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LEGAL RESEARCH DIGEST

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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 11 administration, 40 maintenance, 51 transportation safety, 52 human factors, 54 operations and traffic control, 70 transportation law (01 highway transportation)

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

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highay law. This report supplements and updates a paper in Volume 4, Selected Stuides in Highway Law, entitled "Liability of the State for Injury Producing Defects in Highway Surface," pp. 1966-N33 to 1966-N54.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportration Research Board in 1976, Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an

expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text, which totals about 3000 pages, comprises 72 papers and 38 supplements. In addition, 2 original papers and 5 supplements have been initially published in the Legal Research Digest series and will be published in SSHL in the near future. Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper entitled "Liability of the State for Injury-Producing Defects in Highway Surface" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

INTRODUCTION (p. 1966-N33)

The original paper, supplemented by the herein monograph, took the position that the rules governing the liability of the State for potholes and other injury-producing defects in the surface of highways are encompassed within the body of a few well-established legal principles. Although these principles are sometimes difficult in practical application, they are in themselves clear-cut and straightforward. The body or framework of such principles includes the following.

The State is at all times under a duty to exercise reasonable care in respect to the maintenance and upkeep of its highways, and deriving therefrom is the obligation to inspect for and make timely repair of potholes and like defects appearing in the highway surface. What constitutes the exercise of reasonable care in the performance of such duty is ordinarily a fact question for jury determination. However, the court may take the question from the jury and direct a verdict under circumstances where all reasonable men would agree that there has been a breach of the duty of ordinary care, or under circumstances where a like agreement can be reached that the pothole or defect was of such trivial nature that it could not have caused the accident complained of. In order to impose liability it is additionally necessary to show that the pothole or other defect was the proximate cause of the injury-producing accident, and that the chain of causation was not interrupted by the interposition of a supervening cause. It is further necessary as a condition precedent to recovery to show that the State had actual or constructive notice of the pothole or other defect, and that it was accorded a reasonable opportunity in which to take corrective action with respect thereto. In jurisdictions where so-called "highway defect" statutes are in force and effect, liability is predicated upon a showing that a "highway defect" within the meaning of the statutory language existed, and that it was the efficient cause of the accident and injury which ensued. In jurisdictions, other than those in which the doctrine of comparative negligence is in force and effect, a showing of contributory negligence operates as a complete bar to recovery; and whether or not contributory negligence exists is a question to be decided in the light of the facts and circumstances of the particular case.

Because the majority of the recent cases fall within the framework of the foregoing principles, the cases showing the application of these well-established rules are hereinafter grouped under the headings employed in the original paper. Matters that have been passed on since the prior paper was written are set forth under new headings. It follows that first for consideration are cases deemed to be representative of the application of the established principles hereinabove set forth, and next for consideration and discussion are matters collateral thereto that have been the subject of suit in recent cases.

NECESSITY TO PROVE PROXIMATE CAUSE (p. 1966-N34)

The rule is well established that in order to recover for injury or damage sustained as a result of a motor vehicle striking a pothole or similar defect in the highway it is necessary to show that the pothole or defect was the proximate cause of the injury or damage suffered. The following recent cases illustrate the application of this rule:

Failure to prove that a pothole was the proximate cause of an accident was the ground for denial of recovery in *Brooks v. New York State Thruway Authority*, 73 A.D.2d 767, 423 N.Y.S.2d 543 (1979). This was a wrongful death action brought to recover for the demise of the driver of and a passenger in an automobile, who were both thrown from the car when in crossing a bridge the vehicle suddenly went out of control, striking the curbing, several guardrails, and the bridge abutment, before ejecting the occupants. The lower court (sitting without a jury) found at trial that the cause of loss of vehicle control was the striking of a hole in the pavement surface that measured 6 inches in length in the direction of travel, 2 feet in length perpendicular thereto, and was less than 4 inches in depth at the deepest point.

