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Liability of the State for Injuries Caused by Obstructions or Defects in Highway Shoulder or Berm

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

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with the nature of the obligation of the State, if any, to provide for safe vehicular movement along the shoulder or berm of the roadway.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new

papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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By John C. Vance

Attorney at Law
Orange, Virginia

INTRODUCTION

The precise nature of the duty of care owing to the motoring public to maintain the paved surface or traveled portion of the highway free from dangerous defects was the subject of consideration in the prior paper appearing in *Selected Studies in Highway Law,* Vol. 4, p. 1966-N33, by John C. Vance, entitled "Liability of the State for Injury-Producing Defects in Highway Surface." The underlying principles that emerged from such study of the duty of care owing in respect to maintenance of the riding surface of the highway include the rules of uniform applicability as follows:

1. The State is not an insurer of the safety of its highways.
2. The duty of the State is limited to that of maintaining the highways in a condition reasonably safe for public travel.
3. In an action against the State to recover for injury or death caused by a defect lying in, on, or along the paved surface of the highway, it is necessary to establish that the defect was the proximate cause of the accident and as a necessary corollary that the sequential chain of events leading to the accident was not broken by an efficient, intervening, or independent cause.
4. As a further condition precedent to recovery it is necessary to establish that the State had actual or constructive notice of the defect and at the same time was accorded a reasonable opportunity to remedy the same.
5. Contributory negligence on the part of the driver of the vehicle involved in the injury-producing accident operates as a complete bar to recovery in those jurisdictions adhering to the contributory negligence doctrine, and as a partial defense in those jurisdictions wherein the comparative negligence doctrine obtains.

This paper moves from the duty of care owing in respect to the paved surface or traveled portion of the way, as above outlined, to the question of the nature of the duty of care owing in respect to maintenance of the nontraveled portion of the way, or the nature of the obligation of the State, if any, to provide for safe vehicular movement along the shoulder or berm of the roadway.

It is axiomatic that the berm or shoulder of the roadway is not designed and constructed for purposes of ordinary travel. The courts uniformly and without exception take judicial notice of this known and accepted fact and hence require no proof in respect thereto. The question thus presents itself whether the standard of care that is imposed in respect to the traveled portion of the way is or should be the same in the case of the nontraveled portion of the way, or whether, because of the difference in design, construction, and intended use between paved surface and shoulder, a different standard of care applies or should apply in determining the tort liability of the State for injury-producing accidents caused by defects lying off the paved surface in the berm or shoulder of the roadway. Put another way, the precise question for consideration herein is whether a lesser degree or standard of care is required in respect to maintenance of the berm or shoulder of the highway than is required in respect to maintenance of the paved surface.

Cases involving accidents caused by obstructions or defects located in roadside parks or rest areas are not considered in this paper. The reader is referred to the collation and discussion of such cases in the annotation entitled "Liability, in Motor-Vehicle Related Cases, of Governmental Entity for Injury or Death Resulting from Defects or Obstructions on Roadside Parkway or Parking Strips," 98 A.L.R.3d 439 (1980).

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

Papers in *Selected Studies in Highway Law* that are of related interest include the following: "Liability of State and Local Governments for Snow and Ice Control," by Larry W. Thomas, Vol. 4, p. 1869; "Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed to Reducing Such Accidents on Highways," by Larry W. Thomas, Vol. 4, p. 1889; "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," by Larry W. Thomas, Vol. 4, p. 1966-N1; and "Liability of State Highway Departments for Defects in Design, Construction and Maintenance of Bridges," by William P. Tedesco, Vol. 4, p. 1966-N55.

Before proceeding to a discussion of the pertinent case law it may be noted that the approach taken in this paper to the question under consideration will be an examination of the results reached in representative cases dealing with the fact situations that are most commonly productive of injuries to motorists straying onto the berm from the paved surface. These fact situations include the following: (1) dangerous drop-offs between pavement and shoulder; (2) ruts, ditches, holes, or depressions in the shoulder; (3) loose, friable, or soft shoulder conditions; (4) rocks in shoulder; (5) culverts in shoulders; (6) posts, poles, or trees in shoulder; and (7) government road-working vehicles or equipment parked on shoul-

der. The paper concludes with a discussion of cases dealing with the effect of the plea of contributory negligence as a bar to recovery notwithstanding proved negligence on the part of the State.

Rule of Nonliability

Preliminary to discussion of the cases dealing with the fact situations hereinabove enumerated a brief word is in order with respect to a rule of law that found expression in a few early cases but is not generally repudiated. Based on the proposition that the berm or shoulder of the roadway is not designed and constructed for purposes of ordinary use and travel, the rule was announced that the State is not liable for injuries suffered as a result of use of the berm or shoulder as a riding surface. Such rule, however, wherever announced, has been the subject of reconsideration, and finds little or no support in modern case law.

Typical is the jurisprudence of Nebraska where the rule of nonliability was first announced and later withdrawn. In *Farmers Co-Op Company v. County of Dodge,* 181 Neb. 432, 148 N.W.2d 922 (1967), suit was brought to recover for injuries suffered as the result of the overturn of a vehicle alleged to have been caused by the accumulation of loose dirt on the shoulder of the road. In affirming judgment entered for defendant county below the Supreme Court of Nebraska, in reviewing the evidence, stated:

> Summarizing, there is neither allegation nor evidence of any defective condition of the traveled portion of the roadway; that all loose dirt was on the shoulder of the road . . . and off the traveled portion of the roadway; that the accident occurred while plaintiff's driver was traveling on the shoulder and off the traveled portion of the roadway. . . . The county's liability is limited to defective conditions in the traveled portion of the road. . . . [A] county's duty is discharged if the traveled portion of a road is properly maintained . . . and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of the roadway.

