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Liability of State and Local Governments for Snow and Ice Control

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 Larry W. Thomas, TRB Assistant Counsel for Legal Research, for 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 two others published as Research Results Digest 79, "Personal Liability of State Highway Department Officers and Employees," and Research Results Digest 80, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," deal with legal questions surrounding liability for negligent design, construction, or maintenance of highways. 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

Concern exists among public agencies over the threat of tort suits arising out of negligence in the conduct or performance of governmental operations, because agencies heretofore immune from tort liability are being held accountable for their misfeasance or malfeasance resulting in personal injuries and property damage.[1] Of course, most municipal corporations are amenable to tort suit; however, the suability of state governments, their agencies, and instrumentalities is a more recent development, an outgrowth of judicial activism, state legislation, and, of course, the effort of plaintiffs' bar.

Before discussing liability of public agencies for negligence in snow and ice control, some interesting generalizations or observations on the probability of jury verdicts for plaintiffs and the relative size of jury awards where a governmental body is the defendant may be noted.

Where suits are brought against governmental bodies for faulty maintenance, including claims that snow and ice obscured defects in defendants' streets or that streets or sidewalks were not inspected, the probability of a verdict for plaintiff is 50 percent, a decline of seven percent from that reported in previous studies.[2] However, the volume of litigation against government bodies has increased dramatically in recent years because of the abolition in many jurisdictions of governmental immunity.[3]

The amounts awarded by juries in suits against governmental bodies is still affected by jurors' reluctance to part with government money.[4] Verdict awards for the same or comparable injuries are appreciably lower than national verdict expectancies when a governmental body is the defendant.[5] Thus, awards for claims based on faulty maintenance of public property, including injuries caused by defective or icy sidewalks or streets, averaged fifteen percent lower than national verdict expectancies for similar injuries in comparison cases where a governmental body was not the defendant. However, for this same category there are a relatively higher number of verdicts exceeding, sometimes by as much as five times, the probable verdict range based on national verdict expectancies.[6] Perhaps these large awards, often accompanied by publicity, account for the suspicion by some that jury verdicts are much larger than usual in negligence cases where a governmental body is the defendant. As seen, however, awards generally in the category of faulty maintenance by a governmental body average fifteen percent lower than national verdict expectancies for the same or similar injuries in law suits not involving governmental defendants.

Trend Towards Holding Public Agencies Liable for Negligence

Erosion of Sovereign Immunity Defense

The primary defense to negligence suits against public agencies is, or was, the doctrine of sovereign immunity. That is, a public agency may not be sued in tort unless consent to suit is given by the involved government agency or department. Where the doctrine is invoked, a complaint filed against a public agency will be dismissed as a matter of law, because the agency can not properly be made a defendant in court without its consent, a procedure thereby precluding a litigant from asserting an otherwise meritorious cause of action.[7] However, the power to consent to tort suit is implied in that immunity,[8] which in a particular state may or may not be available to municipalities[9] or to other state agencies.[10] Because the doctrine is sanctioned by many state constitutions or state statutes, many courts hold that the immunity may be waived only by an express statutory enactment or constitutional amendment. On the other hand, where immunity is based solely on the common law of a jurisdiction, many courts have had no difficulty in abrogating the immunity of governmental agencies.[11]

Suability versus Liability

A distinction must be made between suability and liability. As noted, generally an action will not lie against a public entity unless consent to suit has been given (i.e., sovereign immunity). That consent is given does not mean that the public entity consents to liability for the particular wrong committed. In some jurisdictions, although suit is permitted, a public agency may not be held liable for torts committed in the exercise of its governmental functions. Where the agency retains immunity for governmental functions, it is said to have governmental immunity, which may immunize nearly all agency activity. Paradoxically, highway maintenance functions at the state level, such as snow and ice control, are considered governmental in nature and immune from tort liability,[12] whereas at the local level such activity is considered nongovernmental or proprietary in nature and not immune. Thus, an action will not be successful where snow and ice control is considered governmental in nature, unless there is a waiver of immunity from both suit and liability.[13]

Origin of Sovereign Immunity

Historically, the doctrine of sovereign immunity emerged in the United States following the American Revolution because of practical or policy considerations and possibly because of a misunderstanding of the doctrine as it had existed in England. In a series of early decisions,[14] the Supreme Court of the United States held that the federal and state governments were immune from suits without their consent. Holmes' famous dictum in Kawananakoa v. Polybank,[15] gave further impetus to the doctrine: the immunity of a sovereign from suit and liability rests upon no "formal conception, or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends."

Perhaps mistakenly, the American legal community at first assumed that the English Common Law precluded any suit against the sovereign unless consent thereto was given by the supreme English authority, the Crown.[16] By analogy, because of the supremacy of the legislature in American jurisprudence, courts held that only the involved legislature could consent to suit.[17]

Current Status of Liability of Federal, State, and Local Governments

In 1946 tort suits against the federal government were permitted by the Federal Tort Claims Act, enacted as Title IV of the Legislative Reorganization Act, 60 Stat. 842, provisions of which are now scattered throughout various sections of the United States Code. Previously the defense of sovereign immunity was an insurmountable obstacle to tort suit against the United States; today, negligence suits are filed at a rate exceeding 1,500 each year and span the entire field of tort law.

At the state level many courts have abrogated the doctrine of sovereign immunity usually on the legal basis that, because the courts created the doctrine in the common law, they similarly have the power to extinguish it.[18] To accomplish the same end, other courts construe a waiver of immunity on the basis of existing statutory language.[19]

This judicial trend has left many public agencies vulnerable to tort suit, a threat to which numerous states have responded by enacting tort claims legislation setting forth procedures and defenses under which negligence actions are filed against government agencies. Representative states having such legislation are: Alaska, California, Colorado, Hawaii, Idaho, Iowa, Nebraska, Nevada, New Jersey, Utah, and Vermont.

An alternative system for handling tort suits is a special quasi-judicial body or claims commission. State claims boards vary greatly in scope, procedure, and jurisdiction, but the states of Arkansas, Georgia, North Carolina, Tennessee, and West Virginia have established them.

States not already listed have different approaches to the issue of tort liability of public authorities. New York, for example, enacted in 1920 a general waiver of sovereign immunity authorizing the courts to determine its liability in accordance with the same rules of law as applied to actions against individuals or corporations.[20] The legislatures of Arizona, Louisiana, and Indiana have thus far failed to respond to their courts' abrogation of immunity. Oklahoma, New Mexico, and Delaware authorize state agencies to procure liability insurance to satisfy tort judgments. Several states, including Kansas and Connecticut, permit individuals to sue the state for damages for injuries incurred because of a "defective highway." Despite the current trend towards liability, these representative states retain state immunity: Maine, Maryland, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, South Dakota, Virginia, Wisconsin, and Wyoming.

