to alleged negligence in failing to erect a barrier providing protection against an open culvert in the highway, the Supreme Court of California conceded that there was a conflict of authority on the question of whether an action would lie against public officers for "injuries received from their mere negligent omission," but proceeded to align itself with what was described as "the very decided trend of modern decision...to hold such officers liable for acts of nonfeasance." Note that in several of the cases previously set forth herein, in which the highway employee was found liable, the situation was one of nonfeasance or the failure to act, and the defense of nonfeasance does not even seem to have been asserted.

What then is the practical significance of this doctrine? The highly interesting comment is made in Harper and James (The Law of Torts, Vol. 2, Sec. 29.10, n. 39), as follows:

> The words misfeasance and malfeasance imply wrongful or tortious action, while nonfeasance is a purely neutral word, so that obviously liability should not (under the fault system) be imposed upon an officer or anybody else for mere nonfeasance. To be meaningful the comparison should be between misfeasance or malfeasance and improper nonfeasance, and if the statement had to be made in that careful way it probably would often not be made at all. (Emphasis appears in the text.)

If the highway lawyer charged with the defense of a personal liability suit wishes to assert nonfeasance as an independent defense, there is, and has been seen, authority to support him. However, the rule is so obviously vulnerable (at least in an extreme case[15]), that its best application would appear to be as an auxiliary defense, in connection with arguing the existence of a discretionary duty, or a public duty, or both, in which the decision not to act is privileged on one or both of these grounds.

The fact of the matter is that in the cases recognizing nonfeasance as a defense, it appears to have been tied in with the concept of omission to perform a public duty. Note that in Moynihan v. Todd, supra, the Court emphasized that a public official cannot be held liable for nonfeasance "while performing a duty imposed solely for the benefit of the public," and that in Binkley v. Hughes, supra, the Court said that "for nonfeasance in the performance of a public duty the official is not liable to third persons." (Emphasis added.) In Stevens v. North States Motor, Inc., supra, the Court distinguished the failure to remove a log from the highway from the act of leaving a pit open and unprotected, on the ground that the latter act took place during the course of repairing a culvert; viz., an affirmative act that gave rise to a duty of care owing to private persons. The Court described such omission as an act of "misfeasance on the part of the overseer in repairing a culvert in the public highway," and ruled that the failure to act "constituted misfeasance as distinguished from nonfeasance." (Emphasis added.) Can a plausible distinction exist between the failure to remove an obstruction from the highway and the failure to provide protection against the hazard of an open pit in the highway, other than on the ground that the affirmative act of repairing the highway gave rise to a duty owing to private persons, breach of which constituted misfeasance?

Without belaboring the matter further, this much is clear. Whenever an action is predicated on the alleged negligence of a public official in failing to act, whether the asserted defense be that of the performance of a discretionary duty, or a public duty, or both, the argument may equally be made that no liability exists because the facts reflect nonfeasance as distinguished from misfeasance. The defense of nonfeasance, it should be remembered, is ancient in its origins, is supported by solid authority, and is a weapon in the arsenal of defense attorneys that under no circumstances should be forgotten or overlooked.

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[15]Consider the case of a disaster taking place because a bridge is washed out and highway officials having ample time and adequate means to warn of the peril simply fail to take any action to protect travelers on the highway.

DEFENSE OF ACTING UNDER ORDERS

It has been seen that the tests applied by the courts to determine personal liability involve the application of the discretionary-ministerial, public duty-private duty, and misfeasance-nonfeasance dichotomies, and that by far the most important of these is the discretionary-ministerial test. Before proceeding to a discussion of the remaining matters germane to the subject of personal liability of public officials, it should be pointed out that three cases have been found wherein the defense of acting under orders was successfully interposed. In a situation where a minor employee has carried out to the letter the express orders of his superior, and the result has been negligent injury to persons or property, there is obvious injustice (except in an extreme case) in holding the subordinate personally liable for faithfully carrying out the orders of his superior. This was recognized in the following cases.