The Supreme Court, Appellate Division, reversed on the ground that a defect of such dimensions could not have been the proximate cause of the fatal accident, stating: "The experts for both sides testified that a hole of the size and dimensions described in the testimony herein would in no manner deflect a tire passing through it and that the tire of a 1968 Plymouth traveling at the speed ranges testified to would drop no more than seventy-five thousandths of an inch. There is no evidence that striking the hole would produce any bump or other sensation or condition which would cause a reasonably prudent driver to lose control of the vehicle.... Clearly, there is uncertainty as to causation, and other possible causes of this tragic accident are revealed in the record. The rule is well settled that where there are several possible causes of injury, for one or more of which the defendant is not responsible, the plaintiff cannot recover without proving that the injury was sustained ... by a cause for which the defendant was responsible."

A different result was reached in *Durrett v. State*, 416 So.2d 562 (La. App. 1982), which involved the question of proof of proximate cause in the absence of eyewitness testimony as to the actual striking of a pothole by the vehicle involved.

This case arose on consolidated appeal from the decisions in four lower court actions brought against the State of Louisiana and the City of Baton Rouge, wherein damages were sought for the death of a passenger, and to recover for injuries sustained by other passengers, in an automobile accident wherein the vehicle left the road and overturned, allegedly as the result of striking a pothole in the roadway. The State and City contended on appeal that plaintiffs failed to adduce proof at trial that a pothole in the road surface was the proximate cause of the accident.

In rejecting this contention, the Court ruled that, in the absence of eyewitness testimony as to the actual striking of a pothole by the errant vehicle, evidence of the existence of numerous potholes in the vicinity of the accident, coupled with the fact that damage to the rim of a tire was fully consistent with striking a pothole, was sufficient to establish that a pothole in the pavement surface was in fact the proximate cause of the accident which occurred.

NECESSITY TO PROVE ACTUAL OR CONSTRUCTIVE NOTICE (p. 1966-N36)

The rule is well established that as a condition precedent to liability for injury or damage sustained as the result of vehicular collision with a pothole it is necessary to show that the State had actual or constructive notice of the defect and a reasonable opportunity to correct the same.

As an example, see *Lips v. Town of Holland,* 90 A.D.2d 981, 456 N.Y.S.2d 572 (1982), wherein it was held that motion for summary judgment was properly granted for the defendant in an action brought by a motorist to recover for injuries sustained when his vehicle struck a pothole and careened into a tree, where the evidence at trial failed to establish by satisfactory proof that defendant Erie County had either actual or constructive notice of the existence of the pothole lying in a roadway within the County limits.

Cases Holding Notice Received (p. 1966-N37)

The following cases deal with the nature and quality of proof necessary to show that a governmental defendant had actual or constructive notice of the existence of a pothole in a roadway lying within its territorial limits.

Ciccarella v. Graf, 116 A.D.2d 615, 497 N.Y.S.2d 704 (1986), was an action brought by a passenger in a school bus to recover for personal injuries suffered when the bus struck a pothole and went out of control on a highway under the jurisdiction and maintenance responsibility of the County of Nassau. Testimony at trial of the driver of the bus was to the effect that he had seen the same pothole in the roadway the day before the accident occurred. In affirming the action of the lower court in granting judgment for plaintiff, the Supreme Court, Appellate Division, stated: "The bus driver's testimony was sufficient to support a finding that the county had constructive notice of the pothole and had a duty, which it breached, to repair it."

Thus, the period of a mere 24 hours between receipt of notice of the existence of the pothole and the occurrence of the accident was held to have constituted a reasonable length of time within which defendant County was given an opportunity to make repair to the pothole, and its failure to do so within this time frame constituted negligence.

Plaintiff was injured, in *State v. Nichols,* 609 S.W.2d 571 (Tex. Civ. App. 1980), when the automobile that he was operating struck a hole or "washout," in a State highway, measuring 3 to 5 feet in width and 3 to 4 feet in depth. It appeared that approximately 2 hours prior to this accident a vehicle carrying two police officers of the Texas Department of Public Safety struck the same cave-in, causing extensive damage to their automobile. The two DPS officers departed the scene of the accident without giving notification to anyone of the dangerous road condition so encountered. In affirming judgment rendered at trial for plaintiff in the amount of $100,000.00, the Court upheld the plaintiff's contention that the police officers' knowledge of the defect was properly imputable to the State, and that the State was guilty of negligence in failing to take corrective action with respect to the defect so made known.