The rule of nonliability, as thus announced, was later repudiated in *Richardson v. State, Department of Roads,* 200 Neb. 225, 263 N.W.2d 442 (1978). This was a wrongful death action in which plaintiff sought recovery for the demise of his wife who was burned to death when the automobile in which they both were proceeding went off the paved surface onto the shoulder of the road and on attempting reentry struck a 4- to 6-in. drop-off between the paved surface and shoulder causing the vehicle to overturn and burn. The trial court ruled, on the basis of the holding in *Farmers Co-Op Company v. County of Dodge, supra,* that the State was not under a duty to maintain the shoulder of the roadway free from defects. In reversing and remanding for a determination as to whether there was negligence on the part of the State in allowing the drop-off to exist, the Supreme Court of Nebraska overruled *Farmers Co-Op Company v. County of Dodge, supra,* and held that the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of State roads extends to and includes the shoulders thereof.

The Court added that its ruling in such regard found itself "in accord with the great majority of modern court decisions in other states."[1]

Another threshold question requiring consideration is whether any general restrictions or limitations (independent of local regulations) have been placed by the courts on the use of the berm or shoulder as a riding surface.

Conditions Under Which Use May Lawfully Be Made of the Berm or Shoulder

It is the general rule obtaining in the great majority of jurisdictions today that in an action to recover for injuries sustained as a result of obstruction or defects located in the road shoulder or berm it is not a necessary condition precedent to recovery to show justification or good cause for leaving the paved surface and moving onto the berm or shoulder of the roadway. An exception to such rule exists, however, in the State of New York, where the rule has been laid down that motorists may lawfully make use of the berm or shoulder only under conditions of emergency.

New York Rule

Cases in New York in which the emergency doctrine has been announced and applied include the following:

Rolando v. Department of Transportation, 58 App. Div.2d 696, 396 N.Y.S.2d 111 (1977);
Guyotte v. State, 22 App. Div.2d 975, 254 N.Y.S.2d 552 (1964);
Naulty v. State; 25 Misc.2d 76, 206 N.Y.S.2d 210 (1960);
McCauley v. State, 9 App. Div.2d 488, 195 N.Y.S.2d 253 (1960), reversed on other grounds in 8 N.Y.S.2d 938, 204 N.Y.S.2d 174, 168 N.E.2d 843 (1960);
Harrison v. State, 19 Misc.2d 578, 197 N.Y.S.2d 662 (Ct. Cl. 1959);
Eckerlin v. State, 17 Misc.2d 224, 184 N.Y.S.2d 778 (Ct. Cl. 1959);
Gilbert v. State, 56 N.Y.S.2d 232 (Ct. Cl. 1945).

Exemplary of the application of the rule is the statement of the Court in *Guyotte v. State, supra,* that "even assuming the State was negligent in the maintenance or construction of the shoulder, claimant could only recover if he established that an emergency necessitated his driving upon the shoulder." Similarly in *Naulty v. State, supra,* the Court stated that "the principle that the shoulder of the highway must be maintained in a reasonably safe condition for use when occasion requires . . . has been applied only when operation on the shoulder rather than on the pavement was a reasonable recourse by reason of some emergency."

The word "emergency" has not been made the subject of precise definition by the New York courts. Whether the particular situation facing the operator of the vehicle involved in the accident constitutes such "emergency" situation as justifies deliberately leaving the paved surface and moving onto the berm or shoulder is a fact issue to be determined by the circumstances of the particular case. And because the issue is decided on a case-by-case basis it should be noted, and possibly empha-

sized, that the emergency doctrine, as announced and applied by the New York courts, has operated as a bar to recovery in only a small minority of the decided cases, recovery having been permitted in a majority of those cases wherein negligent conduct on the part of the State was proved and established.[2]

General Rule

The emergency doctrine obtaining in New York has been widely rejected elsewhere. Typical is *Terranella v. City and County of Honolulu,* 52 Hawaii 490, 479 P.2d 210 (1971), involving an accident in which a car turned over after striking ruts in the shoulder of the road, and the emergency doctrine as enunciated by the New York courts was interposed as a defense, it being asserted that liability could not be shown without proof that the vehicle had moved from the paved surface of the highway to the shoulder as the result of an emergency situation. In rejecting this contention the Supreme Court of Hawaii said:

> Defendant City and County resist this appeal by arguing that it owes no duty to maintain the shoulders of a highway other than to a driver who is compelled to leave the traveled portion of a highway in an emergency situation. ... As authority for this proposition appellee cites a group of New York decisions of the Court of Claims, a decision of the Appellate Division of the Supreme Court, Third Department, and a 4–3 decision of the Court of Appeals.[3]
>
> We do not concur with the reasoning of appellee and the decisions of the New York courts. We think the required determination of what is and what is not an "emergency" would be exceedingly difficult and could only lead to hopeless confusion. Furthermore, such a rule would create a temptation on the part of an injured driver in cases involving defects in shoulders to describe the circumstances surrounding a departure from the paved portion of a highway as having been required by an "emergency" regardless of his real reason for using the shoulder.

A similar result was reached in *Rue v. State, Department of Highways,* 372 So.2d 1197 (La. 1979). The narrow legal question was presented in this case whether plaintiff was barred from recovery for injuries sustained in striking a rut in a shoulder found to be negligently maintained because she left the paved portion of the highway for no apparent reason and in the absence of any kind of emergency. In ruling that the lack of an emergency situation was not a bar to recovery the Supreme Court of Louisiana stated:

> [T]he Highway Department's duty to maintain a safe shoulder encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on, the shoulder. We conclude that plaintiff's conduct if indeed it was sub-standard is no bar to her recovery of damages occasioned chiefly because the Highway Department failed to maintain a safe highway shoulder.

