Liability of State and Local Governments for Negligence Arising Out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings

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INTRODUCTION

The use and adequacy of highway warning signs, traffic lights, or pavement markings are increasingly important tasks for the transportation departments in providing safe roads and highways. In recent years the departments have been held liable for negligence in providing, or in failing to provide, highway warning signs, traffic signals, or other roadway markings. The courts have held that it is reasonable to expect highway agencies to use advisory signs depending on the circumstances at a given location.

Recent studies suggest that more research is needed to assist the highway agency's adoption of the most effective warning device. Depending on the highway condition for which advisory signs, signals, or markings are needed, some studies suggest that no single method is effective for all roadway configurations. In spite of greater uniformity, it seems that motorists encounter differing types of information systems from State to State, from location to location within States, and even from interchange to interchange. A study entitled "Motorist Information Systems and Services," *Transportation Research Record 600* (1976), published by the Transportation Research Board, Washington, D. C., highlights recent findings of advisory signing, as well as provides references to some of the available technical literature.

One of the findings of the study is that motorists need information that can be quickly interpreted and applied to imminent highway conditions. The likelihood of driver error increases when the motorist is confronted by highway configurations, for example, termination of lanes at interchanges, that differ from his expectancies. Moreover, signs are sometimes installed without sufficient testing to ascertain the effectiveness of driver response. The research efforts described in the study covered areas such as overhead mounting of exit signs when dropping a highway lane, use of variable message signs, and the use of more specific warning signs to advise of wet-weather skidding hazards.

Because of the importance of the public agencies' responsibility, this

paper discusses the legal implications arising out of the installation and maintenance of warning signs, traffic lights, and pavement markings.

For a full discussion of the background of the defense of sovereign immunity and the status of tort liability of the Federal, State, and local governments, the reader is referred to the previous papers in this chapter by this author. As seen in those papers, the procedure governing claims against highway authorities may differ from jurisdiction to jurisdiction. There are, however, some principles that are generally applicable in most States. Of course, the application of these principles by the courts to particular situations is somewhat imprecise.

DUTY OF STATE OR GOVERNMENTAL AGENCY TO INSTALL AND MAINTAIN HIGHWAY WARNINGS, TRAFFIC LIGHTS, OR PAVEMENT MARKINGS

In the absence of statute it has been held that there is no general duty of a State or other governmental unit to install or provide highway signs, lights, or markings.

In a suit for negligence it must be averred by the plaintiff that the defendant owed a duty to the plaintiff to take certain action, or to refrain from acting in a manner so as not to injure the plaintiff. "Duty" in tort law is "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." [1] Thus, the initial inquiry herein is whether the State, or other public authority, has any duty in the first instance to install, provide, or erect highway warning signs, traffic lights, or pavement markings.

Numerous cases hold that failure to provide such highway aids is not actionable. For example, if a city should fail to place or to replace a traffic signal at a particular intersection, it may be held not liable for that exercise of judgment in many jurisdictions.[2]

Obviously these duties usually are assumed by the governmental agency; however, it has been held that the assumption of the task of surfacing a highway with asphalt does not mean that there is a concurrent assumption of any duty to post signs and barricades at a dangerous curve.[3]

Whether there is a duty to install warnings signs, traffic lights, or pavement markings often depends on the interpretation of a local

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[1] PROSSER ON TORTS, 4th ed. (West 1971) at 143.

[2] Raven v. Coates, 125 So. 2d 770, 771 (Fla. App. 1961). Although the Supreme Court of Florida had held in Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) the city liable for negligence of a municipal employee for negligence within the scope of his employment, this case did not come within the scope of the *Hargrove* rule. A different result obtains if the traffic control device is negligently operated by a city employee. Hewitt v. Venable, 109 So. 2d 185 (Fla. App. 1959).

[3] Andrus v. Lafayette and Louisiana Dep't of Highways, (third party defendant), 303 So. 2d 824, 827 (La. App. 1975).

statute, particularly in jurisdictions having statutes imposing liability for failure to repair roads and highways. Such a statute has been interpreted to mean that the failure to install adequate warning signs is not a violation of duty under the statute.[4]

Similarly, the Court held in *Western Pennsylvania Nat'l Bank v. Ross* [5] that failure to provide adequate warning of an intersection was not actionable under a statute imposing liability for failure to keep roads and bridges in proper repair,[6] the Court noting that in Ohio municipalities are not liable for failure to apprise motorists of their duty to stop at a street intersection.[7]

> *Although there may be no duty to install warnings, signals, or markings in the first instance, once installed, there is a duty to maintain them in good serviceable condition.*

Generally, there is no duty to place signs or warnings on highways, because these are decisions that are legislative or quasi-judicial in nature, decisions that must be made by the legislative or executive branches of the government, and the courts do not care to second-guess the responsibility vested in the legislative or executive branches of the government. However, after signs, signals, or markings are provided, the government has the duty to place them and maintain them carefully.[8] Once the government has provided the traffic warning, it has assumed the duty to the public, and, moreover, the public reasonably has a right to rely on the warnings. Where the department is required to maintain highways in a state of reasonable repair, the duty may extend to the maintenance of traffic signals [9] and stop signs.[10]

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[4] Dohrman v. Lawrence County, 143 N.W.2d 865 (S.D. 1966). *See also,* Jenson v. Hutchinson Co., 166 N.W.2d 827 (S.D. 1969), statute imposed a duty only where there was damage to the driving part of the highway, and did not impose a duty to replace a "dangerous curve" warning sign. *Compare,* Lynes v. St. Joseph County Road Comm'n, 29 Mich. App. 51, 185 N.W.2d 111 (1970) where, in fact, the Court held that the State statute requiring that roads be kept in reasonable repair requires the government to *install* and maintain traffic control signals:

> Traffic signals which control the flow of traffic are an integral part of the improved portion of the highway. The presence or absence of such signals, as well as the conditions in which they are maintained, directly relates to the statutory duty imposed on the defendant to maintain the highway in a condition safe and fit for travel. (pp. 114–115).

[5] 345 F.2d 525 (6th Cir. 1965).

[6] *Id.* at 526.

[7] *Id.* at 527, citing authorities.

[8] Chart v. Dvorak, 57 Wis. 2d 92, 203 N.W.2d 673, 677–78 (1973). The Court's opinion at 678–679 on the issue of personal liability of the defendants should be noted.

[9] Williams v. State Highway Dep't, 44 Mich. App. 51, 205 N.W.2d 200, (1972).

[10] 185 N.W.2d at 114–115.