Where the rear wheel of the vehicle plaintiff's decedent was operating became stuck in a water-filled hole in the road at the site of a railroad crossing, and the entrapped motorist was resultantly struck and killed by an oncoming train, evidence that the road at this point had long been filled with potholes was sufficient to impute constructive notice to defendant Parish of Jefferson, having jurisdiction over the road, that the same was in a defective condition, and the failure of defendant to correct the defective condition after receipt of notice thereof constituted negligence justifying recovery in plaintiff's wrongful death action. *Davilla v. Southern Pacific Transportation Company,* 444 So.2d 1293 (La. App. 1984).

Proof that a hole in a bridge floor had been repaired on several different occasions and that the repair work did not hold was sufficient to provide defendant, having jurisdiction and control over the bridge, with notice of a recurring dangerous condition, and failure of defendant to erect signing warning of the recurring nature of the defect constituted negligence justifying a $100,000.00 verdict in favor of plaintiff, injured in a motor vehicle accident proximately caused by the defect. *Hennigan v. Vernon Parish Police Jury,* 415 So.2d 584 (La. App. 1982).

Cases Holding Notice Not Received (p. 1966-N40)

The cases that follow next involve construction of the Pennsylvania statute requiring written notice of the existence of a pothole as a condition precedent to recovery for injury or damage caused thereby.

Stevens v. Commonwealth, Department of Transportation, 492 A.2d 490 (Pa. Commw. 1985), involved interpretation of a Pennsylvania statute (42 Pa.C.S. Sec. 8522(b)(5)) which waived sovereign immunity in the case of: "A dangerous condition of highways under the jurisdiction of a Commonwealth agency created by potholes or sinkholes or other similar conditions created by natural elements, except that the claimant to recover must establish . . . that the Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition." The complaint alleged injuries received in a two-car collision caused by the deflection of plaintiffs' motor vehicle into the opposing lane of travel as the result of striking a large pothole in the highway. Although plaintiffs failed to produce evidence establishing that the Commonwealth was in receipt of the written notice required by the statute, it was contended that the burden of proof in respect to establishing receipt of actual notice of the dangerous condition was shifted

at trial from plaintiffs to the Commonwealth by the introduction of plaintiffs' evidence showing that the pothole was located within a mile and one-half of one of the PennDOT's maintenance sheds, and that the pothole was repaired within 4 or 5 days of the time of the accident. In sustaining PennDOT's motion for compulsory nonsuit granted by the trial court, the Court said that:

> The requirements of the statute are clearly written and create a very narrow exception to the defense of sovereign immunity for damages caused by potholes.... The General Assembly in waiving the Commonwealth's immunity to suit for damages resulting from potholes, created the statutory prerequisite that the claimant show that the Commonwealth had actual written notice of the condition. As that burden is placed squarely upon claimants, we are not empowered to alter the clear wording of the statute under the pretext of searching out some unexpressed legislative intent.... We hold, therefore, that the burden of satisfying the prior written notice requirement ... remained solely with Appellants, and that the trial court did not err in ruling that Appellants failed to meet their burden of proving the statutory notice in their claims against PennDOT as required to avoid the bar of sovereign immunity.

Cressman v. Commonwealth, Department of Transportation, 538 A.2d 992 (Pa. Commw. 1988), likewise involved interpretation of the Pennsylvania statute (set forth above in *Stevens*) waiving sovereign immunity with respect to potholes subject to the requirement of written notice thereof.