The Supreme Court of Louisiana then went on to overrule a prior intermediate court case that had announced the rule that departure from the main traveled way, absent an emergency situation, constitutes negligence barring recovery.

As will be shown in cases later set forth herein, the holdings in *Terranella* and *Rue, supra,* are representative of the rule that obtains in the vast majority of jurisdictions today.

This paper now moves to consideration of the cases dealing with the recurring fact situations that have been most productive of legal actions to recover for injury or death suffered in accidents involving obstructions or defects located in the berm or shoulder of highways.

CASES INVOLVING INJURY-PRODUCING FACT SITUATIONS

Although there are many fact situations that are commonly productive of injuries to motorists who leave the paved surface and travel on the berm or shoulder of the highway, the fact situation that seems to have been productive of more actions for wrongful death, or suits to recover for personal injuries, than any other, is that involving the resurfacing of the pavement, and the failure to elevate the shoulder so that it is flush with the newly paved surface. It frequently happens that the work of raising the shoulder to adjust to the new elevation of the recently repaved surface is allowed to lag behind the repaving work for periods of days, weeks, and, in some cases, even months. The consequence has been that motorists, who drive off the riding surface onto the berm (for one reason or another) and who fail to come to a complete halt before attempting reentry, have been deflected off course and their vehicles thrown out of control upon striking the drop-off between pavement and shoulder, with resultant severe injuries and not infrequently the tragedy of death. Cases involving this fact situation bring into sharp focus the question of the duty of care owed by State highway departments to the motoring public in the maintenance of the shoulder or berm of the roadway. The rules of law that have been announced by the courts are illustrated in the cases that follow.

Drop-Off Between Pavement and Shoulder

The facts in *Brown v. Louisiana Department of Highways,* 373 So.2d 605 (La. App. 1979), reflect that at the time of the accident a 2-mile resurfacing project had been fully completed but no part of the raising of the shoulders had been effected, leaving a 2-in. drop-off between surface and shoulder for the entire length of the project. Plaintiffs were passengers in a vehicle which was proceeding along the highway at a speed of 45 to 50 mph when the right rear tire blew out causing the vehicle to veer onto the shoulder of the road. In attempting to regain the paved surface the wheels struck the drop-off and the car was precipitated at an angle across the highway and into the path of an oncoming vehicle. The resulting collision produced the injuries for which plaintiffs, who were passengers, brought suit. Appeal was taken from the ruling of the trial court that the proximate cause of the accident was the negligence of the Department of Highways in failing to build up the shoulders after the resurfacing had been completed and the leaving of a dangerous 2-in. gap in elevation.

The Court stated the law of Louisiana governing in the premises to be as follows:

> The Department of Highways is not responsible for every accident which occurs on state highways. It is not a guarantor of the safety of travelers thereon, or an insurer against all injury or damage which may result from defects in the highways. The duty of the Department of Highways is only to see that state highways are reasonably safe for persons exercising ordinary care and reasonable prudence. The department is liable for damages only when it is shown (1) that the hazardous condition complained of was patently or obviously dangerous to a reasonably careful and ordinarily prudent driver, and (2) that the department had notice, either actual or constructive, of the existence of the defect and failed within a reasonable time to correct it.

Applying these rules to the facts of the instant case the Court stated that three questions were presented for consideration:

> (1) Whether the drop-off was patently or obviously dangerous to a reasonably careful and ordinarily prudent driver? (2) Whether a reasonable time had expired for the Department to eliminate the defect? (3) Whether the condition was a cause-in-fact of the accident?

In answering all questions in the affirmative and sustaining the judgment below the Court stressed expert testimony adduced at the trial that a 2-in. drop-off between roadway and shoulder is inherently dangerous, rejected the Department's excuse that the 60-day delay in raising the shoulders was because other roads in Louisiana were more urgently in need of repair, and, applying the "but for" test, concluded that had the 2-in. drop-off not been in place, the vehicle could probably have been made to proceed on a straight and safe course in returning from the shoulder to the paved surface.

In another Louisiana case, *Godwin v. Government Employees Insurance Company,* 394 So.2d 751 (La. App. 1981), a passenger in a vehicle was allowed to recover damages where the car in which he was riding was allowed to veer off the traveled way (for reasons not determined at trial) and on attempting reentry was catapulted across the road into a tree as a result of striking a 2- to 3-in. drop-off between surface and shoulder. Holding that the Department of Highways was negligent in having failed to raise the shoulder after the resurfacing project had been completed, the Court stated that the duty imposed on the Department to keep the State's roads in a condition reasonably safe for travel "includes the duty to maintain the shoulders of the highways."

Johnson v. State, 32 Mich. App. 37, 188 N.W.2d 33 (1971), was an appeal from grant of motion for summary judgment made by defendant State of Michigan in an action brought to recover damages for injuries suffered in an automobile accident that occurred under the circumstances as follows: Plaintiff was driving her automobile along a divided four-lane highway at a speed of from 60 to 65 mph, when in negotiating a curve, the vehicle left the highway (for reasons not apparent from the record), and in attempting to effect return struck the concrete edge of the highway, which at the point of impact was 6 in. above the level of the adjacent shoulder, causing the vehicle to go out of control and resulting in injuries to the plaintiff. The State contended at trial that although it was liable for defects in the improved portion of the highway, it was not liable for defects in the shoulder of the road. The trial court accepted this argument and granted the State's motion for summary judgment.

In rejecting the argument of nonliability for shoulder defects the Michigan Court of Appeals said that:

> The shoulders of a highway are designed for vehicular traffic although not of the same character as vehicular traffic on the paved portion of the highway. We read the ... duty of the state with respect to the repair of shoulders to be that the state is obligated to maintain the shoulders in reasonable repair so that they are reasonably safe for their intended use as adjuncts of the paved portion of the highway.