However, the duty to provide warnings, lights, or markings may arise where the particular highway presents an unusual, dangerous condition.

Not surprisingly, the courts have held that the existence of the duty to provide highway warning signs, traffic signals, or pavement markings may depend on the nature and circumstances of the roadway condition. That is, is the condition sufficiently dangerous that a reasonably prudent man would provide warning signs, signals, or markings for the motorist's protection? The duty of the State to exercise reasonable and ordinary care in the maintenance of its highways may be required at a particular location.[11]

Warning Signs

In *Commonwealth, Dep't of Highways v. Automobile Club Ins. Co.*,[12] the Court held that a curve, shown to have a 52-degree turn for each 100 feet, with a total curvature of 117 degrees from beginning to end, was a sharp or steep curve and sufficiently dangerous that the State should provide speed advisory signs, guardrails, or barriers near the curve.

Although the department is not compelled to place guardrails or curve signs at every curve along the highway, it must provide them at "dangerous places" or unusual places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and to others.[13]

In addition, the State may have a duty to provide warnings of inherent dangers, such as obstructions or excavations in a highway, or where a bridge has been destroyed, or a highway terminated abruptly.[14] Moreover, signs may be required expressly by statute.[15]

The duty to place or provide warning signs, traffic lights, or pavement markings arises because of the nature of particular locations, and where, for example, conditions are fairly general, it is not necessary for the State to install such signs universally over large areas of the highways.

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[11] See, Olsen v. Wayne County, 157 Neb. 213, 59 N.W.2d 400 (1953); *Duty of public authorities to erect and maintain warning signs or devices for curves in highway,* 55 A.L.R.2d 1000. It may be noted that in some cases, the question of liability turned on whether the motorist was familiar with the curve. 55 A.L.R.2d at 1011.

[12] 467 S.W.2d 326, 329 (Ky. 1971).

[13] *Id.* at 328. The State is not required to erect guardrails or barriers of sufficient strength to withstand *any* degree of force. *Id.*

[14] Vervik v. State Dep't of Highways, 278 So. 2d 530, 533 (La. App. 1973).

[15] In *Vervik,* the Court discussed the legal significance of the department's manual requiring a highway curve sign where a curve test with a ball-bank indicator gives readings of 10 degrees or more at speeds between 30 to 60 mph. The Court held that the department's manual was only persuasive of negligence and that the failure to comply with the requirement did not constitute *negligence per se.* That is, the failure to provide the sign did not

Some statutes require signs, signals, or markings only at dangerous locations,[16] and the California act defines a dangerous condition as one that "creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." [17]

In *Callahan v. San Francisco,*[18] the plaintiff was traveling as a passenger in an automobile on a street that dead-ended at an intersecting street. The weather was foggy and the T-intersection had no warning devices advising that the road terminated abruptly with a cliff dropping into a lake. (The driver of the vehicle had been drag racing just prior to the intersection.)

The evidence was that there had been no prior accident at the intersection similar to the one involving the plaintiff, and that only 29 accidents (one accident per 685,000 vehicles) at the intersection had involved this direction of travel in 4½ years. Thus, the Court held as a matter of law that the City was not negligent, and that the intersection was a safe one, except where a vehicle was driven at excessive or hazardous speed. Where a dangerous condition does not exist, the City is not required to provide warnings by signals, signs, or other markings.[19]

Although the highway department may be required by statute to erect a warning sign or device, it does not necessarily mean that civil liability will be imposed for failure to comply with the statute. Some statutes do not create a duty that enures to the traveling public, the breach of which would render the department liable to the motorist. The rationale of such a decision is that the legislature did not intend there to be a civil remedy for the motorist where the statute or regulation is not followed by the State.

In *Ashland v. Pacific Power and Light Co.,*[20] there was a violation of certain regulations that called for stop signs of certain dimensions at

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render the department liable as a matter of law, and the Court considered other evidence in order to determine the State's liability.

The Court concluded that the manual must be interpreted to mean that the indicator must register 10 degrees at speeds 31 to 59 mph, and if, as the record showed, the 10-degree point was reached only at 60 mph, the necessity of a sign was a borderline decision requiring the exercise of discretion on the part of the individual conducting the test. The matter of the Uniform Manual's effect on department's liability will be considered in more detail later. *Id. See also,* Vervik v. State, 302 So. 2d 895, 900 (1974) where the Supreme Court of Louisiana agreed that a violation of the regulation was not negligence per se.

[16] See CAL. GOV'T CODE § 835.

[17] CAL. GOV'T CODE § 830.

[18] 15 Cal. App. 3d 374, 93 Cal. Rptr. 122.

[19] See CAL. GOV'T CODE, § 830.8 and 830.

[20] 397 P.2d 538 (Oregon 1964).

particular intersections. The regulations were held to impose no duty on the State Highway Commission employee for plaintiff's benefit.

> No doubt it was the duty of Carter, as an employee of the Commission, to follow the regulation, but this was not a duty that he owed to the plaintiff or any other member of the public . . . these regulations . . . are mere directives imposing a duty upon the employees of the Commission for the Commission's benefit only.
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> It is well established that a civil remedy can be invoked by reason of a statute, ordinance or regulation only by members of the class for whose benefit the statute, ordinance, or regulation was adopted. . . . Since the regulation here in question did not create a duty in the defendant Carter for the benefit of the plaintiff, its violation by Carter was not only not negligence per se, but was no evidence of negligence. (Citations omitted.) [21]

Before failure to post warning signs will result in liability, it must be shown that the absence of a sign was a proximate cause of the accident. For example, in *Suligowski v. State,*[22] involving a skidding accident on a wet pavement, the evidence was that there were any number of plausible causes, and the pavement was no more slippery than other pavements when wet. The Uniform Manual on Traffic Control Devices stated that a SLIPPERY WHEN WET sign should be used only on pavements "which become more slippery than normal pavement when wet and that the use of such signs should be minimized." The Court held that the absence of the sign was not the proximate cause of the accident.[23]

The department's own records may amount to an admission that a highway location is particularly dangerous and should be signed. In *Smith v. State,*[24] the traffic engineer, in a letter to the Department of Public Works, had recommended W-160 Oversize Assembly signs at particularly dangerous curves. In part, he advised that the signs were necessary

> to warn motorists that they are approaching an 8 degree curve which is located on a vertical curve. This location has been the scene of many accidents of which speed was usually the contributing factor. Several years ago the curve was rebanked and a coarse mix added to the surface to decrease skidding and aid drivers to negotiate the curve. This improvement seemed to help but motorists still get into trouble when negotiating this curve.[25]

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[21] *Id.* at 540.