Municipal corporations in almost all states may be held liable for negligence in the conduct of street operations;[21] however, a distinction often is drawn between the liability of municipal corporations and that of quasi-municipal corporations.[22] The latter, such as counties and towns, are held not liable at common law for injuries resulting from defective highways, even in states holding municipal corporations liable at common law.[23] One rationale for holding non-municipal corporations not liable is that they are political subdivisions of the state "exercising a part of the sovereign powers of the state and liable only to the extent the state itself would be in the absence of statute imposing liability."[24] Thus, the liability of local units of government may depend on whether the common law or a state statute is applicable.[25]

Duty of Public Agencies to Remove Snow and Ice from Highways

Two underlying questions are whether a public authority has any duty to undertake the removal of snow and ice from the highways, and, if so, is there any duty to use salt, sand, or other abrasives to make the roads reasonably safe for travel?

An essential element of any tort action is "duty," which is, according to a leading authority on tort law,

> . . . an obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.[26]

Moreover, a defendant may be negligent but held not liable, because he was under no duty not to be negligent and injure the plaintiff.[27]

Tort liability of public agencies is no different in this respect than in any other: the claimant must allege facts giving rise to a duty recognized by law on the part of the public entity to remove snow and ice.[28] The mere facts that ice existed on a highway and a vehicle skidded thereon are insufficient to impose the duty.[29]

Existence and Sources of Duty to Remove Snow and Ice

Of course, public entities generally assume the duty of removing snow and ice from the highways, and, once the duty is undertaken, the public body is obligated to perform the task "in such a manner as not to create dangerous conditions for the public user."[30] It has been held, for example, that where a city has not undertaken certain safety measures, such as the installation of height and clearance signs on viaducts, it has no continuing duty to do so.[31] Such holding is in accord with the general rule that there is no legal liability for failure to furnish streets, sidewalks, or bridges for use even in jurisdictions where at common law (usually incorporated municipalities) or by statute there is a right to recover for injuries caused by actionable negligence in the conduct of highway and street operations.[32] Moreover, any assumed duty to remove snow and ice, according to one court, may be abandoned at any time despite the reliance of highway users on the state to keep the highways safe for travel: " . . . the Commonwealth's practice of removing it [ice or snow] is a mere gratuity which may with immunity be abandoned at any time."[33]

Judicial opinions often fail to explain the circumstances that may give rise to the duty of a public agency to remove snow and ice. One court imposes no duty on the public body to take precautionary or remedial action, unless it is either prescribed by law or the highway condition is so inherently dangerous that it is misleading to a traveler exercising reasonable care.[34] One authority writes that many public bodies are required by statute to keep the highways reasonably clear of ice and snow without, however, stating whether those statutes are mandatory or merely directory. Further obfuscating the issue, the courts have held that there is a greater duty on urban governments to keep the streets reasonably clear than on their rural counterparts.[35] Thus, some clarification is needed of the duty of public authorities to remove ice and snow.

The duty of many incorporated municipalities to alleviate specific snow and ice hazards, as well as other highway defects, but not general, natural accumulations of ice or snow exists at common law, meaning that one's right to recover against a city for actionable negligence for defects in its streets and sidewalks need not always be authorized by statute.[36] The reasons for the liability of municipalities at common law for failure to maintain reasonably safe streets are not entirely clear, but one authority suggests:

> The deeming of the performance of these obligations as a private or proprietary, not governmental, duty, i.e., a ministerial function relating to corporate interests only, constitute the reason, in some decisions, for imposing municipal liability for injuries arising from defective public ways. In other cases, the ground for holding the municipality liable is that the duty to maintain or repair the streets was specially imposed on the municipality by statute or charter, or that the statutory duty of keeping streets in repair and free from obstructions is a mandatory and not a discretionary duty, but in those states which deny liability, the fact that the municipality is expressly required to repair its streets is, with some exceptions, deemed immaterial.[37]

Thus, the common law of incorporated municipalities in many jurisdictions provides a right of action for failure to correct specific snow and ice hazards. A right of action against other public bodies, such as towns, counties, quasi-municipal corporations, and state agencies, as well as some incorporated municipalities where the right did not exist at common law, has been created by statute or, less frequently, by the courts where they have abrogated governmental or sovereign immunity.[38] The general rule for all public agencies is that, although there is a duty to maintain the roads in a safe condition, there is no duty, in the absence of statute, to remove general accumulations of ice and snow from the streets and highways.[39]

The most obvious method of imposing a duty on public agencies to take remedial

action with respect to snow and ice hazards is by a statute imposing liability for failure or negligence in doing so. Such legislation may impose liability on public entities where none existed at common law; may reiterate, extend, or limit common law liability where recognized already;[40] or "may give a right of action against municipalities and not against the state."[41]

By comparison, statutes merely empowering a public entity to act against snow and ice hazards do not afford plaintiffs a private right of action in tort. For example, in Smith v. District of Columbia,[42] involving an injury on an icy city crosswalk, a District of Columbia statute provided that the city had the duty to remove snow and ice from crosswalks and sidewalks or to make them reasonably safe for travel. Plaintiff contended that the statute imposed a liability on the city for an injury resulting from the presence of snow or ice on a sidewalk or crosswalk for a reasonable time, unless the city sprinkled the affected area with sand or ashes. However, the Court held that "the snow removal law did not add to the basic liability of the District of Columbia in respect to safe conditions on the public streets."[43]

As seen in Smith, a snow and ice removal statute was not the source of the duty owed to the plaintiff to keep the highways and sidewalks reasonably safe and did not add anything to the common law liability of the District of Columbia. Mills v. City of Springfield,[44] though consistent with Smith on the question of duty,[45] held further that laws imposing a duty to maintain and repair streets afforded a general rule of conduct for which negligence was the basis of liability where there was a violation of the statute. Thus, in Mills the general statutory duty to maintain and repair, though not the source of the duty to plaintiff, constituted evidence of the standard of care owed by the municipality.[46]

Duty to Act Where There Is Notice of a Dangerous Condition

Whether at common law or by statute, where a public entity has notice, either actual or constructive, of a dangerous or hazardous condition caused by snow and ice on the highway, it may have a duty to exercise reasonable care either to alleviate the hazard or to give adequate warning of it.

> Thus, if a roadway should suddenly and without fault of the governmental body, come by any means into a condition dangerous to travel, the governmental body is liable for damages occasioned thereby if the governmental body fails to act in a reasonably prudent manner under the circumstances.[47]

The public entity must have notice of a particular icy condition before the duty arises to apply abrasives or take other precautions.[48] For example, the state highway department may be held liable for negligence where it has notice of a specific hazardous condition consisting of an improperly constructed curve, inadequate shoulders, inadequate warning signs, improper recommended speed, and an icy condition that the state neglects to sand or otherwise rectify by the exercise of reasonable care.[49]

Standard of Care Owed to the Public

The general rule is that the state[50] or other public authorities[51] owe a duty to highway users to construct and maintain the highways in a reasonably safe condition.