The Court of Appeals reversed and remanded for trial to determine whether on the facts the State had complied with its duty of care in respect to shoulders, as spelled out in the opinion.

In *Brandon v. State, Through Department of Highways,* 367 So.2d 137 (La. App. 1979), *cert. den.* 369 So.2d 141, contracts were let to independent contractors by the Louisiana Department of Highways for the resurfacing of several miles of highway and it was agreed that after the work was completed and accepted the Department would undertake the task of raising the road shoulders to make them flush with the newly paved surface. After the overlay work had been performed by the independent contractors, but before the Department had undertaken any part of the work of elevating the shoulders, a car carrying several passengers, because of momentary inattention of the driver, went off the road and turned over, killing one of the passengers and injuring three others. Suit was brought alleging negligence on the part of the Department of Highways in failing for a period of 5 months after completion of the overlay work to take any steps to reduce the amount of the drop-off, which was described as constituting "several inches." The State defended on the ground, *inter alia,* that the reason for the 5-month delay in raising the shoulders was a justifiable schedule of priorities which the Department had made out for its overall statewide work program.

In affirming judgment rendered below for the plaintiffs the Court said that the duty of the Highway Department to keep roads in a condition reasonably safe for public travel extends to and includes the "maintenance of the shoulders of the highway in safe condition." The Court rejected the Department's contention that its schedule of priorities justified the 5-month delay in raising the shoulders, stating that although it would hesitate to "second-guess the Department on priorities in correcting defects not of its own making" that a different situation existed where the Department had initiated the construction project and thereby itself created the hazard, in which case and under which circumstances the clear duty was imposed on the Department "to complete the construction and eliminate the hazard within a reasonable time," a duty not performed.

The question was presented in *Waterman v. State,* 24 Misc.2d 783, 206 N.Y.S.2d 380 (1960), whether the negligence of the State in allowing a dangerous drop-off between paved surface and shoulder could properly be ascribed as the proximate cause of injury to a passenger riding in an automobile which never came in contact with the drop-off between pavement and berm. It appeared in this case that a car being operated at a reasonable rate of speed on the New York State Thruway was forced to slow down because of the action of the driver of another vehicle in cutting precipitously in front, and that in the process of applying the brakes, the car slipped off the cement surface of the Thruway onto the shoulder of the road, at which point there was a 2½- to 3-in. drop-off between paved surface and shoulder. In attempting to regain the cement portion of the highway the car struck the drop-off, the driver lost control, and veered across the highway into the path of an oncoming car, killing one of its occupants. Suit was brought against the New York Thruway Authority by the administrator of the deceased, seeking recovery for his alleged wrongful death, and charging that the proximate cause of the accident was the negligence of the Thruway Authority in permitting the existence of a serious gap in elevation between the paved surface of the road and the shoulder. In agreeing with the latter contention and awarding judgment in favor of claimant the Court said:

> The vertical drop from the straight edge of the concrete pavement to the shoulders shows a lack of proper maintenance of this highway. This highway was built as a super highway with a speed limit of 60 miles per hour. The degree of care required is that care which will provide a safe and convenient highway for a reasonably prudent driver taking into consideration traffic loads, higher speed and the foreseeable hazards attendant thereto, including safe shoulders for use in an emergency.
>
> The Thruway Authority had actual knowledge that this condition or a like condition had existed prior to the accident. Where they have knowledge that a continuing or recurring hazard exists, they have a duty to eliminate the hazard or to warn of its existence.
>
> It is the opinion of the Court that the failure of the Thruway Authority to adequately maintain the shoulder . . . constituted negligence, which was a proximate cause of this accident.

A like question was presented and similar result reached in *Protzman v. State,* 80 App. Div.2d 719, 437 N.Y.S.2d 147 (1981), *aff'd* 56 N.Y.2d 821, 452 N.Y.S.2d 570, 438 N.E.2d 103, involving a situation where a car strayed from the paved surface to the road shoulder and in attempting to renegotiate the main portion of the highway struck a 3- to 4-in. drop-off between paved surface and shoulder, went out of control, and crossing the highway crashed into the vehicle in which claimant was riding as a passenger. In awarding damages for injuries suffered in the collision the Court stated:

> The record contains the testimony of an engineer for the State Department of Transportation who stated that shortly before the accident the shoulders in the area of the accident had been inspected and were found to be in violation of the State standard and that work orders had been issued to upgrade and fill the shoulders to remedy the hazardous condition. This testimony, when considered with claimant's other evidence, was sufficient to establish liability.

The question was also presented in *Sinitiere v. Lavergne,* 391 So.2d 821 (La. 1980), whether negligence in failing to rebuild the shoulder of a road so as to be flush with the level of a recently repaved road resulted in the breach of a duty of care owed to persons riding in an automobile that did not leave the main traveled way and hence never came in contact with the negligently maintained shoulder of the road. The facts were as follows: A van was being driven along a road maintained by the Department of Highways in such condition as to allow a 3½- to 4-in. drop-off from surface to shoulder, when the operator inadvertently allowed the two right wheels of the vehicle to ease onto the shoulder of the road. He slowed the van to a speed of 35 to 40 mph before attempting reentry, but when his left wheels struck the drop-off on making return he lost control of the vehicle, and careened into the path of an oncoming car on the highway, killing both of the occupants thereof. The survivors of the deceased persons brought suit against the Louisiana Department of Highways for wrongful death. In upholding the decision of the lower court in awarding judgment in favor of plaintiffs, the Supreme Court of Louisiana said:

> It has been repeatedly stated that the Department is not a guarantor of the safety of travelers but, rather, owes a duty to keep the highways and its shoulders reasonably safe for non-negligent motorists. Liability based upon negligence is imposed when the Department is actually or constructively aware of a hazardous condition and fails to take corrective action within a reasonable time. . . .
>
> The duty to maintain reasonably safe highways and shoulders extends to the protection of those people who may be foreseeably placed in danger by an unreasonably dangerous condition. In the past this duty was held to extend to the protection of those persons who had to drive onto the shoulder because an emergency condition made travel on the main portion of the roadway hazardous. It was later held to include people who reasonably believed that conditions required them to drive onto the shoulder although no actual hazard existed. [Later] the rule was clarified to include persons who drove onto the shoulder inadvertently where there was neither knowledge nor reason to know of either a defective condition of the shoulder itself or any other condition that would make such action hazardous (such as a car on the shoulder of the road). Likewise, passengers in vehicles that strayed from the road were within the ambit of the duty. From this there can be no doubt but that the duty extends to passengers and drivers in one vehicle who are likely to be injured when a driver of another vehicle goes out of control because of a negligently maintained shoulder. Thus, the plaintiffs' decedents . . . are within the ambit of the Department's duty to maintain reasonably safe highway shoulders.

See also *McDaniel v. State, Department of Transportation and Development,* 398 So.2d 88 (La. App. 1981), *cert. den.* 404 So.2d 277, *cert. den.* 404 So.2d 279, wherein separate tort actions were filed by plaintiff McDaniel and plaintiff Wagley against the Louisiana Department of

Transportation and Development. Both tort actions arose out of the same accident and the suits were consolidated at trial and on appeal. The common facts were as follows: At approximately dusk plaintiff McDaniel was driving his automobile along a two-lane highway and plaintiff Wagley was operating his automobile from the opposite direction along the same roadway. Both vehicles entered an "S" curve at the same time but from opposite directions. McDaniel testified that he saw the lights of two vehicles approaching him (one of which was the Wagley car) and that the glare of the lights caused him to believe that both vehicles were headed directly toward him. As a result he steered his automobile to the right, causing it to leave the traveled portion of the way and move onto the shoulder. At the point of departure from the paved surface there existed a drop-off of anywhere from 4 to 10 in. caused by the fact that the road had been repaved but the shoulders had not been raised to compensate for the new elevation of the surface. McDaniel testified that the drop-off (which he could not see) caused him to lose control of his car so that it swerved back onto the paved surface and collided head-on with the Wagley car. Both McDaniel and Wagley were seriously injured.

In affirming judgment rendered for both plaintiffs in the consolidated suits the Court said:

> The record supports that the overlay was completed approximately four months prior to the date of the accident. At the site of the accident, there existed a four to ten inch drop-off presenting a hazardous condition which the Department knew or should have known of yet nonetheless allowed to exist for approximately four months.... Applying the "but for" test to the circumstances here, we hold that the negligence of the Department was a cause in fact of the accident. Further, there is a substantial relationship between the Department's failure to correct the low shoulder and the type of risk encountered by both McDaniel and Wagley, namely an automobile accident.

The practical question is presented as to what constitutes a reasonable time frame within which action must be taken to raise the shoulder of the road after resurfacing operations have been completed in order to absolve the highway department of negligence. The cases yield little instruction on this question, each case being decided in terms of its own factual situation, but a delay of no more than 6 days was held in *Hale v. Aetna Casualty & Surety Co.*, 273 So.2d 860 (La. App. 1973), *cert. den.* 275 So.2d 867, not to be such lapse of time as to constitute negligence on the part of the Louisiana Department of Highways. The facts in this case were as follows.

Defendant Department of Highways let a contract to defendant paving company for the resurfacing of a section of highway, the contract calling for an overlay of blacktop which would raise the surface of the highway anywhere from 3½ to 6 in. above the existing shoulder of the road. On the date of the accident the overlay work had been fully completed for a period of 6 days, but no steps had as yet been taken to raise the shoulders, so that a gap in elevation of several inches existed between the road shoulder and the recently repaved surface. Plaintiff's decedent was proceeding in his automobile along the roadway when the rear wheels of a car approaching from the opposite direction left the paved surface, and the vehicle went out of control on striking the drop-off in steering back onto the paved surface, crossed over into the opposite lane of traffic, and collided with the vehicle being operated by plaintiff's decedent, causing his instant death. Plaintiff brought suit alleging negligence on the part of the Department of Highways and the paving company in allowing the dangerous drop-off condition to exist when it could have been corrected sooner. In holding that a delay of 6 days in raising the elevation of the shoulder to that of the repaved highway did not constitute negligence the Court stated that:

> [I]t was customary to finish a section of the resurfacing and then go back and raise the shoulders of the road.... [T]he witnesses for the highway department gave good reasons for proceeding in this manner rather than raising the shoulder of the road as the resurfacing progressed. They said resurfacing and raising simultaneously would have been not only economically unsound and impractical but would have increased the hazards because of the location of additional equipment in or on the highway and the congestion of traffic.... We conclude the highway department and the contracting company, having used all reasonable precautions in the repair of the road, were not guilty of negligence.

It has been held in at least two cases that failure to correct a drop-off condition caused by feathering of the edge of the pavement due to natural wear and tear did not constitute negligence on the part of the highway agency.

In *Zacherer v. Town of Wakefield*, 291 Mass. 90, 195 N.E. 893 (1935), negligence was alleged in that the edge of an asphalt surfaced street had, as a result of weathering and wear and tear, crumbled and grown ragged, and the gravel shoulder had slipped 3 to 4 in. lower than the pavement surface. Complainant testified that because of these conditions the steering wheel of the vehicle she was driving was "jerked out of her hand" causing the vehicle to go out of control and collide with a telegraph pole located in the shoulder of the road. In ruling against the plaintiff in an action brought to recover for injuries sustained by her in the collision with the pole, the Supreme Judicial Court of Massachusetts said:

> The testimony, as well as common knowledge, shows that edges similar to those described are common under roads having an asphalt surface and gravel shoulders. Photographs taken on the afternoon of the accident disclosed nothing uncommon or apparently dangerous.... To impose liability upon a town, an accident must be caused by "a defect or a want of repairs ... in or upon a way" which "might have been remedied by reasonable care and diligence on the part of the ... town." The duty to repair is merely a duty to keep the way reasonably safe and convenient for general travel. Perfection is not required. A majority of the court think that no defect, continuing to exist by negligence of the town, could have been found by the evidence, and that the refusal to direct verdicts for the defendant was error.