[22] 179 N.Y.S.2d 228 (1958).

[23] *Id.* at 233.

[24] 12 Misc. 2d 156, 177 N.Y.S.2d 102 (1958).

[25] *Id.* at 104. *See also,* Dawley v. State, 61 N.Y.S.2d 59 (1946) (highway appeared to continue straight ahead and there were no caution, slow, stop, curve, or other signs and no white line in the center to indicate that the highway curved to the east); and LeBlanc v. Estate of Blanchard, 266 So. 2d 918 (1972) (no traffic control indications or warning signs at the approach to

The State was held liable for its failure to warn the decedent of the dangerous highway condition presented.

The issue of the negligence of public authorities for failure to erect or maintain warning signs or devices at curves may be submitted to the trier of fact, which may be the jury,[26] and the result depends on the facts of the particular case. A sudden, sharp, obscured curve, for example, such as a 5-degree curve, which is very unusual and dangerous according to one court, requires a warning sign commensurate with the danger,[27] but it has been held that a 3-degree curve, which could be seen 1,000 to 1,500 feet away and where there were 9-foot minimum shoulders and only a gradual slope drop of 2½ feet to an adjoining field, did not require a guardrail or a warning sign.[28]

Nor is there any general duty to install reflectorized signs where a conventional sign is present.[29] However, in *Rugg v. State,*[30] conventional signs were inadequate where a road narrowed from 27 feet in width to 20 feet to conform to the width of a bridge, which was positioned such that the road had to turn sharply in order to reach the bridge. The only sign was one reading NARROW BRIDGE located approximately 180 feet west, and it was disputed whether it was reflectorized. The Court held that motorists should have been warned of the dangerous condition by reflectorized signs "notifying them that they were approaching a sharp curve and that speed should be drastically reduced."[31]

Traffic Lights

There is a split of authority as to whether the State or other public agency is liable for failure to erect traffic lights, but most jurisdictions hold that the decision to provide or not to provide traffic lights is either the exercise of immune discretion or the performance of a purely governmental function.[32] In some municipalities there is no liability for failure to maintain traffic lights.[33]

According to one authority liability for failure to provide or maintain traffic lights or signals at intersections depends on the particular circumstances:

> [G]enerally speaking, the strongest cases for recovery have been

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a bridge except for battery operated flashing sign, inoperative for two or three months, and other highway signs obscured by weeds).

[26] Cameron v. State, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777 (1972).

[27] Vervik v. State, 302 So.2d 895, 901 (La. 1974).

[28] Janofsky v. State, 49 N.Y.S.2d 25 (1944).

[29] See 55 A.L.R.2d 1013.

[30] 284 A.D. 179, 131 N.Y.S.2d 2.

[31] 19 MCQUILLIN, MUN. CORP., § 54.102.

[32] See Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960); Hulett v. State, 4 A.D.2d 806, 164 N.Y.S.2d 929 (1957); Pierrotti v. Louisiana Dep't of Highways, 146 So. 2d 455 (La. App. 1962).

[33] See discussion in Radosevich v. County Com'rs of Whatcom Co., 3 Wash. App. 602, 476 P.2d 705 (1970).

> those in which the highway authority failed within a reasonable time to replace a traffic sign which had been removed by unauthorized persons, to re-erect or repair a sign which had fallen down or had been knocked down or bent over, or to replace a burned-out bulb in an electric traffic signal. Conversely, the situations least likely to produce a judgment against a state or municipal corporation for negligence in connection with the maintenance of traffic control devices have been those in which a traffic sign or signal was removed from an intersection under proper authorization and those in which it was claimed that the traffic control system at an intersection had been negligently planned or designed. In other factual situations, the cases are generally divided or inconclusive, such as those involving a failure to install any traffic control devices at an intersection alleged to be dangerous, traffic signals flashing green in intersecting directions at the same time or twisted so as to give wrong or confusing directions, or traffic signs obscured by vegetation or otherwise defective and in need of repair.[34]

In *Arizona State Highway Dep't v. Bechtold* [35] the signal was flashing a green indication to both drivers, and there had been two prior accidents at the same location on the same date. The evidence was that repairs earlier in the day following the first accident had been inadequate and, further, that the department had notice later the same day that another accident at that location had been caused presumably by malfunctioning traffic signals. It was held that the State has a duty to maintain and repair traffic control signals in a manner that will keep them reasonably safe.

It may be noted that liability for defective traffic lights may be imposed pursuant to a local statute imposing liability for defects in the highway.[36] On the other hand, where a defect, such as in the timing of a light, is defective from the very inception of the design, the public authority may be immune from liability on the basis that the design of the system is the exercise of a planning-level decision.[37]

Pavement Markings and No-Passing Zones

Considerable interest has been expressed concerning the liability of States arising out of pavement markings, particularly no-passing zones. Few cases have been located, however, that concern the specific fact situation of no-passing zones. There are cases holding the States liable for improper, inadequate, or misleading pavement markings.

In *Dawley v. State,*[38] the claimant sued for negligence of the State

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[34] See *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection,* 34 A.L.R.3d 1008, 1015.

[35] 105 Ariz. 125, 460 P.2d 179 (1969).

[36] See Fox v. City of Columbia, 196 S.E.2d 105 (S.C. 1973); Gazoo v. City of Columbia, 196 S.E.2d 106 (S.C. 1973).

[37] See Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

[38] 61 N.Y.S.2d 59 (Ct. Cl. 1946).

in constructing, maintaining, and safeguarding a State highway. Be cause of the surface appearance of the road, it appeared to proceed straight ahead, when, in fact, it curved to the east. No caution, slow, stop, curve or other signs were on the highway. Moreover, "there was no white line in the center of the highway to indicate the highway curve." [39] The Court held that the evidence sustained findings that the curve was dangerous and that the State was negligent in failing to provide proper warnings and barriers.

In *Campbell v. State,*[40] an intermediate appellate court decision, the State was claimed to have been negligent in (1) failing to mark with a yellow line the area where it was unsafe to pass, and (2) failing to install NO-PASSING signs to advise the public that the area was unsafe for passing. The Court, after struggling with the state of the law in Indiana and the definition of governmental and proprietary functions, ruled that the alleged negligence fell squarely within the Court's definition of governmental functions, and, therefore, because the State of Indiana enjoyed immunity from negligence in performing governmental functions, the department could not be held liable for failing to mark no-passing zones.