Gordon v. Doyle, 352 Mass. 137, 224 N.E. 2d 211 (1967), was a suit for damages premised on the allegation that a highway accident was caused by the action of defendant, a minor employee of the Massachusetts Department of Public Works, in erecting a traffic sign that had a misleading arrow on it. The facts brought out at trial established that the sign, with the faulty legend already inscribed, was handed to the defendant by his superiors, with instructions where to install it. In affirming direction of a verdict for defendant, the Supreme Judicial Court of Massachusetts pointed out that the "defendant as a subordinate employee had no alternative in the action he was ordered to take. He had received the sign ready-made from the department with a detailed sketch allowing him no choice to make changes in the location or in the legend on the sign." The Court concluded therefrom that: "It could not be properly found that defendant was negligent in the performance of this ministerial act."

A minor county employee was sued in Gibson v. Sioux County, 183 Iowa 1006, 168 N.W. 80 (1918), charging that a highway accident was caused by his negligence in depositing sand and gravel on the road in such manner as to create an obstruction. In ruling in favor of defendant, the Supreme Court of Iowa bottomed its holding on the fact that defendant was acting under orders, stating that "if he deposited the sand and gravel where directed by the supervisors, he did not thereby become guilty of negligence."

Osborn v. Lawson, 374 P. 2d 201 (Wyo. 1962), which involved the operation of a snowplow, has been previously adverted to herein. One of the elements of negligence charged was the operation of the snowplow in the wrong lane of traffic. In finding for the defendant, the Court excused this violation of the rules of the road on the ground that the defendant had been instructed by his superiors to operate the machine against the on-coming traffic. The Court said that "the negligence, if any,...was the negligence of the highway commission by reason of the fact that it prescribed the method of operating the snowplow."

It needs no elaboration that there is evident justice in relieving a minor employee from personal liability where he has been obedient to orders not on their face improper. Redress under such circumstances may properly be limited to an action against the superior officer who is responsible for the order that produced the injury.

Next for consideration is the matter of liability of highway officers for the torts of their subordinates.

DOCTRINE OF RESPONDEAT SUPERIOR

The question of liability of highway officials for the tortious conduct of those serving under them requires only the briefest of mention, because the principle is firmly established that the doctrine of respondeat superior has no application to public officers. The obvious reasons why public officers should not be held accountable for the torts of their subordinates are well stated in Robertson v. Sichel, 127 U.S. 507, 32 L. Ed. 203, 8 S. Ct. 1286 (1888), wherein the sole question before the Supreme Court was whether the rule of respondeat superior applies to a public officer. In holding that it did not the Court stated that to allow recovery "would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions...if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person...A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties."

The rule as thus announced finds unanimous support in the state court cases. The only serious qualification is that the public officer may be held liable if he has participated in the tortious conduct of his subordinate, or, if it can be shown that he has not exercised due

care in the selection of his subordinates. As stated in Stone v. Arizona, 93 Ariz. 384, 381 P. 2d 107 (1963), holding members of the Arizona State Highway Commission not liable for the torts of their employees: "The doctrine of respondeat superior...is not applicable. Public officers are responsible only for their own misfeasance and negligence, and not for the negligence of those who are employed under them, if they have employed persons of suitable skill."

That the rule of respondeat superior has no application to public officers (with the exceptions noted) is so well established that it is superfluous to multiply authorities so ruling. See, however, as illustrative, the following cases which relate to highway officers: Strickfaden v. Green Creek Highway District, 42 Idaho 738, 248 P. 456 (1926); Bowden v. Derby, 97 Me. 536, 55 A. 417 (1903); Trum v. Town of Paxton, 329 Mass. 434, 109 N.E. 2d 116 (1952); Moynihan v. Todd, 188 Mass. 301, 74 N.E. 367 (1905); Hitchcock v. Sherburne County, 227 Minn. 132, 34 N.W. 2d 342 (1948); Coldwater v. State Highway Commission, 118 Mont. 65, 162 P. 2d 772 (1945); Laird v. Berthelote, 63 Mont. 122, 206 P. 445 (1922); Brown v. West, 75 N.H. 463, 76 A. 169 (1910); Miller v. Jones, 224 N.C. 783, 32 S.E. 2d 594 (1945); Lowe v. Storozyszyn, 183 Okla. 471, 83 P. 2d 170 (1938); Vance v. Hale, 156 Tenn. 389, 2 S.W. 2d 94 (1928); Lowry v. Carbon County, 64 Utah 555, 232 P. 908 (1924).