The facts in this case established that plaintiff was driving along a State road covered with 2 to 4 inches of freshly fallen snow, and that in order to allow clearance for another automobile approaching in the opposite lane of travel, she caused her car to veer to the right, and in so doing struck a pothole (apparently obscured from vision by the snow), the force of the collision propelling her vehicle directly into the path of the oncoming car. Plaintiff was unable to prove that the Commonwealth had written notice of the pothole, as required by the statute.

Seeking to avoid the mandate of written notice, plaintiff pointed out that immunity was waived by the statutory language in the case of "potholes or sinkholes or other similar conditions created by *natural elements*" (emphasis added), and, contending that the pothole in question was created by heavy truck traffic and not by "natural elements," argued that the statute waiving immunity was therefore inapplicable, including the provision thereof requiring written notice.

In rejecting this argument, and affirming the lower court order of compulsory nonsuit as to the Commonwealth, the Court stated:

> We believe that potholes or sinkholes, as used in Section 8522(b)(5), are intended to encompass any such holes in the roadway caused by deterioration resulting from a combination of water, freezing and thawing and traffic. We believe the statute does not require written notice, for example, where a hole exists because of construction to the roadway. Where, as here, however, the hole is caused by a combination of traffic and the natural elements, we believe the statute requires written notice. Since appellant was not able to prove DOT had such notice, the trial court's ruling in this regard was correct.

LIABILITY UNDER "HIGHWAY DEFECT" STATUTES (p. 1966-N47)

Under the "highway defect" type of statute, in force and effect in a few jurisdictions, liability of the State is not predicated on ordinary negligence grounds, but rather on a showing that a "highway defect" within the meaning of the statutory language existed, and that such defect was the proximate cause of the injury or damage suffered.

A handful of recent cases have been decided interpreting the provisions of the Louisiana highway defect statute (termed in that jurisdiction the "strict liability" law). Under this statute recovery may be had against the State upon proof: (1) that the thing or condition which caused the injury or damage was under the custody and control of the State; (2) that the thing or condition possessed an inherent vice or defect which occasioned unreasonable risk of injury or damage; and (3) that the thing or condition was the proximate cause of the injury or damage sustained.

The question was presented in these cases whether it is a condition precedent to recovery under the statute to establish, by satisfactory proof, that the defect was of such nature as to cause unreasonable risk of harm or injury to the traveling public.

Young v. City of Gretna, 470 So.2d 274 (La. App. 1985), was an action to recover for injuries suffered in the overturn of a vehicle allegedly brought about by collision with a pothole. In this case the Court affirmed the finding at trial that none of the potholes in the vicinity of the accident site were of such size, dimension, and character as would cause the overturn of a vehicle being driven at a reasonable rate of speed. Because of the failure of proof that the defect was of such kind and nature as to cause unreasonable risk of harm or injury to motorists, the Appellate Court ruled that recovery under the terms of the highway defect statute was properly denied by the trial court.

See, also holding that recovery under the statute cannot be allowed where there is a failure to establish that the defect was of such kind and character as to cause unreasonable risk of harm to the traveling public: *Worsham v. Walker,* 498 So.2d 260 (La. App. 1987); *Lognion v. Calcasieu Parish Police Jury,* 503 So.2d 1092 (La. App. 1987); and *Mansour v. State Farm Mutual Automobile Insurance Company,* 510 So.2d 1305 (La. App. 1987).

CONTRIBUTORY NEGLIGENCE (p. 1966-N49)

The rule is well established, in all jurisdictions other than those in which the doctrine of comparative negligence obtains, that proof of contributory negligence on the part of the complaining plaintiff operates as a complete bar to recovery. The following cases are illustrative of those fact situations in which contributory negligence has been held a bar to recovery, and those circumstances under which it was held that contributory negligence as a defense was not established.