Campbell may be an authority for the States that retain immunity for governmental functions. However, in its own State of Indiana, it is of no value as a precedent because of the Appellate Court's reversal at the hand of the Supreme Court of Indiana.[41] The High Court ruled that the State may be found liable for breach of a duty owed to a private individual regardless of whether the State function involved was characterized as "proprietary" or "governmental."

Other cases involving pavement markings are *Rogers v. State,*[42] and *State v. l'Anson,*[43] which are discussed further herein at footnote 85, *infra,* but in both cases the department was held liable for negligence in providing improperly marked and striped portions of the highway. In both instances, the courts ruled that the department's actions were low-level, operational-level, maintenance activity that did not fall within any immunity for discretionary functions.

It may be noted that one court has held that special pavement markings are not required, for example, at an intersection where the evidence does not establish that there is a hazardous or dangerous condition.[44] However, the State or public entity may be held liable for installing highway signs that are themselves misleading and dangerous. For example, in *Germar v. Kansas City,*[45] the City was held liable where its employees failed to mark adequately by signs, lane markings, barri-

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[39] *Id.* at 61.

[40] 269 N.E.2d 765 (Ind. App. 1971).

[41] 284 N.E.2d 733 (Ind. 1972).

[42] 51 Haw. 293, 459 P.2d 378 (1969).

[43] 529 P.2d 188 (Alaska 1974).

[44] Stornelli v. State, 11 A.D.2d 1088, 206 N.Y.S.2d 823 (1960); Egnoto v. State, 206 N.Y.S.2d 824 (1960).

[45] 512 S.W.2d 135 (Mo. 1974).

cades, and the like, and to warn motorists that the roadway was reduced from four lanes to two-lane, two-way traffic. Such negligence created a dangerous and deceptive condition by which plaintiff was misled into collision and injury.[46] Other cases hold the public authority liable where the road appears to go in one direction or the other and either there is no warning of the condition or there are misleading highway signs.[47] Liability for misleading signs may be imposed by local statute.[48]

Requirement of Notice

In the absence of statute the public authority is generally held to be under no duty to act until it has actual or constructive notice of the defect or danger. For example, with respect to municipalities the general rule is that in order to hold them liable for injuries for failure to exercise ordinary care to keep roads and streets in a reasonably safe condition, it must appear that the municipality knew, or had reasonable cause to know, of the defective condition a sufficient length of time prior to the accident to enable it to put the road in a state of repair.[49] Where the negligence relied on is the failure of the city itself to act to remove an obstruction or to repair a defect in the street, usually no notice of any kind is necessary—the public authority is deemed to have knowledge of the actions of its own employees.[50] These prerequisites of notice appear to apply to all highway authorities and public agencies.[51]

STATE OR LOCAL GOVERNMENT DEFENSES AGAINST NEGLIGENCE ACTIONS ARISING OUT OF HIGHWAY SIGNS, TRAFFIC LIGHTS, OR PAVEMENT MARKINGS

There are two defenses particularly significant in tort actions brought against highway authorities in those jurisdictions in which the aggrieved motorist may bring suit. First, in some jurisdictions the authority is still immune for negligence in performing governmental functions. In the remainder and majority of the States, the highway authority is not liable for negligence in performing, or failing to perform, duties that are discretionary in nature.

> *The governmental proprietary test of immunity is applicable usually to highway authorities at the municipal government level.*[52]

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[46] *Id.* at 146.

[47] Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470.

[48] Gazoo v. Columbia, 196 S.E.2d 106 (S.C. 1973).

[49] 39 AM. JUR. 2d *Highways, Streets, and Bridges.*

[50] *Id.*, § 412.

[51] See also, Walker v. County of Coconino, 473 P.2d 472, 475 (Ariz. App. 1970), and Reynolds v. State, 35 Misc. 2d 757, 231 N.Y.S.2d 681 (1962).

[52] See Thomas, "Liability of State Highway Departments for Design, Construction,

The governmental–proprietary test of immunity does not appear to be particularly applicable, except to the municipal level of government, to actions arising out of negligence in providing highway signs, signals, devices, or markings.

It is perhaps anomalous that a defense is applicable to municipalities and not similarly applicable to State authorities, yet the dichotomy in the law has developed in just that fashion. Local governments, particularly municipal corporations, are immune from the exercise of governmental functions, but are liable for negligence in performing proprietary activities or functions.[53]

There is some difficulty reconciling the decisions that attempt to classify street construction, repairs, or maintenance as either a governmental or a proprietary function. One authority states that in the ownership, control, and supervision of their streets, municipalities act in their governmental and not their proprietary capacities.[54] But later the writer declares

> . . . 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.[55]

The threshold decision of whether to install a traffic sign or provide pavement markings or other warnings generally is held to be the performance of a governmental function, for which there is no liability if the public entity chooses not to act.[56] Moreover, the regulation or direction of traffic is a governmental function, and falls within the doctrine immunizing the city or other political entity for the negligent performance thereof. Pursuant to that view, highway authorities have been relieved of liability for their failure to erect or maintain stop signs.[57]

In *Watson v. Kansas City,*[58] the Court refused to overrule the doctrine of governmental immunity as it had been applied in Missouri to the law of municipalities. The *Watson* Court held that there was no liability of the city for its failure to warn that an intersection was a T-intersection because the erection and maintenance of traffic signs were im-

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and Maintenance Defects," Vol. 3, Ch. VIII, p. 1771 *supra,* for further discussions of the governmental–proprietary dichotomy.

[53] See 57 AM. JUR. 2d *Municipal, School, and State Tort Liability,* § 31; and 1A MUNICIPAL CORPORATION LAW (Bender), § 11.26.

[54] 18 McQUILLIN MUN. CORP., § 53.41 at 228.

[55] *Id.* at 231.

[56] See Annot., 34 A.L.R.3d 1008, 1019, and numerous citations therein.

[57] BLASHFIELD, AUTOMOBILE LAW AND PRACTICE, § 161.17 at 331.

[58] 449 S.W.2d 515 (Mo. 1973).

mune government functions.[59] Other decisions similarly provide that the installation and maintenance of signs are governmental, as distinguished from proprietary, duties.