> Ordinarily, in the absence of any provision establishing a different rule, the duty and liability resting upon the public authority in this respect are to exercise reasonable care and diligence, in view of all the circumstances, including climatic conditions, to keep the street, road, or walk in a reasonably safe condition for travelers who are themselves using due care. The public authority is not an insurer of the safety of those who use the public ways, but the foundation of its liability for injuries from snow or ice thereon is its negligence in failing to keep them safe for public travel.[52]

The public authority has a duty to exercise reasonable care and prudence under the circumstances;[53] however, the standard "is incapable of exact expression or reduction to an unvarying formula," and "in a given case is necessarily dependent on the particular facts developed in the judicial investigation."[54]

Limitations of Duty of Public Agencies

The duty of care owed by a public entity for snow and ice maintenance is qualified by judicial decisions for practical and policy reasons. Because it would be unduly burdensome to require public authorities to maintain the roads free of ice at all times, they are held not liable generally for accidents caused by natural accumulations of snow and ice,[55] unless the accumulation constitutes a highway obstruction.[56] Moreover, there is no duty to remedy a condition prevalent throughout the community resulting from the usual fall of snow on sidewalks and subsequent thaws and freezes.[57] The reasons for this standard are that public entities should not be compelled to do the impossible and that the dangers presented by such conditions generally are known and assumed by highway travelers. The law does not require what is unreasonable, nor does it condemn an act or omission as negligent which can be done or prevented only by extraordinary exertion or by the expenditures of extraordinary sums of money.[58]

Liability of a public authority may be predicated on its failure to exercise ordinary care to remedy an unusual or exceptional condition, not prevalent in the community, such as an isolated patch of ice or accumulation of snow and ice.[59] In addition, liability may be founded on a slippery condition created by some fault of the municipality, by some artificial means, or by a positive act of the public entity; for example, the existence of a defect in a street or sidewalk contributing to or causing an icy condition.[60] Although there are exceptions -- one case holding a public entity liable even for an injury caused by a general icy condition in the absence of any structural defect[61] -- the weight of authority is that public entities are liable only for injuries caused by isolated patches of untreated ice and snow, but are not liable for injuries caused by mere slippery conditions due to natural causes.[62]

Apparently in an attempt to identify hazardous roads for which liability may be imposed for negligence, the courts have considered whether the ice or snow was rough, uneven, or rutted. Such criteria supposedly demonstrate that passing traffic or pedestrians have altered a natural accumulation of snow and ice, thus creating a dangerous condition of which the public entity should have notice because of the physical change. The rule recognized by many jurisdictions is that

> . . . where snow or ice has remained on the streets or sidewalks for a period of time and in certain places has been pushed or trampled or otherwise formed into an obstruction or danger, apart from its original natural dangerous state and in an unusual shape or size, it is not different from any other obstruction or danger. If the municipality has actual notice of the danger, or if the danger is so notorious or so long - continued that the municipal authorities are charged with constructive notice of it, the municipality is liable for injuries resulting from it.[63]

Duty and Standard of Care Concerning Use of Abrasives

The first underlying issue is whether a public entity owes a duty of ordinary care to the public to undertake snow and ice control. The second underlying issue is whether a public authority has any duty to undertake a specific course of action, such as the use of salt, sand, gravel, ashes, or other chemicals, or combination thereof, to remedy snow and ice hazards.

As with snow and ice control generally, a city, for example, is "under no specific duty to sand its sidewalks, [but] the propriety of doing so is generally recognized."[64] However, even if it is assumed that a public authority is not obligated to use sand, salt, or other abrasive substances on the highway, the absence of such substances may have some bearing on the question whether the public authority has exercised reasonable care under the circumstances to maintain the highways reasonably safe for travel.

> There may, however, be circumstances under which the sprinkling of such abrasive substances on the pavement would be required, or under which it would have a material bearing on the question of reasonable care. For example, where over a period of years prior to an accident, water from rainfall or melting snow ran onto a highway from adjoining property, causing a dangerous icy condition in the wintertime, it was held that the public authority was liable for its negligence in failing to apply sand, salt, or cinders, or to remove the ice.[65]

Where a duty has been imposed on public agencies to use abrasives on the highway, the public authority has had notice of a particular or isolated hazardous condition. For example, in Bruce v. State[66] an icy segment of the highway, a recurrent problem for fifteen years, culminated in the state's liability for failure to apply abrasives to remedy a "long and well-established history of ice conditions at this point."[67]

Similarly, in Ventura v. City of Pittsburgh[68] a duty to apply abrasives is imposed for particular icy conditions, as distinguished from general conditions or natural accumulations. A city storm sewer proved to be inadequate and caused water to overflow the curbs and ice to form on the pavement. Because this defect was not solely the result of general weather conditions, the city was held to have a continuing duty to keep the pavement clear of abnormal accumulations of ice by applying cinders or other suitable material in order to afford friction.

In Ewald v. City of South Bend,[69] the Court applies the same rule of law: that is, the city's duty to apply sand, cinders, or any other substances does not arise where the snow and ice is the result of a natural accumulation, not amounting to an obstruction, that is altered only by ordinary traffic.[70]

The rationale for requiring public agencies to apply abrasive substances only to isolated road hazards is that it would be unreasonably harsh to require counties or rural areas, for example, to clear a road each time it thawed and recinder it every time a snow and ice hazard occurred; on the other hand, highway authorities are held to a higher standard of care in more congested areas.[71] Nevertheless, it may be erroneous to assume that a public agency can shirk its duty to use reasonable care on the basis that there are inadequate funds available for snow and ice control. Evidence of the availability of public funds, personnel, or equipment is rejected by the courts, because the roads are open to use by the public.[72]

Where the duty to apply abrasives to hazardous road conditions is either assumed or imposed, the public authority is held to a standard of ordinary care;[73] i.e., action in accordance with generally accepted engineering standards and practices.[74] Thus, the public agency must exercise reasonable care under the circumstances in applying abrasives to hazardous conditions caused by snow and ice.[75] Whether the public entity has exercised ordinary care is judged by the facts of the individual case,[76] but ordinary care does not compel a public authority to sand every part of every road.[77]

Public authorities may be held liable for negligence for failing to apply abrasives to hazardous highway conditions caused by ice or snow. Thus, a state may be held liable where it has notice of an improper drainage condition causing ice to form on the highway and has failed to apply sand or other abrasives or otherwise correct the highway.[78] Moreover, if untreated snow or ice, unusually hazardous in comparison to general city conditions, remains on a sidewalk, the city, having notice of the condition and a reasonable time to act, may be held liable to a pedestrian injured as the proximate result of the dangerous condition.[79]

City of South Bend v. Fink[80] holds that the public authority's failure to sand or salt a roadway on a hill does not comport with reasonable care and diligence. The basis of the decision is that a natural accumulation of snow and ice was not involved, because the area was first used as a play street, but thereafter the icy street, presenting a particular hazard, was not cleared or salted.[81]