The facts alleged to constitute an actionable highway defect in *Summers v. State Highway Commission*, 178 Kan. 234, 284 P.2d 632 (1955), were that for a distance of approximately 110 ft the edge of the bitu-

minous surface of a highway had crumbled, and that for a distance of about 15 ft, the edge of the surface was 4 to 5 in. higher than the adjoining shoulder. Plaintiff's complaint alleged that at the latter point the vehicle that she was driving during the night hours went off the surface onto the shoulder, and, being unable to regain control, the automobile turned over causing her serious injuries. In sustaining a demurrer interposed to the complaint seeking damages for the injuries incurred, the Court stated that there was no "legal foot-rule" by which to measure whether a highway defect did or did not exist, and that each case must be determined in the light of its own circumstances. The Court took judicial notice of the fact that "there are hundreds of miles of highways with bituminous surface in this state and that it is a matter of common knowledge that such type of surfacing tends to feather off and crumble at the edges . . . and that there will be some deviations along the edge of such type of highway surfacing as contrasted to a concrete slab." The prevalence of this condition over many miles of the State's highways, and well-known to operators of motor vehicles on Kansas roads, apparently influenced the Court in ruling that the facts pleaded in the complaint and taken as true on demurrer were insufficient to establish and constitute an actionable highway defect.

It has been held that failure to correct a drop-off condition caused by human agency other than activity authorized and under the supervision and control of the highway department did not constitute negligence on the part of the latter.

Ortego v. Brouillette, 347 So.2d 1209 (La. App. 1977), was a wrongful death action wherein it was alleged that the fatal accident occurred when a car moving on the shoulder of the road in attempting to effect reentry to the riding surface struck a drop-off between paved surface and shoulder, went out of control, and met in head-on collision with a vehicle approaching from the opposite direction. It was charged by plaintiff that the drop-off was caused by excavation of the shoulder by the State Highway Department preparatory to widening the highway. It was admitted at trial that construction work was in progress on the highway where the accident occurred, but the Highway Department's engineers testified that such work was confined to culverts and wholly unrelated to shoulder excavation, and that the drop-off in question was probably caused by the passage of multi-wheeled trucks, the outside wheels of which ran off the paved surface onto the shoulder. Concluding that there was no evidence to support the contention that the drop-off was caused by excavation work on the shoulder, or any other activity of the Highway Department, the Court of Appeals affirmed the trial judge's action in dismissing the complaint.

And finally it has been held that failure to establish that the State had actual or constructive notice of a drop-off condition is fatally defective in an action brought to recover for injuries suffered as a result of vehicular collision with such drop-off.

Thus, in holding that the evidence did not establish negligence on the part of the State of New York when a car traveling on the shoulder of the road went out of control on striking a 3-in. drop-off in attempting to regain the paved surface, causing it to veer into the path of and collide with a vehicle in which claimants were riding as passengers, the Court, in *Eckerlin v. State,* 17 Misc.2d 224, 184 N.Y.S.2d 778 (1959), *aff'd* 9 App. Div.2d 717, 193 N.Y.S.2d 236, based its ruling on the fact that although a State police officer testified that he had seen the drop-off 4 or 5 days before the accident occurred, there was no evidence that he had reported the defect, and hence on the basis of the adduced evidence the State could not be charged with knowledge thereof.

Thus it has been seen from the foregoing review of cases that the State has frequently been held liable for injuries suffered or death resulting from failure to raise the shoulder of the road within a reasonable time after resurfacing operations have been completed; and that the State has been absolved of negligence in situations where (1) it was not shown that elevation of the shoulder had been delayed for an unreasonable length of time; (2) where the drop-off condition was caused by ordinary wear and tear; (3) where the drop-off was not directly attributable to highway department activities; and (4) where there was a failure to establish that the State or its subdivision had actual or constructive knowledge of the dangerous condition.

The paper turns now to a consideration of other fact situations that have frequently been productive of injuries to motorists who leave the paved surface of the highway and travel on the roadway berm or shoulder.

Rut, Ditch, Hole, or Depression in Shoulder

Another fact situation that has often been productive of accidents is where the driver of a motor vehicle departs the traveled way and strikes a rut, ditch, hole, or depression in the shoulder, thereby causing him to lose operative control of the vehicle. The question is presented in such cases as to whether a duty of care is owing to motorists to protect against defects of this kind or nature that are located in the berm or shoulder of the roadway. It has been adjudicated in a number of cases that such affirmative duty does exist. The following cases illustrate.

The facts in *Collins v. State Highway Commission,* 134 Kan. 278, 5 P.2d 1106 (1931), were as follows: Plaintiff was a passenger in an automobile which was proceeding at night at a reasonable rate of speed along a hard-surfaced highway when the driver steered the vehicle off the paved surface in an effort to avoid collision with an oncoming car that was traveling in the middle of the road. The right wheels of the car became lodged in a ditch running a distance of 80 to 90 ft along the edge of the road. The rut was 12 to 14 in. in depth and 18 to 20 in. in width. The driver was unable to extricate the vehicle from the ditch, and, although the brakes were applied and the vehicle slowed down, the car overturned before it could be brought to a halt, resulting in serious injuries to the plaintiff. In affirming the action of the trial court in overruling a demurrer interposed to the complaint and allowing the matter to go to trial resulting in judgment for the plaintiff, the Supreme Court of Kansas said:

> Of course the slab is intended to be and is the traveled way; but it is a matter of common knowledge that careful automobile drivers not only may on occasion, but frequently must, use the shoulder to some extent as a part of the highway, and a pitfall in a shoulder, adjoining or even adjacent to the slab, may constitute a defect in the highway.