There remains for consideration the problem of indemnification, which arises in those jurisdictions where the sovereign is amenable to suit and the state has been made to answer in damages for the negligence of an employee.

RECOVERY BY STATE AGAINST NEGLIGENT EMPLOYEE

The rule seems to be clearly established that where the state has been made to respond in damages for the negligence of its employee, the state is entitled to indemnification against the employee for the amount of the recovery against it. The principle that compels this result is set forth in the Restatement of Agency (Sec. 401, Comment c 1933), as follows:

> Unless he has been authorized in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or wrongful act is himself subject to liability to the principal for the loss which results therefrom.

Notwithstanding that this rule is firmly established, it seems that in actual practice the right of the principal to recover against his agent is one that is seldom exercised. Davis points out that as a matter of business practice when the typical corporation is held vicariously liable for its employee's negligence, the corporation rarely seeks recovery from the employee, no matter what its theoretical legal right to indemnity may be.[16] In a Note in 63 Yale Law Journal 570 (1954), entitled "Government Recovery of Indemnity from Negligent Employees," the author states that his research disclosed only six reported cases in the 20th century wherein private employers sought indemnification against their employees. Although the sovereign clearly has the right to proceed against its servants to recover the amount for which it has made to answer vicariously in damages, some of the same reasons that have restrained private employers from seeking indemnification seem persuasive in respect to formulation of a policy of restraint by state government from proceeding against those employees who have been guilty of no more than lapse of judgment or the commission of honest error.

This is underscored by the fact that the problem of indemnification was resolved against the government in the case of United States v. Gilman, 347 U.S. 507, 98 L. Ed. 898, 74 S. Ct. 695 (1954), wherein the Supreme Court brought a halt to the prior practice of the Federal government of seeking indemnification from its negligent employees. The sole question before the Court in this case was whether the Federal government should recover indemnity from an employee after it had been held liable under the Federal Tort Claims Act for his negligence in operating a government vehicle. The unanimous decision in favor of the employee reads, in part:

> Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequences to those who make government service their career. The right of the employer to sue his employee is a form of discipline...the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier burden than the loss of his seniority or a demotion in rank...Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity...

16Davis, Administrative Law Treatise, Vol. 3, Sec. 26.02.

Inasmuch as the Court's decision was largely based on policy, it might well serve, in addition to being binding law insofar as Federal employees are concerned, as a guideline to the formulation of policy at the state level, where abstaining from pressing the right of indemnification is not complicated by the presence of malice, corruption, or wanton and willful misconduct.

CONCLUSION

It will not serve a useful purpose here to summarize and review the various rules, previously discussed, that have evolved in solving the problem of personal liability of public officers and employees; recapitulation at this point can be little more than redundancy. However, the point might be reiterated that in the defense of a lawsuit the discretionary and public duty concepts should be argued together, and the defense of nonfeasance should be joined thereto when the facts involve omission to act. It might also be emphasized that the inapplicability of the doctrine of respondeat superior to public officials should prove a well-nigh impregnable defense where action is brought against a higher official for the torts of subordinates in which he did not participate.