The conflict in the decisions is illustrated by *Gordon v. City of West Palm Beach,*[60] in which it was alleged that the city's design and construction had caused an illusion that the road was a continuous, nonintersected roadway, thereby creating a highway "trap." The Court, confirming earlier Florida decisions, held that the construction, maintenance, and repair of streets in a municipality are *proprietary* functions, the negligent performance of which may result in liability. In juxtaposition, the Court held further that the city could not be held liable for the absence of a warning sign. "The installation and maintenance of traffic control devices such as stop signs, automatic traffic lights, etc., is a *governmental* function in the exercise of which the municipality is not liable."[61]

The Court was not satisfied with the result, however, for it wrote:

> While we have tried to articulate and apply what we conceive to be the law in the area of municipal tort liability, we are concerned that the substantive rights of individuals should turn upon such artificial distinctions as whether maintenance of a traffic control device is governmental or proprietary, or whether a warning sign or light is a traffic control device. It would seem far more realistic and workable for such rights to turn on the question whether the governmental entity's act or failure to act proximately caused the harm claimed.[62]

As will be seen further in this paper, other courts hold that the *design* of a roadway is discretionary in nature, and, if the installation of signs or signals are immune from liability, it is because the decision whether to have them is likewise the exercise of a discretionary function. The majority rule for municipalities is that they are not liable for negligence in the regulation of streets by signs or signals, because regulation of traffic is a function that is governmental in nature.[63] There are decisions, of course, holding that the maintenance of traffic control devices is in the nature of a proprietary function for which liability may be imposed for negligence.[64]

As noted, the governmental–proprietary dichotomy is not usually applied at the State level. In cases involving State highway depart-

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[59] See also, Johnson v. Oman Constr. Co., Inc., 519 S.W.2d 782, 786 (Tenn. 1975), where Court recognizes that there may be an exception to the rule of governmental immunity where the location or relocation of traffic signs constitutes a "virtual trap."

[60] 321 So. 2d 78 (Fla. App. 1975).

[61] *Id.* at 80.

[62] *Id.* at 81.

[63] *See,* Hammell v. City of Albuquerque, 63 N.M. 374, 320 P.2d 384 (1958). See Annot., 34 A.L.R.3d 1008, 1025, where cases are cited that maintenance of traffic control devices is a governmental function to which the doctrine of governmenal immunity applies.

[64] 34 A.L.R.3d at 1040.

ments, it is often held that they are not liable for negligence arising out of the performance of governmental functions. However, 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. Few cases apply the governmental–proprietary test of immunity to State agencies. In fact, recently the courts or legislatures that have considered the governmental–proprietary test of immunity for State agencies have rejected it.[65] Moreover, the governmental–proprietary dichotomy has elsewhere been rejected in favor of immunity for only discretionary governmental activity.[66]

State or local highway agencies may be immune from liability for negligence where the activity involved concerns the exercise of discretionary functions or duties.[67]

A more important defense of a highway authority 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 duties discretionary in nature is rooted in the common law, having emerged in the law on personal liability of public officials, who were not liable for negligence in the exercise of discretionary duties but were liable for the exercise of ministerial functions.

Any activity, of course, involves the exercise of discretion, but as used herein a discretionary duty is the power to make choices among valid alternatives, and to exercise independent judgment in choosing a course of action.[68] Conversely, ministerial duties are more likely to involve clearly defined tasks that are to be executed with minimum leeway and individual judgment. Ministerial tasks are said not to require any evaluating or weighing of alternatives before performing the assigned duty.[69]

A leading case that illustrates the type of executive activity that is discretionary in nature is *Weiss v. Fote.*[70] In *Weiss,* the issue was the reasonableness of the clearance interval in a traffic light system that had been approved by the Board of Safety after ample study and traffic checks. The Court held that New York's general waiver of im-

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[65] See State v. Turner, 32 Ind. Dec. 409, 286 N.E.2d 697 (1972), *overruling* Knotts v. State, 274 N.E.2d 400 (Ind. 1971), and IDAHO CODE § 6–901 *et seq., overruling* Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970).

[66] *See, e.g.,* Spencer v. Gen. Hosp. of the District of Columbia, 425 F.2d 479 (D.C. Cir. 1969).

[67] See Thomas, "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," Vol. 3, Ch. VIII p. 1771 *supra,* for an in-depth discussion of the discretionary defense.

[68] Burgdorf v. Funder, 246 Cal. App. 2d 443, 54 Cal. Rptr. 805 (1966).

[69] Pluhowsky v. City of New Haven, 151 Conn. 337, 197 A.2d 645 (1964); Shearer v. Hall, 399 S.W.2d 701 (Ky. 1965).

[70] 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

munity [71] 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 governmental 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.[72]

Other cases hold that the decision to provide or withhold a certain service is discretionary in nature; for example, the failure to erect a traffic light may be discretionary in nature and protected from liability.[73] Immunity usually attaches to governmental decisions affecting signs, signals, or markings, if there is a showing that a safety plan or program has been adopted after reasonable consideration and deliberation. Of course, the decisions should be made by a public body or official vested with authority to exercise discretion in formulating public policy. There should be evidence that the decision was reasonable, was duly prepared and approved, and was not arbitrary or capricious.[74] Moreover, there may be a duty to review these decisions later to determine whether they are safe once implemented and in actual use.[75] The public official must be cautious: the discretionary field of activity should not be used to justify the omission of obvious safeguards for the protection of the public.[76]

The defense for action discretionary in nature is both a shield and a sword depending on, first, the circumstances of the particular case, and, second, the law of the particular jurisdiction. Clearly some decisions are more discretionary than others, and court decisions differ on what falls within the discretionary field of activity. The trend is that only decisions made at a policy level or decisions that involve a consideration of policy-type factors are discretionary. The result has

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[71] In New York the State may be held liable, just as a private party might be, for its negligence, with the exception for discretionary acts as set forth in *Weiss*.

[72] 167 N.E.2d at 65–66.

[73] See citations collected in 34 A.L.R.3d 1008, 1019.

[74] 167 N.E.2d at 66.

[75] *Id.* at 67.

[76] High v. State Highway Dep't, 307 A.2d 799 (Del. 1973) (immunity waived in Delaware to a limited extent by 18 DEL. CODE § 6509).

been a narrowing of the meaning of discretion and more types of decisions that once would have been immune from liability no longer enjoy that protection.

This narrowing of discretion is demonstrated in several cases construing tort claims legislation. These acts usually contain a provision immunizing the public agency for negligence in the performance or failure to perform discretionary functions (the discretionary function exemption). This exemption has its roots in the exclusion from liability for discretionary activity previously discussed.