Contributory Negligence Held Bar to Recovery (p. 1966-N51)

In *Northern v. Department of Streets of the City of New Orleans,* 455 So.2d 1288 (La. App. 1984), plaintiff motorcycle driver brought an

action to recover for injuries sustained when the motorcycle he was operating struck a pothole in a street of the City of New Orleans, causing his vehicle to go into a prolonged skid and overturn. The trial court found for the municipal defendant on the ground that plaintiff was guilty of contributory negligence in operating his vehicle in excess of the lawful speed limit of 40 miles per hour. In affirming the action of the lower court the Court of Appeals sustained the trial judge's finding of unlawful vehicle speed, based entirely on expert testimony given at trial that the distance of a skid bears direct relation to the speed of travel, and that the length of the skid in the instant case indicated a vehicle speed in excess of the lawful limit of 40 miles per hour.

In a wrongful death action brought to recover for the demise of the driver of a vehicle which went out of control and crashed on attempting to round a dangerous unmarked curve filled with potholes in the pavement surface, a blood sample drawn by the coroner showing a blood alcohol level of 0.24 was held sufficient to establish that the deceased driver was legally intoxicated at the time of the accident, and hence was guilty of contributory negligence barring recovery. *Ryan v. State*, 477 So.2d 110 (La. App. 1985).

Contributory Negligence Held Not Bar to Recovery (p. 1966-N49)

As an example of cases in which the facts were held not to constitute contributory negligence, see *Davilla v. Southern Pacific Transportation Company*, 444 So.2d 1293 (La. App. 1984). This was a wrongful death action brought to recover for the demise of a motorist killed at a railroad crossing. The evidence established that the arm of the railroad crossing gate would sometimes become operative when no train was approaching, and at other times fail to operate when a train was in fact approaching. As a result, habitual users of the crossing were accustomed to skirt around the gate and cross the tracks when no approaching train was seen or heard. On this set of facts plaintiff's decedent was held not to have been guilty of contributory negligence when in attempting to drive around the lowered guardarm he became stuck in a pothole and was killed by an approaching train.

Comparative Negligence (p. 1966-N53)

The "all or nothing" effect of the common law rule of contributory negligence is, of course, modified in those jurisdictions where the doctrine of comparative negligence obtains.

As an example of the operation of this doctrine in respect to pothole-caused injuries, see *Ford v. City of Chicago*, 132 Ill.App.3d 408, 87 Ill.Dec. 240, 476 N.E.2d 1232 (1985), wherein proof that a motorcycle operator was following so closely behind a preceding car that he was unable, in making a lane change, to see and avoid a pothole obscured from view by the lead vehicle, was held properly to support a jury finding of 95 percent negligence on the part of the motorcycle operator, and 5 percent negligence on the part of the City of Chicago in failing to repair the pothole.

There follow next new matters not covered by the schematic outline set forth in the original paper.

EFFECT OF PROVISIONS OF MAINTENANCE MANUAL

The question has arisen as to the effect of the provisions of a highway department maintenance manual on liability of the State for a pothole-caused injury.[1]

Townsend v. State, 738 P.2d 1274 (Mont. 1987), was an action brought by the guardian of a 9-year old infant who was injured when the bicycle that he was riding struck a pothole in a highway owned and maintained by the State of Montana. In testimony at trial the Field Maintenance Chief and the Field Maintenance Supervisor of the Montana Department of Highways both admitted that they had observed, a few weeks prior to the accident, the beginnings of the formation of potholes in the area of the accident site. They further testified that it was their conclusion that immediate repair was not required because the road in question was a lightly traveled one, and the holes were no more than one-half to three-quarters of an inch in depth at the time of their inspection.

Plaintiff introduced into evidence portions of the Maintenance Manual of the Montana Department of Highways, which provided that: "The early detection and repair of minor blemishes is the most important phase of maintenance work. Cracks and other surface breaks which are almost unnoticeable in their early stages, may develop into major repair jobs ... if unattended.... This type of failure should have immediate attention."

In the face of these provisions of the Maintenance Manual calling for early repair the jury returned a verdict in favor of the State. However, the trial judge, in granting a motion for judgment notwithstanding the verdict, ruled that violation of the provisions of the Maintenance Manual constituted negligence *per se*.