Plaintiff testified in *Brummerloh v. Fireman's Insurance Company of Newark, N.J., et al.,* 377 So.2d 1301 (La. App. 1979), that he was driving his automobile at nighttime in a misty rain, and that as he crossed a bridge spanning a bayou, he steered his vehicle to the right to avoid an oncoming car whose bright lights blinded him to the extent that he could not ascertain the location of the center line. Immediately after crossing the bridge his right wheels dropped into a rut extending along the edge of the road causing him to lose control of the vehicle, which swerved into the lane of oncoming traffic and collided with another car. Injuries were sustained by plaintiff, his wife, and their two minor children riding in the car. Suit was instituted to recover damages for injuries to all the occupants of the vehicle. In affirming judgment for plaintiffs rendered below, the Appellate Court stated:

> The Highway Department had prior knowledge that such a dangerous condition had existed for a long period of time before the accident and the Highway Department took no steps to remedy same. . . . We . . . hold that the record supports the trial court's conclusion that the Highway Department was negligent in allowing such a dangerous condition to exist, which condition caused the occurrence of the accident in question.

Falender v. City of Louisville, 448 S.W.2d 367 (Ky. 1969), was a wrongful death action, wherein the facts established that decedent was driving her car along a black-topped road when on entering a curve the right wheels of the vehicle slipped into a rut or ditch 10 in. deep and extending approximately 28 ft along the edge of the road, causing her to lose control of the vehicle and swerve into the opposite lane of travel, where she was struck broadside by a car traveling in that lane and killed. Defendant City of Louisville was granted summary judgment in the court below. In ruling that on the facts summary judgment was improper and that the matter should have been allowed to go to trial, the Court stated that the City was "under a duty to exercise ordinary care to keep, not only that part of its streets that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but that it must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part."

Holding that the failure to give a requested instruction in respect to the posting of signs to warn of a dangerous defect did not affect the verdict the Court, in *Black v. County of Los Angeles,* 55 Cal. App.3d 920, 127 Cal. Rptr. 916 (1976), affirmed the judgment entered below in favor of persons sustaining injuries when the automobile in which they were riding as passengers collided with a car that crossed the road after being deflected off course by striking a hole in the shoulder of the road measuring 6 to 8 in. in depth and 12½ to 13 in. in diameter. The Court found that the hole was the proximate cause of the accident and that defendant County of Los Angeles was "aware or should have been aware of such dangerous and defective condition." No testimony was produced at the trial to show that the driver of the vehicle striking the hole was forced off the highway or left the paved surface for any reason other than inadvertence.

Taylor v. State, 262 App. Div. 657, 30 N.Y.S.2d 712 (1941), *aff'd* 288 N.Y. 542, 41 N.E.2d 939, involved injuries suffered by a passenger in an automobile which overturned as a result of striking a rut in the shoulder of the road. The driver of the vehicle, claimant's daughter, was forced off the traveled portion of the highway on which she was proceeding by a truck approaching from the opposite direction. The right wheels of the car were turned out of alignment as the result of being buffeted by the walls of a rut 6 in. deep and 50 to 60 ft long in which they were entrapped on leaving the concrete portion of the highway, causing the car to go out of control and overturn. In reversing judgment for the State of New York, rendered by the Court of Claims, the Supreme Court, Appellate Division, Third Department, said that when confronted with the approaching truck the driver had no alternative but to take evasive action, and that she was entitled to rely on the belief that the shoulder of the road where she took refuge would be in a condition reasonably safe for public travel. Using the "but for" test the Court said that: "If there had been no dangerous rut in the shoulder, the operator of the car could easily have brought the right wheels thereof back upon the concrete and the accident would have been avoided."

Plaintiff, in *Starling v. Board of County Commissioners,* 53 Ohio App. 293, 4 N.E.2d 921 (1935), brought suit to recover for injuries sustained when an automobile in which she was riding as a passenger struck a rut in the berm of the road 8 to 10 in. deep, 4 to 6 in. wide, and 40 ft long, causing the vehicle to overturn after the right rear wheel became dislodged. Suit was predicated on liability imposed by statute for negligence in failing to keep county roads in a state of good repair. The question was presented whether the term "road" as used in the statute had reference solely to the improved portion of the traveled way, or whether it extended to and included the berm or shoulder thereof. In reversing a judgment entered on a verdict directed for defendant Board of County Commissioners, the Court interpreted the language of the statute to mean that County Commissioners were liable for negligence in failing to keep the berm or shoulder of the road in a condition reasonably safe for public travel, as well as the paved or main traveled portion of the road.

The question was squarely presented in *Bunton v. South Carolina State Highway Department,* 186 S.C. 463, 196 S.E. 188 (1938), whether the duty of care imposed on the Highway Department to maintain roads in a condition reasonably safe for public travel extended to the shoulders of the roads. Facts giving rise to the question were that an automobile being driven by plaintiff struck a rut (of unspecified dimension) in the shoulder of the highway causing the vehicle to go out of control and collide with a telegraph pole. Plaintiff brought suit for damages for

personal injuries against the Highway Department, and in ruling that the duty of reasonable care extended to road shoulders the Supreme Court of South Carolina stated:

> It would be laying down too strict a rule, if not an unreasonably harsh one, to hold that the driver of a motor vehicle on a paved highway may not, under any circumstances, turn from the pavement to the shoulder of the road, to such extent as an emergency or the circumstances might require, without being guilty of negligence as a matter of law. In view of present-day vehicular traffic upon the highways, a number of reasons might be given for the leaving of the paved portion of the road and passing, to some extent at least, to the shoulder thereof by a motor vehicle without any fault on the part of the driver. The State Highway Department, whose duty is to keep the highways in reasonably safe condition for travel, is fully cognizant of such reasons. We hold, therefore, that the duty rests upon the defendant to not only keep the paved portion of the road in reasonably safe condition for motor vehicle travel, but also to keep the road adjacent to the pavement, the shoulders of the highway, in such condition as will meet the reasonable needs of motorists as above indicated.