The courts have struggled to construe the acts' exemption from liability for a discretionary function, and a landmark United States Supreme Court case has been used by lower courts for the development of the operational-planning level test in an effort to give meaning to the exemption. The majority of the courts hold that only decisions made at the planning level, rather than at the operational level, fall within the discretionary function exemption.[77] 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 decions involving questions of policy and the evaluation of policy-type factors such as the financial, political, economic, and social ramifications of a given plan.[78]

Some courts question the use of the operational-planning level test and suggest that this "aid" tends to obscure the meaning of the exemption which should be construed according to the "nature and quality of the discretion involved." [79] It is the later decisions that have restricted the meaning and application of the exemption with fewer and fewer governmental actions seemingly qualified to be truly discretionary in nature. Thus, since the decision in *Indian Towing Co. v. United States,*[80] 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.[81]

It would appear that the decision to provide signs, signals, or markings is the exercise of immune discretion at the planning level; however, under recent decisions negligence in providing these devices is less likely to be protected from liability. For example, in *State v.*

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[77] See Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), *reh. 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). The discretionary function test and the operational versus planning level test of one's duties have now been extended to the area of personal liability of public officials. See Mayer, *Immunity Denied to Federal Officials Failing to Perform Discretionary Duties,* 35 FED. BAR J. 206 (1976), which discusses the benchmark decision of Estrada v. Hills, 401 F.Supp. 429 (N.D. Ill. 1975).

[78] Swanson v. United States, 229 F.Supp. 217, 219–220 (N.D. Calif. 1964).

[79] Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967), *cert. den.* 389 U.S. 841 (1967).

[80] 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 1065 (1955).

[81] 350 U.S. at 69.

Abbott,[82] in which the State was alleged to have failed to sand properly a highway, 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.

The courts differ on what type of highway function involves sufficient discretion to justify immunity. In *Catto v. Schnepp*[83] it was alleged that there was negligence in the design of a curve, and, further, that there was a failure to warn that a change of speed was necessary. The design of the road was held to be discretionary in nature; furthermore, no independent liability attached for the failure "to post a speed limit or other warning sign or for failure to maintain the roadway in a safe condition since these activities also are cloaked with immunity as resting within the discretionary judgment of the governing authority."[84]

The *Catto* decision may be compared to the holding in *State v. l'Anson*[85] where the Court ruled that, within the meaning of the discretionary function exemption of the Alaska Tort Claims Act, the State was liable for the failure to place traffic signs or paint lines on the highway at the entrance to campgrounds. The decisions on traffic signs or pavement markings were not broad policy decisions that came within the planning category.

> . . . In the trial court, the questions in dispute turned on whether the state properly marked and striped a portion of the Seward Highway north of the Granite Creek Campground access road. In our view, functions of this nature do not involve broad basic policy decisions which come within the "planning" category of decisions which are expressly entrusted to a coordinate branch of government. We are further persuaded that resolution of questions such as whether or not the state properly striped or marked a portion of highway as it relates to the state's duty of care to users of the highway presents facts that

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[82] 498 P.2d 712, 722 (Alaska 1972).

[83] 121 N.J. Super. 506, 298 A.2d 74 (1972).

[84] 298 A.2d at 76. See also, Urow v. District of Columbia, 316 F.2d 351, 352 (D.C. Cir. 1963), involving alleged negligence in failing to install a traffic control device at an intersection. The Court held that the government's decision was discretionary and immune where the establishment of a general traffic control plan was concerned.

[85] 529 P.2d 188, 193–194 (Alaska 1974).

courts are equipped to evaluate within traditional judicial fact-finding and decision-making processes.

Our decision is in accord with the holding and reasoning of the Supreme Court of Hawaii in *Rogers v. State*, 51 Haw. 293, 459 P.2d 378 (1969). In *Rogers*, the state contended that its negligence in locating the road signs and restriping the center lines was not actionable under the discretionary function exemption of Hawaii's tort liability act. More particularly, the state contended that

> discretion on the part of a State employee is involved in the placement of road signs and restriping of pavement in that road signs are placed after the district maintenance engineer has made a visual observation and has determined where and how they are to be placed, and center lines are restriped after the engineer has taken into consideration such factors as the geographical area involved, the amount of rain, and the volume of traffic in the area.

Justice Marumoto, writing for the Supreme Court of Hawaii, rejected the state's contention. After discussing the history of the Federal Tort Claims Act and federal decisional authority, Justice Marumoto wrote:

> None of the cases mentioned above gave a precise definition as to what is meant by operational levels acts. However, we may draw from the decisions in those cases, and others involving the discretionary function exception, a conclusion that operational level acts are those which concern routine, everyday matters not requiring evaluation of broad policy factors.

Employing this definition framework, the Supreme Court of Hawaii concluded that:

> Here, such matters as the kinds of road signs to place and where to place them, and which center line stripings to repaint and when to repaint them, did not require evaluation of policies but involved implementation of decisions made in everyday operation of governmental affairs. Admittedly, application of the *Abbott* "planning-operational" distinction regarding levels of decision-making involves delicate degrees of judgmental value. Although we recognize that it is not possible to articulate a rule which would provide more certainty, we remain convinced that the analytical approach adopted in *Abbott* is viable and will yield just results. (Footnotes deleted.)

The *Anson* and *Abbott* cases focus on the nature of the activity and ask whether the decision concerns high-level policy or merely routine day-to-day governmental functions, such as painting lines on highways or removing snow and ice from the highway. To the extent that these are decisions made by maintenance personnel or involve maintenance activities, any negligence is unlikely to be protected by the discretionary exclusion or exemption.

Moreover, as a general rule, highway maintenance is not considered

to fall within the concept of discretionary function or duty.[86] In *Lanning v. State Highway Comm'n*,[87] agents of the State had watched debris collect on a bridge structure and failed to take action to remove the debris before plaintiff's land was flooded. The decision to remove the debris from the bridge piers did not constitute a policy-level decision.

> Generally, maintenance functions, that is, decisions made by highway employees as how best to maintain highways, involve none of the questions cited by *Smith* as being beyond the proper scope of examination by the judicial branch. Maintenance decisions involve the recognition of defects and dangerous conditions, and the taking of proper steps to prevent resulting injury. Courts and juries have traditionally been considered competent to determine the reasonableness of these types of decisions.[88]

Where the highway authority fails to maintain traffic signs after they are erected, such authority may be held liable because the negligence is ministerial in nature.[89] The State has been held liable for failing to mark a highway with a yellow line and install a NO-PASSING sign where it was unsafe to pass.[90] Highway authorities have a duty to maintain traffic lights at intersections in a reasonably safe, visible, working condition.[91]

Although highway authorities may be vested with discretion in deciding when to provide signs, signals, or markings, they probably are not protected from improper maintenance of such devices, and recent decisions indicate that failure to paint highway lines or provide highway warning signs are not discretionary acts.