The Supreme Court of Montana, in setting aside the lower court ruling and reinstating the jury verdict in favor of the State, took the position that violation of the provisions of an administrative manual constitute negligence *per se* only when such provisions are incorporated by reference into the terms of statute law, and that the statute law of the State of Montana had not done so in the case of the Maintenance Manual of the Department of Highways. The Court spelled out that the effect of the particular provisions of the Manual was to place the burden of proof on the State to show that it had exercised reasonable care under the circumstances, and that the jury verdict in favor of the State was sufficient to establish that it had successfully carried this burden of proof.

[1] See in this connection the paper by Larry W. Thomas, entitled "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," appearing in *Selected Studies in Highway Law*, Vol. 4, at 1966-N1.

FINANCIAL FEASIBILITY TEST

It was asserted as a further defense in *Townsend v. State, supra,* that the State of Montana could properly take into consideration in making determination as to the need for repair the cost to the State of making such repair.

In giving limited approval to such defense, and upholding the jury finding in favor of the State, the Supreme Court of Montana stated:

> Here, cost is not the State's sole defense. There is a limit to how many potholes can be repaired in any given time period. The Department's supervisory employees made a decision based on the severity of the potholes, as well as the frequency and type of traffic on the road in determining whether repair of the potholes was immediately necessary. They took a calculated risk that the potholes were small enough and the traffic light enough that repair of the potholes could wait without endangering the safety of the traveling public. The jury agreed with the employees' decision. There is substantial credible evidence to support the jury's decision.

Thus, according to the doctrine of this case, financial feasibility may be taken into account when it is but one of several factors to be considered, but that it is an impermissible defense where asserted as the sole reason or excuse for failure to take such corrective action in respect to potholes as is required to protect the safety of the traveling public. Financial feasibility, in this case, was evidently but one factor taken into account in determining whether under all the circumstances the State was guilty of a breach of duty owing to the plaintiff.

EVIDENTIARY MATTERS

In an action brought by a pedestrian to recover for personal injuries suffered when a motor vehicle ran her down after the driver thereof collided with a pothole in the street, evidence proferred by defendant City of Chicago in respect to the absence of prior pothole-caused accidents on the same street was held properly refused, where foundation for the introduction of such evidence was not laid by the proffer of evidence showing that the prior condition of the street was at all times "substantially similar" to the condition thereof on the day the accident occurred. *Parson v. City of Chicago,* 117 Ill.App.3d 383, 72 Ill.Dec. 895, 453 N.E.2d 770 (1983).

LIABILITY IN CASES OF CONCURRENT JURISDICTION

The question has arisen as to whether the State, or a municipal subdivision thereof, is liable when a pothole-caused injury occurs on a portion of State road lying within the boundaries of a municipality.

The cases that follow illustrate different aspects of the problems that are presented by concurrent jurisdiction over highways.

Hutley v. N.Y.S. Thruway Authority, 139 Misc.2d 868, 529 N.Y.S.2d 258 (1988), was an action brought by the driver of a tractor-trailer to recover for injuries suffered when his vehicle ran off the road and down an embankment as a result of striking a pothole in an expressway owned and maintained by the New York State Thruway Authority, the portion of expressway where the accident occurred lying within the boundaries of the City of New York.

Pursuant to Sections 1630 and 1631 of the New York Vehicle and Traffic Law, the Thruway Authority was granted authority to regulate traffic on all of its systems, but Section 1632 subsequently provided that: "This article shall not apply with respect to any portion of the New York State thruway located within a city having a population in excess of one million."

The City of New York was expressly granted, by the terms of Section 1645 of the said Vehicle and Traffic Law, authority to regulate the movement of traffic on those portions of the Thruway system which lay within its boundaries.

Plaintiff's position in seeking to hold the Thruway Authority, rather than the City of New York, liable for negligent failure to post signing warning of the dangerous condition created by the presence of the pothole in the expressway, was stated by the Court of Claims in the following language: "Claimants contend that as the owner of the Thruway, the Authority had a non-delegable duty to maintain the roadway in a reasonably safe condition, which included the responsibility to warn of known dangers such as by posting reduced speed limit and rough road signs where appropriate. The Vehicle and Traffic Law, they argue, while allowing the City to regulate traffic, does not abrogate defendant's responsibility in this area, but only adds another possible regulator."