In Farrell v. State,[82] a recent decision, the evidence adduced was: ice was present at the scene of the accident; ice patches were a recurrent condition at that location, and had been reported frequently to the state highway department; there were no warning signs in the area; and there was no evidence of any sand, salt, or other abrasive material having been applied to the ice. The Court held the state liable for its negligence in omitting either to provide warning signs or to apply abrasives.[83] Clearly, the courts of New York and other states hold that in order for a public authority to satisfy its duty of reasonable care under the circumstances it must use signs and apply whatever materials are required.[84]

Erecting adequate warning signs is, of course, one option open to the public authority in responding to the danger presented by road hazards. However, an authority is not exercising reasonable care in posting warning signs which do not adequately warn the motorist of the impending danger. Thus, in Laitenberger v. State,[85] water from melting snow covering a highway for a distance of 100 feet and freezing after sundown was an unusual and dangerous obstruction to travel rendering the highway unsafe for travel. Although the

Court did not state precisely what the state should have done to rectify the situation, it held that an accident at this location was foreseeable, that the icy condition was improperly "guarded", and that mere flares and flags were inefficient and inadequate warning of the danger.[86]

Finally, in Jennings v. United States,[87] plaintiffs brought wrongful death and personal injury actions alleging that the United States negligently caused or permitted "ice to accumulate in a dangerous location on the Suitland Parkway in Maryland and failed to use reasonable care to eliminate the danger by sanding or salting or giving notice of the condition by signs, flares, or other means."[88] The court made the following findings of fact:

> . . . that an icy condition, at least 25 feet in length, and 6-8 feet in width, was present on the westbound lane of Suitland Parkway at the place [of the accident at the time of the collision]; that past experience should have led the Government to anticipate at least the possibility of such condition; that the condition was dangerous to automobile traffic; and that the size, location and duration of the ice patch were such that the Government by the use of reasonable care in patroling the highway should have discovered the condition in time by the use of reasonable care to have sanded the ice or provided effective warning thereof; but that the Government either failed to discover such condition or . . . failed to remedy or warn of such condition.[89]

As a matter of law the Court held, on the basis of the above findings, that "the failure of the Government to discover, or after discovery to remedy, such condition, was negligence, and was at least a proximate cause of the collision . . . . "[90]

In sum, the courts have imposed a duty of reasonable care on public authorities with respect to specific icy hazardous conditions, as distinguished from general conditions or natural accumulations of snow and ice; thus, a public authority may be held liable for the failure to use abrasives, such as salt, sand, or other substances, or to provide adequate warning of the danger.

As expected, a public entity is not liable where it has exercised due diligence in applying abrasives to icy road hazards. If an accident occurs "very shortly" before the road was sanded, the authority has diligently attempted, though unsuccessfully, to remedy the icy condition.[91] Nor is liability imposed where the road is well-covered by sand, ashes, or other abrasives.[92] Finally, a public authority is not negligent for an icy condition caused by a natural accumulation where the plaintiff fails, or is unable to show, that the public entity had notice of a hazardous condition giving rise to the duty to apply abrasives or take other precautions.[93] There must be more than the mere presence of ice and snow on the highway and the fact that a vehicle skidded in order to hold the authority liable in tort for damages.[94]

Liability of Public Works Agencies Under "Highway Defect" Statutes

The preceding discussion of the duty and standard of care for snow and ice control owed by public agencies to the traveling public is illustrated by case law from ordinary negligence jurisdictions. However, legislatures in several jurisdictions provide for a statutory action by a claimant injured because of a "defective highway."[95] For example, in Kansas

> . . . any person who shall without negligence on his part sustain damage by reason of any defective bridge or culvert on, or defect in a state highway, not within an incorporated city, may recover damages from the state.[96]

The action permitted by "highway defect" statutes is not an action in negligence. Instead, the claimant's evidence must demonstrate that his injury is the result of a dangerous condition constituting a "defect" within the meaning of the statute. Although the jury determines questions of fact, the court determines whether a defect in a highway is a defect within the meaning of the statute;[97] that is, the Court decides whether a particular condition is one intended by the legislature to render the state or public authority liable.[98] Moreover, there is no " 'legal foot rule' by which to measure conditions generally to determine with exact precision whether a condition in a state highway constitutes a defect."[99]

Thus, one can only suggest that the courts in applying a highway defect statute may make two preliminary determinations: (1) whether the condition is the result of a failure to comply with a specific legislative mandate, or (2) whether the condition poses actual peril to persons using the highway.[100] However, the real inquiry is one of policy: whether the dangerous condition is of such a nature that the legislature intended that the department should be held liable. Generally, liability may attach to certain maintenance defects arising out of use of the highway and to built-in defects; i.e., those included at the time of design.

It has been held that a defect is anything that renders a highway unsafe[101] and that a public authority has the duty to keep the streets free of dangerous and concealed defects.[102] However, as a matter of law, the mere accumulation of ice and snow on a highway is not a defect; to hold otherwise "would place an impractical burden on the highway department to keep highways free of ice in the winter months."[103]

Something more than a natural accumulation is needed before one can recover under a highway defect statute. As stated in Pape v. Cox:[104]

> The mere fact that ice exists upon a highway does not of itself render the highway defective. Whether or not the highway is rendered defective by the existence of ice or snow thereon depends upon a variety of conditions and circumstances, including the difficulties attending situations as they are created by the rigors of our winters.[105]

Public authorities are held liable for particular highway defects caused by snow and ice and the failure to apply abrasives to remedy the condition. For example, in Baker v. Ives,[106] plaintiff was injured in a fall caused by an accumulation of snow and ice approximately two to four inches thick and at least two weeks old. No evidence was presented that the state had at any time prior to the accident sanded or taken other measures to remedy the hazardous condition. The Court held that a highway may become defective as a result of snow or ice depending on the circumstances and conditions. Moreover,

> . . . in view of the location and nature of the ice and snow and the other circumstances present in this case, it was proper for the jury to conclude that the condition was a defect within the meaning of 13-a-144, thereby warranting a verdict for the plaintiff.[107]

A related issue is liability for accidents caused by abrasives which tend to accumulate after repeated use and produce dangerous conditions; e.g., sand or gravel. Shapley v. State[108] holds that an accumulation of sand or gritty material left by the state on the highway may result in a finding of negligence if the accumulation is the proximate cause of the accident. Two other decisions hold that accidents caused either by accumulations of sand and gravel during winter sanding operations[109] or by sand and debris left on the highway by street flushing operations[110] present jury questions whether the hazards constitute defective or dangerous conditions.

Special Defenses of Public Agencies to Negligence Actions

Two defenses are particularly significant in tort actions brought against public agencies in those jurisdictions in which immunity from suit is waived. First, the involved agency in many jurisdictions may be held not liable for negligence in performing governmental functions; and, second, it may be held not liable for acts which are discretionary in nature.