UNIFORM LAWS, REGULATIONS, OR STANDARDS AS AFFECTING LIABILITY

Generally, State laws and regulations are admissible into evidence.

State laws and regulations have significant impact in a suit arising out of negligence in providing or failing to provide signs, signals, or markings. Where Federal and State regulations, rules, or standards have the force of law, they are clearly admissible into evidence.[92] For

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[86] See Smith v. Cooper, 256 Or. 485, 475 P.2d 78, 45 A.L.R.3d 857 (1970).

[87] 515 P.2d 1355 (Oregon 1973).

[88] *Id.* at 1359. It may be noted that the defendant was unsuccessful in claiming that debris collected on the bridge because of its design, and that because designing bridges is discretionary, it should have immunity for any negligence caused by design.

[89] Board of Comm'rs of Delaware Co. v. Briggs, 337 N.E.2d 852 (Ind. App. 1975).

[90] Campbell v. State, 284 N.E.2d 733 (Ind. 1972).

[91] See Smith v. City of Preston, 97 Idaho 295, 543 P.2d 848 (1975).

[92] See Rudd v. Public Service Co., 126 F.Supp. 722 (N.D. Okla. 1954); Daniel v. Oklahoma Gas & Electric Co., 329 P.2d 1060 (Okla. 1958); Lutz Industries v. Dixie Home Stores, 242 N.W. 332, 88 S.E. 2d 333 (1955).

example in *State v. Watson,*[93] involving negligence in the construction and maintenance of a narrow bridge and failure to post appropriate warning devices, the trial court admitted those provisions of the Manual of Uniform Traffic Control Devices that had been violated. The Appellate Court held that:

> . . . the admission of this manual was proper, under either one of two theories: (1) as evidence of standard custom or usage in this country, to be considered by the jury in connection with its determination of whether the state used ordinary care in this specific instance . . . ; or (2) as evidence that the state failed to meet the safety standards set for itself by the enactment of A.R.S. § 28.641 [statute requiring highway commission to adopt manual conforming to system current and approved by AASHO]. This latter purpose is grounded on the hypothesis that the jury may have determined the state highway commission had not conformed its traffic-control system "so far as possible" with the system "then current" with the American Association of State Highway Officials. Generally, safety regulations adopted by a defendant for its own guidance are admissible in evidence. (Citations omitted; emphasis supplied.)

That highway regulations, such as set forth in the Uniform Manual, are admissible in evidence appears to be well-settled.[94]

A violation of a uniform law or regulation may be evidence of negligence or may constitute negligence per se.

In tort law the violation of a statute or regulation under certain circumstances [95] may result in civil liability.[96]

> Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of the violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard

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[93] 7 Ariz. App. 81, 436 P.2d 175 (1968).

[94] Chart v. Dvorak, 57 Wisc. 2d 92, 203 N.W.2d 673 (1973); Waits v. St. Louis-San Francisco Ry. Co., 216 Kan. 160, 531 P.2d 22 (1975); Dowen v. State, 174 N.Y.S.2d 849 (1958); Fraley v. City of Flint, 54 Mich. App. 570, 221 N.W.2d 394 (1974); Vervik v. State Dep't of Highways, 278 So.2d 530 (1973); Quinn v. United States, 312 F.Supp. 999 (E.D. Ark. 1970); Mullins v. Wayne Co., 16 Mich. App. 365, 168 N.W.2d 246 (1969); Jorstad v. City of Lewiston, 93 Idaho 122, 456 P.2d 766 (1969) (the preceding cases all involved the Uniform Manual); see also, Slade v. New Hanover County Bd. of Educ., 10 N.C. App. 287, 178 S.E.2d 316 (1971); *cert. den.* 278 N.C. 104, 179 S.E.2d 453 (book published by N.C. Dep't of Motor Vehicles to train school bus drivers); Steffes v. Farmers Mutual Auto. Ins. Co., 7 Wis. 2d 321, 96 N.W.2d 501 (1959), and Thedorf v. Lipsey, 237 F.2d 190 (7th Cir. 1956) (all admitting motorists manual pertaining to stopping distances), but *contra* is McDonald v. Mulvihill, 84 N.J. Super. 382, 202 A.2d 213 (1964).

[95] PROSSER ON TORTS (4th ed.), § 36, 190–200.

[96] *Id.* at 190–192.

> of conduct is taken over by the court from that fixed by the legislature, and "jurors have no dispensing power by which to relax it," except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence "per se," or in itself. The effect of such a rule is to stamp the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect. There will still remain open such questions as the causal relation between the violation and the harm to the plaintiff, and, in the ordinary case, the defense of contributory negligence, and assumption of the risk.[97]

In *Watson v. Kansas City, supra* n. 58, the Court did not decide whether a violation of the involved standards was negligence per se.[98] Moreover, some courts have held that a failure to conform to the standards does not constitute negligence per se: "the department's manual is merely persuasive and the failure to comply with its requirements does not constitute negligence per se." [99]

The similar view that a violation of the Uniform Manual is only persuasive of the standards to be applied is stated in *Harkins v. State.*[100] There, the Court was faced with the adequacy of signs and barricades ahead of road construction and ruled that the Uniform Manual's specifications were recommendations only.

> It is obvious that the repair crew in this case did not use the warning signs and cones recommended by the manual. However, the defendant contends this does not necessarily lead to the conclusion that the crew was negligent. We agree that the manual is merely persuasive. The failure to comply with its requirements is not negligence per se, as in a case of violation of a highway safety statute, *Dixie Drive It Yourself System v. American Beverage Co.,* 242 La. 471, 137 So. 2d 298 (1962). Hence, in determining whether the repair crew was negligent we must also look to the jurisprudence which has established the duty of the Highway Department to provide adequate warning of hazards in the highway.[101]

In *Harkins,* the Court considered the circumstances at the scene of the accident, the adequacy of the signs provided, as well as the Uniform Manual's recommendations before holding that the signs were not commensurate with the danger presented.

The legal effect of highway regulations was considered in *Quinn v. United States,*[102] involving the government's failure to warn of the steepness of the grade of a hill and the presence of a barricade across

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[97] *Id.* at 200.

[98] 436 P.2d at 181, n. 6.

[99] Vervik v. State Dep't of Highways, 278 S.2d 530, 537 (La. App. 1973).