It is difficult to take leave of this subject without commenting on the singularity of the manner in which the law in the premises has developed. By this is meant, it has been seen that those performing discretionary activities (being the higher paid functions) are generally protected, and those performing rote ministerial activities (being the lower paid type of work) are more apt to be found liable. Thus, the law has developed in the direction of providing immunity for those better able to pay, and imposing liability on those less able to pay. Where sovereign immunity is in force, the situation becomes even more aggravated, because liability is then directly linked to the resources of the most financially insecure. The peculiarity of this situation has not passed unnoticed, and has been characterized by eminent scholarship as an "inverted pyramid."[17] It seems difficult to conceive of a situation less adapted to protecting the weak, or more ill-suited to allowing deserving plaintiffs actually to recover money judgments. The very sound reasons that have contributed to this result have been hereinbefore discussed. Nevertheless, the comment seems worth making that it seems a strange evolutionary course for American jurisprudence to have taken to arrive at a set of rules whereby those least able to pay are most likely to pay, and achieving the dubious result of permitting deserving plaintiffs to take judgments that are least likely to be satisfied because the defendants against whom they are taken are most likely to be "judgment-proof."

This leads to the matter of providing protection for underpaid public employees, and, equally important, providing a system that will allow injured plaintiffs actually to recover. The only answer would seem to lie in a sufficient system of liability insurance or indemnification. It is beyond the scope of this paper to attempt a review of the various state provisions relating to liability insurance or indemnification for public employees. Suffice to say, there is no uniformity, and in too many cases a lack of adequacy of coverage and protection. The problem of suits against private individuals may, with the continuing erosion of sovereign immunity, paradoxically be on the increase rather than on the decrease, because individuals, in many or most instances, can easily be joined as defendants with the state, thus allowing the plaintiff lawyer to bring additional targets within his sights.

The ultimate answer to the problem of personal liability of public officers and employees may lie in acceptance of the fact that mistakes of judgment will inevitably be made in the course of carrying out vast public works programs, and reasoning therefrom that the public, which receives the benefits of these programs, should pay the social cost of providing protection for diligent public servants (i.e., those who have made mistakes free of the taint of malice or other properly punishable misconduct), and according redress to persons who have been injured by the honest errors of such employees.[18]

In any event (and without regard to such speculative long view), if suits against individuals can be expected to increase, it would seem to behoove highway administrators and ranking officials to take a close look at the sufficiency and adequacy of their state programs providing insurance or indemnification for their employees who may be subjected to suit.

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[17]Harper and James, The Law of Torts, Vol. 2, Sec. 29.9.

[18]The reader is invited to consider Professor Robson's conclusions in respect to the problem of liability of public officials, which have drawn scholarly attention and comment. He says:

> The liability of the individual officer for wrongdoing committed in the course of his duty on which so much praise has been bestowed by English writers, is es-

In so doing it should be recognized that huge judgments in tort actions are no longer uncommon, and it hardly needs statement that the vast majority of public employees are ill prepared to meet catastrophic financial losses from their own resources and survive the day.

Also to be taken into account is the fact that public employees are often under a legal duty to act, and cannot, like their counterparts in private enterprise, insulate themselves against liability by weighing the risks of affirmative conduct, and deciding to pursue that course which seems the safest, or no course at all. Herein lies a distinction between the obligations of those in public and those in private employment that should not be forgotten. The rule of private employment - high pay for high risk - does not apply to the public sector, and those therein employed all too often cannot act to protect themselves through elastic freedom of choice. To the extent that they are thus more heavily strictured, they merit greater consideration. Adequate insurance coverage will serve to meet this obligation, and at the same time achieve the socially beneficial result of redounding to the advantage of those who under our system of justice in equity and good conscience should have recovery for injuries suffered by them.

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APPLICATIONS

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

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sentially a relic from past centuries where government was in the hands of a few prominent, independent and substantial persons, so-called Public Officers, who were in no way responsible to ministers or elected legislatures or councils... Such a doctrine is utterly unsuited to the twentieth century state, in which the Public Officer has been superseded by armies of anonymous and obscure civil servants, acting directly under the orders of their superiors, who are ultimately responsible to an elected body. The exclusive liability of the individual officer is a doctrine typical of a highly individual common law. It is of decreasing value today. [3 Pol. Sci. Q. 346, 357-58 (1932)].

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