In rejecting this contention and rendering judgment in favor of defendant New York State Thruway Authority, the Court of Claims stated:

> . . . Claimant's interpretation of the statutes in question disregards their plain meaning and would create an unworkable regulatory morass.
>
> One can hardly imagine a clearer statement of the Legislature's intent than sections 1632 and 1645 of the Vehicle and Traffic Law. Their language leaves no room for interpretation but sets forth in an unambiguous fashion which entity has jurisdiction over traffic on the Thruway within the boundaries of New York City. To suggest a joint authority was envisioned not only disregards the words of the statutes but is unworkable. . . .
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> With respect to the argument that ownership creates a nondelegable duty to warn of dangers, this case points up the pitfall of quoting phrases from cases without remembering the circumstances which engendered their creation. While the Court of Appeals has repeatedly held that a governmental unit has a non-delegable duty to maintain its roads, one must remember that the concept being reiterated was that a municipality or department of the State could not unilaterally abrogate such responsibility by subcontracting the maintenance work. That is not to say, however, that the Legislature cannot specify which governmental unit will be responsible for a particular roadway while freeing others from any obligation with respect thereto.
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> . . .
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> [W]hile we have found no precedent directly on point, prior cases confirm the proposition that traffic control authority, and concomitant liability therefor, may rest with a governmental entity other than the one which owns and maintains the roadway. That such a division of respon-

sibility may be less than perfect cannot be denied. However, "if it results in conditions which may create inconvenience or peril to wayfarers upon such highways the remedy must be sought in legislation, for the courts must give effect to the statutes as they stand." (Citation omitted.)

In summary, defendant may not be held liable for a failure to post reduced speed limit and rough road signs because the sole authority for such regulation was vested in the City of New York which was already on notice of the problem.

However, in the situation where the municipality was sought to be held liable, rather than the State, it has been held that the lower governmental entity was not liable.

Medina v. Township of Falls, 454 A.2d 674 (Pa. Commw. 1983), involved the question whether a Township of the Commonwealth of Pennsylvania could be held liable for injuries suffered in an automobile accident resulting from vehicular collision with a pothole in United States Route 1, a State road that ran within and through the boundaries of defendant Falls Township.

The Commonwealth Court ruled that because responsibility for the maintenance of the State road was vested exclusively in the Commonwealth of Pennsylvania, defendant Falls Township was neither under a duty to repair the pothole, nor under a duty to notify the Commonwealth of the hazard to traffic created by the existence of the pothole in that portion of the State road which lay within the Township boundaries, and, therefore, the grant of summary judgment by the lower court in favor of the Township was proper.

These cases serve to illustrate that resolution of the problems presented by concurrent jurisdiction are ordinarily governed and resolved by reference to the provisions of local statute law.

DISCRETIONARY IMMUNITY

The rule has long obtained, in this country, in actions brought against State officers and employees to recover for negligence in the performance of their duties, that a distinction is to be drawn between activities of such officers and employees that are discretionary in nature and those that are ministerial in character, immunity being granted in the case of discretionary activities, and liability imposed in the case of ministerial activities. This rule was based, in part at least, on the policy consideration of encouraging competent persons to enter public service and to engage in fearless decision-making unhampered by the threat of personal liability.

This rule has been applied to decision-making by a public official with respect to the need or necessity for the repair of potholes.