[100] 247 So. 2d 644 (La. App. 1971).

[101] *Id.* at 648.

[102] 312 F.Supp. 999 (W.D. Ark. 1970). The court grounded its ruling that the violations did not constitute negligence per se on its belief that the involved Corps of Engineers regulations and the Manual on Uniform Traffic Control Devices did not have full force and effect as law.

the highway. The Court held that regulations of the Corps of Engineers, setting forth design and construction criteria that adopted by reference the Manual on Uniform Traffic Control Devices, would be considered "as neither an absolute standard nor as scientific truth, [but as] illustrative and explanatory material along with other evidence in the case bearing on the question of ordinary care." [103] Similarly, in *Mullins v. County of Wayne,*[104] it was not negligence per se when the county failed to erect warning signs authorized by Michigan law. Rather, it was a jury question whether the violation amounted to negligence in failing to keep the road in reasonable repair.

In *Erschens v. County of Lincoln,*[105] the issue was whether the Uniform Manual had the full force and effect of law on the placement of signs and signals by *local authorities.* The Court held that the pertinent State statute that required local authorities to place such devices as they deemed necessary, although conforming to the Uniform Manual, manifested a legislative intent that the Uniform Manual in that instance did not have the full force and effect of law. Furthermore, it was not necessary to instruct the jury that the county was negligent as a matter of law for failing to comply with the manual's specifications. The Court noted that certain parts of the Uniform Manual permitted the exercise of discretion in the erection of signs where less than minimum protection was required; thus, even if the Court had ruled that the Uniform Manual had the full force and effect of law, under the circumstances a violation thereof would not have constituted negligence per se.[106]

Whether the violation of the uniform regulation is negligence per se may depend on whether the provision permits discretion or is mandatory. Providing signs, for example, may be discretionary, but the type of sign or signal called for may be mandatory. Thus, where the Uniform Manual calls for traffic signs or signals to be placed and maintained as the public authority "shall deem necessary" and further provides that all such signs or signals shall conform to the Uniform Manual's specifications, the language "deems necessary" may preclude a finding that a violation is negligence per se.[107] By contrast, where it has been held that the violation of a highway regulation was negligence per se, the issue was the adequacy of the warnings given and not the failure to provide warnings; [108] that is, the Court was dealing with the Manual's requirement that signs be erected to conform to the specifications, not with the necessity of the signs (discretionary).

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[103] *Id.* at 1005.

[104] 16 Mich. App. 365, 168 N.W.2d 246 (1969).

[105] 177 N.W.2d 28 (Minn. 1970). See also, Poppenhagen v. Sornsin Constr. Co., 220 N.W.2d 281, 285 (Minn. 1974) where there is the dictum that "a violation of the manual would not compel a finding of negligence as a matter of law."

[106] 177 N.W.2d at 33.

[107] Chavez v. Pima County, 107 Ariz. 358, 488 P.2d 978 (1971).

[108] Jorstad v. City of Lewiston, 93 Idaho 122, 456 P.2d 766 (1969).

If there is a general rule, it appears to be this: if the highway regulation permits the department to exercise discretion, then the Uniform Manual is admissible only as some evidence of the standard of care. However, if the regulation directs that something be done in a prescribed manner, a failure to conform to that standard of conduct constitutes negligence per se. *Vervik, Quinn,* and *Mullins* (but not *Harkins*) appear to support this conclusion, because the issue was the failure to post signs, not the adequacy thereof once posted, and in all the courts held that the exercise of discretion was not negligence per se.[109]

CONCLUSION

Liability of highway departments for negligence arising out of the installation and maintenance of highway warnings, traffic lights, and pavement markings is an important topic, given the expanding number of States in which the department may be sued and held liable for negligence or the failure to perform its duties.

As seen, there is no general duty, in the absence of statute, for the department to install and maintain signs, signals, or markings. The department may have no duty to provide such devices and, moreover, is usually immune from liability where it has considered the necessity of a warning but decided not to provide it. The courts, however, generally require the agency to maintain warnings properly once they have been installed and the motorist has come to rely upon the warning for his safety.

Particularly dangerous highway situations may give rise to the duty, pursuant to a statute or common law, to erect a sign, traffic light, or otherwise in order to keep the roads reasonably safe for the prudent traveler. As seen, liability is determined on the basis of the factual circumstances of each case, and the question in most jurisdictions, except those with highway defect statutes, is whether the department has exercised ordinary and reasonable care under the circumstances.

Depending on the jurisdiction, the highway department may raise the defense that the highway department function involved is either governmental in nature or discretionary in nature. At the State level, the defense that the duty involves the exercise of discretion and is, therefore, immune from liability is the most prevalent defense. It was formulated in the common law of personal liability of public officials and is now embodied in many tort claims acts as the "discretionary function exemption."

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[109] *Accord:* Waits v. St. Louis-San Francisco Ry. Co., 216 Kan. 160, 531 P.2d 22 (1975) holds that the failure to comply with a mandatory provision of the Uniform Manual that certain signs be erected at railroad crossings is negligence per se. See also, Chart v. Dvorak, 57 Wis. 2d 92, 203 N.W.2d 673 (1973), and Denton v. Mathes, 528 S.W.2d 625 (Tex. App. 1975).

Because of the development of the operational-planning level dichotomy in determining which governmental acts are truly discretionary, the trend is a narrowing of the functions that the courts recognize to be discretionary in nature. Moreover, another even narrower view is that once a governmental decision is made at the planning level, any negligence in the execution of that decision may result in liability.

Applying these concepts the courts have held, for example, that the initial plan or design of a traffic light system is discretionary in nature, as is the failure to provide traffic signs. On the other hand, painting pavement markings does not involve broad matters of policy, and negligence in connection therewith is not immune from liability. Finally, maintenance of traffic signs, for example, is often considered operational, low-level governmental activity, and negligence in performing, or failing to perform such functions is not protected by the so-called defense for the exercise of discretionary duties.

Because of the existence of uniform laws, manuals, and regulations pertaining to highway signs or warnings, their impact at trial is considered. Most courts hold that the failure to follow the uniform law or regulation is not negligence per se, but merely some evidence of negligence to be considered with all the other evidence. An exception may exist where the law or regulation does not permit any leeway for discretion on the part of officials attempting to comply with the standards. On the other hand, some courts hold that there is no civil remedy for damages, absent some clear legislative intent to the contrary, for the failure of a highway official or employee to fulfill the requirement of a statute regulating highway signs or warnings.