Governmental-Proprietary Test of Immunity

These defenses do not appear to be particularly applicable to actions arising out of negligence in snow and ice control. Immunity for governmental functions is usually available to local units of government, especially municipal corporations, meaning that those public entities may be held liable only for negligence when exercising proprietary functions. A proprietary activity is one in which a special benefit or profit inures to a corporate entity,[111] usually a pecuniary one where a commercial or compensated service is provided.[112]

One authority appears to have difficulty reconciling the cases on the question of the classification of street maintenance as a governmental or proprietary activity, for at one point it states that in the ownership, control, and supervision of their streets, municipalities act in their governmental and not their proprietary capacities.[113] But later it declares that

> . . . although sometimes classified as a governmental duty, the maintenance and repair of streets to keep them reasonably safe for travel generally is classified by the judicial decisions as a corporate [proprietary] duty, with respect to which the city or town is liable for its negligence.[114]

Without attempting to resolve the apparent contradiction, one may note decisions holding, first, that street maintenance is a proprietary function[115] and, second, that snow removal operations constitute street maintenance, to which the doctrine of governmental immunity is inapplicable.[116]

At the state level it is often held that public authorities are immune for negligence arising in the performance of governmental functions. But the cases do not state that the converse is true -- that state authorities may be held liable for negligence in the performance of proprietary functions -- and few cases apply the governmental-proprietary immunity test to state authorities.[117] In fact, immunity for governmental functions has been nullified recently in one state,[118] and adopted in another,[119] with the latter decision being overruled by a tort claims act.[120] Moreover, the governmental-proprietary dichotomy has elsewhere been rejected in favor of immunity for only discretionary governmental activity.[121]

Discretionary-Ministerial Duty Test of Immunity

A more important defense of a public agency to tort suits is that the activity or function giving rise to the complaint is discretionary in nature, and, therefore, immune from liability. The exemption from liability for discretionary activity is rooted in the common law, having emerged in the law on personal liability of public officials. In modern times, the discretionary versus ministerial function dichotomy extends to tort suits against governmental entities. That is, the public entity is not liable for action which requires the exercise of discretion but may be liable for negligence in the conduct of its non-discretionary or ministerial duties.

Any activity, of course, involves the exercise of discretion. But the term discretion as employed herein means the power and duty to make a choice among valid alternatives; it requires a consideration of alternatives and the exercise of independent judgment in arriving at a decision or in choosing a course of action.[122] On the other hand, ministerial duties are more likely to involve clearly defined tasks performed with minimum leeway as to personal judgment and not requiring any evaluating or weighing of alternatives before undertaking the duty to be performed.[123]

A leading case on immunity for discretionary activity is Weiss v. Fote.[124] In Weiss, the issue presented was the reasonableness of the clearance interval in a traffic light system which had been approved by the Board of Safety after ample study and traffic checks. The Court held that New York's general waiver of immunity did not extend to areas of lawfully authorized planning and that it would be improper to submit to a jury the reasonableness of the plan approved by the expert body.

> Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the state liable for injuries arising out of the day-by-day operations of government -- for instance, the garden variety injury resulting from the negligent maintenance of a highway -- but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the govenmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the legislature has seen fit to entrust to experts.[125]

No case has been located in which a public entity argued that snow and ice control including the use of abrasives is immune from tort suit on the basis that such a function constitutes discretionary activity.[126] A distinction might be drawn, however, where the public authority adopts an overall snow and ice control program that designates circumstances under which certain methods are to be used. Such an initial safety plan or a program adopted after reasonable consideration and deliberation, even though later found

to be unsatisfactory or dangerous in actual practice, may be considered immune from tort suit, because it was adopted by a public body exercising discretionary functions in formulating public policy. Nevertheless, the program would have to be reasonable, duly prepared and approved, and could not be arbitrary or capricious.[127] Moreover, there is probably a duty to review the plan to determine whether it is safe in actual practice.[128] Despite the broad immunity granted to a public entity, it may not use "its discretionary field of activity to justify the omission of obvious safeguards for the protection of the public."[129]

Aside perhaps from the adoption of a snow and ice control plan, the actual conduct of snow and ice removal operations does not appear to qualify as discretionary activity but is instead a normal maintenance function, or ministerial duty, for which liability may be imposed for negligence.[130] This conclusion is supported also in the material which follows on actions brought pursuant to tort claims acts.

Liability of Public Agencies Under Tort Claims Acts

In view of the numerous states having comprehensive tort claims legislation similar to the Federal Tort Claims Act, a brief discussion of the acts is imperative. The statutes reflect the prevailing opinion that public agencies should assume, as must a private person or corporation, the responsibility of compensating victims of their negligence, but recognize the felt need for flexibility in government administration.

Tort claims acts either reenact governmental immunity with exceptions permitting suit for certain "dangerous conditions"[131] in public improvements, or, on the other hand, generally permit tort suits against the state or other governmental entities with certain exceptions. Both types ordinarily preclude liability for actions based on certain activities of the public agency or employee, chiefly any activity in the exercise or performance or the failure to exercise or perform a discretionary function or duty, hereinafter referred to as the discretionary function exemption. This exemption has its roots in the exclusion from liability for discretionary activity previously discussed.

Courts have had difficulty in construing the acts' exemption from liability for a discretionary function; however, the majority rule is that only decisions made at the planning level, rather than at the operational level, fall within the discretionary function exemption.[132] It is a fairly mechanistic test, the result in many cases appearing to depend on whether a decision was made at "high altitude." The planning level notion refers to decisions involving questions of policy; that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.[133]

Other courts question the use of the operational-planning level test, suggesting that this "aid" tends to obscure the meaning of the exemption which is concerned with the "nature and quality of the discretion involved."[134] Thus, since the decision in Indian Towing Co. v. United States,[135] many courts hold that once the government has exercised its discretion to perform an act, negligence thereafter in carrying out the decision may result in liability.[136]

A public authority could claim immunity for its preparation and adoption of a plan or program of snow and ice control as a discretionary function within the meaning of a tort claims act, where applicable. By implication, the decision in State v. Abbott[137] may be read to immunize the high-level decision to provide snow and ice control measures. In Abbott the state argued broadly "that the determination of what constitutes proper winter maintenance of the state's highways system is a 'discretionary function'" within the meaning of the Alaska Tort Claims Act.[138] Furthermore, Abbott tacitly assumes that the initial policy decision to undertake winter maintenance is discretionary.[139]

In Abbott, the state violated its standard operating procedures by failing to sand a highway adequately at the location of a sharp curve. The Court held:

> Once the initial policy determination is made to maintain the highway through the winter by melting, sanding, and plowing it, the individual district engineer's decisions as to how that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision. Once the basic decision to maintain the highway in a safe condition throughout the winter is reached, the state should not be given discretion to do so negligently. The decisions at issue in this case simply do not rise to the level of governmental policy decisions calling

for judicial restraint. Under these circumstances the discretionary function exemption has no proper application.[140]

Abbott imposes a standard of ordinary care on the state highway department for injuries resulting from the natural accumulation of ice and snow on the state highways, a departure from the majority rule. Abbott, specifically rejecting the hardship and undue burden arguments advanced by the state, grounds its decision on the fact that Alaska has a strong public policy favoring compensation of individuals injured by the tortious conduct of the state.