State v. Lewis, 498 So.2d 321 (Miss. 1986), was a suit against an individual member of a board of county supervisors alleging that he failed in his duty to keep a county road free of potholes in the driving surface, and that as a result of such negligent conduct plaintiff lost control of the vehicle that he was operating, ran off the road, and sustained injuries in the wreckage of the vehicle. The Court approached the question of liability from the standpoint of whether defendant's duty in respect to repair of the road in question was discretionary or ministerial. It stated:

> The distinction between discretionary and ministerial acts by a government employee is directly correlated to what immunity he will enjoy in the event he has been negligent in his actions or in failing to act. The basis for extending sovereign immunity to government officials lies in the inherent need to promote efficient and timely decision-making without lying in fear of liability for miscalculation or error in those actions. The immunity defense has generally been extended to officials' discretionary acts in most states, Mississippi ranking among them.
>
> In order to allow our lawmakers and government officials to participate freely and without fear of retroactive liability in risk-taking situations requiring the exercise of sound judgment, the discretionary-ministerial distinction has evolved, and remains an integral part of our judicial system in the determination of liability of the state and its employees.

In absolving defendant of liability on the basis of the ruling that his duties were discretionary in nature the Court found that "at least some roads may be in a state of disrepair from time to time, particularly due to the lack of funds, which would, of course, require that the main, heavily-traveled roads receive the supervisor's immediate attention. Certainly, making the determination as to which roads should be the better maintained under such conditions would be a discretionary matter with the individual member of the board, absent some personal tort committed by him."

Thus, the Court ruled in this case that decision-making with respect to the repair of potholes and like defects in the paved surface of roadways is a discretionary rather than ministerial activity, and as such, is exempt from judicial review.

It is, of course, readily apparent that a distinction can be drawn between cases in which suit is brought against State officers and employees in their individual capacities, and cases in which suit is brought against the State itself. In the formulation of social policy governing distribution of risk from tortious conduct, it is obvious that different policy considerations obtain where the State appears as party defendant, and financial accountability is thereby broadly distributed among the public at large, and the situation where the entire burden of financial accountability is cast on public servants in their individual capacities.

However, more than half the States have now enacted Tort Claims Acts, wherein sovereign immunity is waived in tort actions against the State, subject to an exception to waiver of immunity in the case of activities that are discretionary in nature.[2] The writer is prompted to express surprise that no cases were found asserting as a defense to an action against the State to recover for pothole-caused injury, the discretionary function exception of the said Tort Claims Acts.

[2] See the paper in *Selected Studies in Highway Law,* by John C. Vance, entitled "Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments," Vol. ___, at ___.

It seems obvious that where State highway departments are faced with the problem of repairing many potholes (as following a severe winter) that not all potholes can be repaired at the same time, and that the problem of which potholes to fix first, and which to repair later, must be made the subject of judgment or choice, and in accordance with the establishment of a schedule of priorities. Such decision-making and the establishment of a schedule of priorities would arguably appear to involve the exercise of discretion. Also, the necessary marshalling of men and materials, and the decisions in respect to the allocation of available funds, would seem to involve the exercise of discretion, rather than constitute the performance of mere ministerial functions or duties.

It is, therefore, suggested that wherever *judgment* or *choice* is involved in decision-making with respect to repair of potholes (of which the State highway department has actual or constructive notice) that the discretionary function exception of State Tort Claims Acts might well be asserted as a defense to an action charging negligence in failing to make timely repair of such defects, and that such defense, where firmly founded, might prove successful.[3]

CONCLUSION (p. 1966-N54)

It can be stated by way of summary that the amount of recent appellate case law in respect to a highway defect as common as the ordinary pothole is, perhaps surprisingly, rather sparse, and that the majority of the recent cases deal not with new matters, but with the reapplication of the long established rules of law (set forth at the beginning of this paper) which govern and control the liability of the State for injury-producing defects in the surface of highways.

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[3] For a more full discussion of the effect of the discretionary function exception on the activities of State highway departments, see the paper in *Selected Studies in Highway Law*, by Larry W. Thomas, entitled "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," Vol. 4, at 1771, and the paper by John C. Vance, referenced in footnote 2, *supra*.

APPLICATIONS

The foregoing research should prove helpful to highway and legal counsel and state highway and transportation employees involved in defending tort claims. The practicing highway maintenance engineer will also benefit from the research by being better informed about the consequences of various maintenance activities and actions affecting highway surface defects.