In sum, the conduct of snow and ice operations, pursuant to a winter maintenance program, is not protected by a discretionary function exemption. As held in Jennings v. United States,[141] the failure to exercise reasonable care such as by sanding, salting, or giving notice of a dangerous condition may result in liability of a public authority pursuant to an action under a tort claims act.

Conclusion

Many public authorities whether at the city, county, or state level are now liable in tort for negligence in the failure to remedy snow and ice hazards on the highways. Most incorporated municipalities have long been held liable at common law for failure to keep the highways reasonably safe for travel. Moreover, many unincorporated municipalities, counties and towns, and numerous state agencies may be sued because of the judicial abrogation of sovereign immunity or the enactment of "highway defect" statutes, state claims commissions, or tort claims acts.

In the absence of statute, there is no affirmative duty imposed on a public entity to remove snow and ice or to use abrasives or chemicals. Nevertheless, such action has been assumed generally by public authorities which owe a duty to the public to maintain the roads in a reasonably safe condition. Thus, the duty to remedy an icy road hazard may arise where the agency has notice, either actual or constructive, of a dangerous or defective condition, and the fact that an agency failed to use abrasives may have a bearing on the question of ordinary care. Nevertheless, there is no requirement that the agency perform unreasonable tasks, and, for that reason, public agencies generally are not expected to guard against natural accumulations of snow and ice. The public authority is expected to exercise ordinary care to remedy isolated patches of ice or rutted, rough, or uneven accumulations of snow and ice that foreseeably may cause injury. Cases hold public authorities liable in many instances where they fail to salt or sand an icy road hazard or fail to provide adequate warning of the danger.

In those jurisdictions having "highway defect" statutes the courts hold that specific snow and ice hazards that are untreated or have inadequate warning may constitute a highway defect. Once again, natural accumulations and general icy road conditions do not result in a finding that a highway is defective.

Defenses of public agencies for negligent snow and ice removal do not appear to include immunity for governmental action, several courts holding that snow and ice removal and the use of abrasives constitute maintenance or proprietary activity. The defense that routine snow and ice control is a "discretionary activity" and, therefore, immune from liability also appears to be inapplicable, whether an action is brought in a common law jurisdiction or in one having a tort claims act. In either jurisdiction snow and ice removal operations are routine, day-to-day functions (ministerial duties) or are operational-level acts not involving the exercise of policy or planning functions.

A snow or ice removal program, however, adopted by a public body having discretionary authority that contained an inadequate or defective feature would probably be immunized, because of the courts' reluctance to second-guess the expert judgments of public authorities with legislative or quasi-legislative attributes. However, this initial immunity may be lost or fail to attach where a safety plan has inadequate consideration; is unreasonable, arbitrary or capricious; is not duly approved; or omits an obvious safety feature presenting a manifest danger to the public. Finally, there may be a duty to review any snow and ice control program in order to discover and correct any features that are hazardous in actual operation.

Footnotes

[1]See also, Vance, Personal Liability of State Highway Department Officers and Employees, Research Results Digest No. 79 (September 1975), and Thomas, Liability of State Highway Departments for Design, Construction, and Maintenance Defects, Research Results Digest No. 80 (September 1975).

[2]Personal Injury Valuation Handbooks, Special Research Reports in the continuing Jury Verdict Research Project, p. 444 (1975).

[3]Id., p. 943.

[4]Id., p. 846.

[5]Id.

[6]Id., p. 847.

[7]Principe Compania Naviera, S. A. v. Board of Com'rs of Port of New Orleans, 333 F. Supp. 353, 355 (E.D. La. 1971).

[8]Bailey v. City of Knoxville, 113 F. Supp. 3, 6 (E.D. Tenn. 1953).

[9]Metropolitan Government of Nashville and Davidson County v. Allen, 220 Tenn. 222, 415 S.W. 2d 632, 635 (1967).

[10]Grand Hydro v. Grand River Dam Authority, 192 Okl. 693, 139 P. 2d 798 (1943).

[11]See contra, McNair v. State, 305 Mich. 181, 9 N.W. 2d 52 (1943).

[12]See, e.g., Fonseca v. State, 297 S.W. 2d 199 (Tex. Civ. App. 1956).

[13]See, e.g., Houston v. Glover, 355 S.W. 2d 757, 759 (Tex. Civ. App. 1962). A more complete discussion of the defense to tort suit based on the governmental nature of the involved function follows in the section of the paper on "Defenses."

[14]See, e.g., Cohens v. Virginia, 6 Wheat 264 (U.S. 1821); Hans v. Louisiana, 134 U.S. 1, 10 Sup. Ct. 504 (1890); Beers v. Arkansas, 20 Howard 527 (U.S. 1857); Smith v. Reeves, 178 U.S. 436, 20 Supp. Ct. 919 (1900).

[15]205 U.S. 349, 353, 27 Sup. Ct. 527 (1907).

[16]Legal historians have concluded, however, that for many wrongful acts the Crown was amenable to suit, one exception being that the Crown could not be held liable for the tortious acts of its servants. See Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 2, 1-17 (1925); and Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3, 18-19 (1963).

[17]See, e.g., Chisholm v. Georgia, 2 U.S. 419 (1792).

[18]See, e.g., Stone v. Arizona Highway Commission, 9 Ariz. 384, 381 P. 2d 107 (1963).

[19]See, e.g., Herrin v. Perry, 215 So. 2d 177, aff'd 254 La. 933, 228 So. 2d 649 (1969).

[20]McKinney's Consol. L. of N.Y. Ann., Ct. of Claims Act, § 8.

[21]19 McQuillin Mun. Corp. (3d Ed.), § 54.01, p. 8.

[22]Id., p. 9.

[23]Id.

[24]Id.

[25]See, e.g., Calif. Govt. Code §§ 810-996.6 which is a comprehensive tort claims act applicable to all "public entities," i.e., "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." Id., § 811.2.

[26]Prosser on Torts, 4th Ed. (West 1971), p. 143.

[27]Id.

[28]Walker v. County of Coconino, 473 P. 2d 472 (Ariz. App. 1970).

[29]Id.

[30]Ziff v. Town of Brighton, 136 N.Y.S. 2d 723 (S. Ct., Monroe Co. 1955) (snow on sidewalk).

[31]Hermann v. City of Chicago, 16 Ill. App. 3d 696, 306 N.E. 2d 516, 519 (1973).

[32]19 McQuillin Mun. Corp., § 54.02, p. 11.

[33]Commonwealth v. Brown, 346 S.W. 2d 24, 25 (Ky. 1961). See, however, Smith v. Commonwealth, 468 S.W. 2d 790, 792 (Ky. 1971) which questions the soundness of Brown.

[34]Tyler v. Pierce County, 188 Wash. 229, 62 P. 2d 32, 34 (1936) (no duty to maintain barriers and post signs).

[35]Cloughessey v. City of Waterbury, 51 Conn. 405, 50 Am. Rep. 38 (1883).

[36]19 McQuillin Mun. Corp., §§ 54.02 and 54.036, at pp. 11-13; § 54.79, at p. 188 and p. 191.

[37]Id., § 54.036, pp. 14-15.

[38]39 Am. Jur. 2d, Highways, Streets, and Bridges, § 509, p. 909.

[39]Id.; 19 McQuillin Mun. Corp., § 54.79, p. 188.

[40]Id., § 54.05, p. 20.

[41]Id., § 54.05, p. 21.
[42]189 F. 2d 671 (D.C. Cir. 1951).
[43]Id., p. 673.
[44]166 Ohio St. 412, 142 N.E. 2d 859 (1956].
[45]Id., p. 863.
[46]Id.
[47]Walker v. County of Coconino, 473 P. 2d 472, 475 (Ariz. App. 1970).
[48]Id.
[49]Reynolds v. State, 35 Misc. 2d 757, 231 N.Y.S. 2d 681 (1962).
[50]Echerlin v. State, 184 N.Y.S. 2d 778 (Ct. Cl. 1959).
[51]See 39 Am. Jur. 2d, Highways, § 509, p. 909.
[52]Id., § 506, p. 906.
[53]See, e.g., 19 McQuillin Mun. Corp., § 54.11, p. 27; see also, City of South Bend v. Fink, 219 N.E. 2d 441 (Ind. 1966).
[54]19 McQuillin Mun. Corp., §§ 54.14a, p. 39.
[55]Mills v. City of Springfield, 142 N.E. 2d 859, 864 (Ohio App. 1956).
[56]Christo v. Dotson, 151 W. Va. 696, 155 S.E. 2d 571 (1967).
[57]Although the duty of a public entity for snow and ice removal may be greater where the accident took place on a sidewalk rather than a street or highway, 19 McQuillin Mun. Corp., § 54.79, p. 189, the same limitations of the duty of a public body are cited by the courts in upholding or denying liability. See Anno., Municipal Liability for Injuries from Snow and Ice on Sidewalk, hereinafter cited as Anno., Municipal Liability - Ice or Snow, 39 A.L.R. 2d 782, 790.
[58]Mills v. City of Springfield, 142 N.E. 2d 859, 864 (Ohio App. 1956); McCave v. City of Canton, 140 Ohio St. 150, 42 N.E. 2d 762 (1942).
[59]See Anno. Municipal Liability - Snow and Ice, supra, note 48, p. 791.
[60]Id., pp. 792-796, and cases cited therein. See also, Flournoy v. State, 275 C.A. 2d 806, 80 Cal. Rptr. 485 (1969) (surface of bridge formed ice because flow of water under the bridge caused moisture which, in cold weather, turned to ice; liability predicated on failure to warn of dangerous condition in that bridge was vulnerable to ice formation); Christian v. City of Waterbury, 123 Conn. 152, 193 A. 602 (1937) (structural defect made more dangerous by presence of snow and ice).
[61]Cloughery v. City of Waterbury, 51 Conn. 405 (1883).
[62]Nelson v. City of Seattle, 16 Wash. 2d 592, 134 P. 2d 89, 92 (1943).
[63]Smith v. District of Columbia, 189 F. 2d 671, 674 (D.C. Cir. 1951). See, Anno. Municipal Liability - Ice or Snow, supra, note 48, at pp. 797-800; see also, Walker v. County of Coconino, 473 P. 2d 472, 474 (Ariz. App. 1970).
[64]Anno. Municipal Liability - Ice or Snow, 39 A.L.R. 2d 782, 818, citing cases from Connecticut, District of Columbia, Iowa, and New York.
[65]39 Am. Jur. 2d, Highways, § 510; p. 910, citing Smith v. District of Columbia, 89 App. D.C. 7, 189 F. 2d 67 (1951); Taylor v. Sibley, 238 Iowa 1010, 29 N.W. 2d 251 (1947); and Bruce v. State, 1 Misc. 2d 104, 146 N.Y.S. 2d 767, aff'd 3 A.D. 2d 793, 160 N.Y.S. 2d 404 (1955).
[66]1 Misc. 2d 104, 146 N.Y.S. 2d 767 (1955).
[67]Id., p. 768.
[68]159 Pa. Super. 279, 47 A. 2d 668 (1946).
[69]104 Ind. App. 679, 12 N.E. 2d 995 (1938). In Ewald it apparently was immaterial that the plaintiff charged that the city had customarily applied abrasive material in the past at the scene of the accident, the Court holding flatly that there was no duty imposed on the city to remove ice and snow, unless it amounted to an obstruction.
[70]Id., p. 997.
[71]Armstrong v. Bacher, 280 A.D. 512, 113 N.Y.S. 2d 813 (1952).
[72]Id., p. 997.
[73]See generally, Anno. Municipal Liability - Ice or Snow, supra, note 48, 39 A.L.R. 2d 782, 788-789; 19 McQuillin Mun. Corp. §§ 54.13-54.14a, pp. 38-39; 39 Am. Jur. 2d, Highways, §§ 506, p. 906.
[74]Legg v. City of New Orleans, 219 So. 2d 798 (1969).
[75]Walker v. County of Coconino, 473 P. 2d 472 (Ariz. App. 1970).
[76]Corratti v. State, 20 A.D. 2d 166, 245 N.Y.S. 2d 561 (1963).
[77]Zeider v. Town of Woodbridge, 11 Conn. Supp. 539 (1943).
[78]Corratti v. State, 20 A.D. 2d 166, 245 N.Y.S. 2d 561 (1963).
[79]Smith v. District of Columbia, 189 F. 2d 671 (D.C. Cir. 1951). See also, Dooley v. City of Meriden, 44 Conn. 117 (1876) (held liable for failure to apply gravel or other substance or to use other ordinary methods to correct a dangerous icy condition on a sidewalk which had existed for approximately one week).

[80]219 N.E. 2d 441 (Ind. 1966).
[81]Id., p. 444.
[82]46 A.D. 2d 697, 359 N.Y.S. 2d 922 (1974).
[83]Id., p. 923.
[84]See also, Spence v. State, 165 N.Y.S. 2d 896 (Ct. Cl. 1957), and Carthay v. County of Ulster, 5 A.D. 2d 714, 168 N.Y.S. 2d 715 (1957) (skidding accidents on unusually slippery roads as a result of inadequate highway design and roadway surface).
[85]72 N.Y.S. 2d 810 (Ct. Cl. 1947).
[86]Id., p. 821. See also, Goldfarb v. State, 178 Misc. 180, 33 N.Y.S. 2d 656 (1942) (hazardous condition had existed for six years; inadequate warning signs were posted; and only state action on the day of the accident was to scrape ice from highway and sand remaining layer of ice).
[87]178 F. Supp. 516 (D. Md. 1959) (Federal Tort Claims Act); vacated and remanded 291 F. 2d 880; judgment reinstated, 207 F. Supp. 143; aff'd, 318 F. 2d 718.
[88]Id., p. 520.
[89]Id.
[90]Id.
[91]Dodd v. State, 31 Misc. 2d 112, 223 N.Y.S. 2d 32 (1961).
[92]Gordon v. City of New Haven, 5 Conn. Super. 199 (1937).
[93]Walker v. County of Coconino, 473 P. 2d 472 (Ariz. App. 1970).
[94]Shaw v. State, 56 Misc. 2d 857, 290 N.Y.S. 2d 602 (1968); Commonwealth v. Brown, 346 S.W. 2d 24 (Ky. 1961); Hooker v. Town of Hanover, 247 A.D. 623, 288 N.Y.S. 290 (1936).
[95]See, e.g., Conn. Gen. Stat., 13a, § 144; Kan. Stat. Ann., § 68-419, and Mass. Ann. L., Ch. 81, § 8.
[96]Kan. Stat. Ann. § 68-419(a).
[97]Douglas v. State Highway Commission, 46 P. 2d 890 (1935).
[98]Martin v. State Highway Commission, 213 Kan. 877, 888, 518 P. 2d 437 (1974).
[99]Brown v. State Highway Commission, 202 Kan. 1, 444 P. 2d 882 (1968).
[100]518 P. 2d at 441.
[101]Daigneault v. Town of Auburn, 259 N.E. 2d 574, 576 (Mass. 1970).
[102]Austin v. Daniels, 322 S.W. 3d 384 (Tex. Civ. App. 1959) (slip and fall on wet paint used to mark streets).
[103]Gorges v. State Highway Commission, 135 Kan. 371, 10 P. 2d 834 (1932).
[104]129 Conn. 256, 28 A. 2d 10 (1942). One lower court case does not appear to draw any distinction between defects caused by snow and ice and other defects. See, Faircloth v. Cox, 18 Conn. Supp. 499 (1954).
[105]In Pape, supra, the evidence failed to establish that the icy condition existed at the time of the accident.
[106]162 Conn. 295, 294 A. 2d 290 (1972).
[107]Id. at 294. See also, Morico v. Cox, 134 Conn. 218, 56 A. 2d 522 (1947), which, although not squarely faced with the issue, appears to assume that where a bridge surface is coated with ice and untreated by sand or other abrasive material the said conditions constitute a defect within the meaning of the statute.
[108]30 A.D. 2d 901, 292 N.Y.S. 2d 289 (1968).
[109]Hickey v. Town of Newtown, 192 A. 2d 199 (1963).
[110]Duran v. Gibson, 180 Cal. App. 2d 753, 4 Cal. Rptr. 803 (1960).
[111]57 Am. Jur. 2d, Municipal, School, and State Tort Liability, § 31.
[112]Id., § 33. See also, 1A Municipal Corporation Law (Bender) § 11.26, for a discussion of the governmental-proprietary test.
[113]18 McQuillin Mun. Corp., § 53.41, p. 228.
[114]Id., p. 231.
[115]Austin v. Daniels, 322 S.W. 2d 384, 386 (Tex. Civ. App. 1959) (fall on wet paint on street).
[116]Meyers v. City of Palmyra, 355 S.W. 2d 17 (Mo. 1962).
[117]Anno., State's Immunity from Tort Liability as Dependent on Governmental or Proprietary Nature of Function, 40 A.L.R. 2d 927.
[118]State v. Turner, 32 Ind. Dec. 409, 286 N.E. 2d 697 (1972), overruling Knotts v. State, 274 N.E. 2d 400 (Ind. 1971).
[119]Smith v. State, 93 Idaho 795, 473 P. 2d 937 (1970).
[120]Idaho Code, § 6-901 et seq.
[121]Spencer v. General Hospital of the District of Columbia, 425 F. 2d 479 (D.C. Cir. 1969).
[122]Burgdorf v. Funder, 246 Cal. App. 2d 443, 54 Cal. Rptr. 805 (1966).

[123]Pluhowsky v. City of New Haven, 151 Conn. 337, 197 A. 2d 645 (1964); Shearer v. Hall, 399 S.W. 2d 701 (1965).
[124]7 N.Y. 2d 579, 167 N.E. 2d 63, 200 N.Y.S. 2d 409 (1960).
[125]Id.
[126]Several cases brought against highway employees in an attempt to hold them personally liable for their negligence in operating snow removal equipment were successfully defended on the basis that removal of snow and ice requires the exercise of discretion. See, Mower v. Williams, 402 Ill. 486, 84 N.E. 2d 435 (1949); Osborn v. Lawson, 374 P. 2d 201 (Wyo. 1962). Also, in Derfall v. Town of West Hartford, 25 Conn. Sup. 302, 203 A. 2d 152 (1964), an action brought against the superintendent of streets, the complaint charged that the defendant failed to keep the roads safe for travel by the removal of ice and snow, or, in the alternative by sanding the streets. It was held, however, that "no liability would attach to the defendant . . . for his negligence in the performance of a public duty requiring the exercise of discretion." It must be borne in mind, however, that the few cases involving liability of public authorities hold that the initiation of a program of winter maintenance may be discretionary and protected, but not the negligent execution or implementation of that program. See, e.g., State v. Abbott, 498 P. 2d 712 (Alaska 1972).
[127]167 N.E. 2d at 66.
[128]Id., p. 67.
[129]High v. State Highway Department, 307 A. 2d 799 (Del. 1973) (immunity waived in Delaware to a limited extent by 18 Del. Code § 6509].
[130]See generally, 18 McQuillin Mun. Corp., §§ 53.33 and 53.41.
[131]See Deering, Calif. Govt. Code, § 810, at § 835.
[132]See Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. ed. 1427 (1953), rehearing den. 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. ed. 263, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954).
[133]Swanson v. United States, 229 F. Supp. 217, 219-220 (N.D. Calif. 1964).
[134]Smith v. United States, 375 F. 2d 243, 246 (5th Cir. 1967), cert. den. 389 U.S. 841 (1967).
[135]350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 1065 (1955).
[136]Id., p. 127.
[137]498 P. 2d 712 (Alaska 1972).
[138]Alas. Stat. § 09.50.250.
[139]498 P. 2d at 722.
[140]Id., p. 722.
[141]178 F. Supp. 516 (D. Md. 1959) (Federal Tort Claims Act); vacated and remanded 291 F. 2d 880; judgment reinstated, 207 F. Supp. 143; aff'd, 318 F. 2d 718.

APPLICATIONS

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