Thus it seems to be clear that the State and its subdivisions may be held liable as for negligent conduct in failing to protect motorists making use of the berm or shoulder of the roadway against accidents brought about by vehicular collision with dangerous ruts, ditches, holes, or depressions located therein.

Soft, Loose, or Friable Shoulder Condition

Another fact situation that has been productive of injuries to motorists is that of soft, loose, or friable shoulder conditions leading to collapse under the weight of trucks or other motor vehicles proceeding thereupon. As might be expected, the failure to correct such conditions has been held to constitute negligence on the part of the highway department.

It appeared in *Murphy v. Lake County,* 106 Cal. App.2d 61, 234 P.2d 712 (1951), that two trucks approached each other within the confines of the narrow paved surface of a winding mountain road, and that in order to allow for passageway of both vehicles, plaintiff pulled his truck partially onto the shoulder. The evidence tended to establish that both vehicles were proceeding at the slow speed of 15 mph. Although the pavement surface of the roadway was dry, the shoulder was wet, and under the impact of the weight of plaintiff's vehicle and its load, the shoulder began to crumble, and finally caved in plunging the truck 400 ft into a canyon below. The evidence was conflicting as to the composition of the shoulder, but it was agreed that it was unstable, testimony being introduced to the effect that the road was generally reputed to be so treacherous that for a time the school bus ceased to travel over it thereby preventing children from attending school. Defendant Lake County insisted that there were insufficient funds available to rebuild the road and make improvements to the shoulders. In rejecting such defense and affirming judgment entered below for the plaintiff, the Court concluded that from the evidence adduced in the case the jury was justified in finding that the County had been derelict in its duty to maintain the road, including the shoulders, in a condition reasonably safe for public travel, and that the jury could properly have found that such negligence was the proximate cause of the accident.

In affirming judgment rendered for plaintiffs who were injured when the vehicle in which they were riding went over an embankment and down into a river as a result of the collapse of the outer 2 ft of the shoulder on which they were driving, the Court in *Simmons v. Cowlitz County,* 12 Wash.2d 84, 120 P.2d 479 (1941), said that "the shoulder of the road . . . was as much a part of this road or highway as any part of the road" and that the plaintiffs had a right to travel thereupon, this being particularly true in light of the fact that the shoulder gave every appearance of being firm, stable, and safe for use.

And in *Shaw v. State,* 196 Misc. 792, 93 N.Y.S.2d 513 (1949), *aff'd* 278 App. Div. 871, 104 N.Y.S.2d 273, *aff'd* 303 N.Y. 644, 101 N.E.2d 760, where plaintiff motor vehicle operator and a passenger in the car were both injured when the vehicle left the road at a curve and after proceeding some 200 ft along the sandy loam of the shoulder went out of control and struck a tree, the Court stated in respect to the duty of care owing in regard to maintenance of the shoulder:

> The duty resting on the State is that of exercising reasonable care under the circumstances. It may be held liable only for failure to exercise such care. It may only be charged with the duty of anticipating those consequences which, in the ordinary course of human experience, may reasonably be expected to happen. We think enough was shown to warrant a finding that the shoulder, at least at the point where [plaintiff's] car left the macadam, was not in such a firm condition as to exonerate the State from . . . claim of negligence in the . . . maintenance of the shoulder.

Rocks or Boulders in Shoulder

It appears that under circumstances where rocks or boulders in the road shoulder present a condition dangerous to motorists that the State and its agencies are under a duty to remove the same, and failure to do so constitutes negligence rendering the public authority answerable in damages for injuries suffered as a result of vehicular collision therewith.

In *Arno v. State,* 20 Misc.2d 995, 195 N.Y.S.2d 924 (1960), plaintiff was driving his automobile, carrying his wife and daughter as passengers, at a speed of 40 to 45 mph, when he met with two tractor-trailers coming from the opposite direction, one of which, in attempting to overtake the other, did not allow sufficient room for the passage of plaintiff's vehicle. Confronted with a threatened collision plaintiff attempted to move to the shoulder but was prevented from doing so by a large pile of rocks that occupied more than 75 percent of the shoulder area. As a result plaintiff's vehicle was sideswiped by the oncoming truck and caused to swing completely around and crash into the rock pile causing injuries to all occupants of the vehicle. In awarding judgment in favor of plaintiff and the two passengers in the automobile, the Court said:

> It is well established that a rock pile 6 to 7 feet long and 4 to 5 feet high obstructed 3 of the 4 feet of shoulder on the north side of the highway. It is also well established that this obstruction had been in the same

position for at least three weeks and probably for five weeks. The State knew or should have known of this hazard. The State has a duty to maintain the shoulders of a highway in a reasonably safe condition for travel when necessity for their use arises. Failure to use reasonable care is negligence and in the instant case the State was negligent.

Mendelin v. Town of West Boyleston, 331 Mass. 597, 121 N.E. 2d 667 (1954), was an action for personal injuries to the operator of a motor vehicle, and for the wrongful death of his daughter who was a passenger therein, arising out of the collision of the vehicle with a stone in the road shoulder that caused the car to go out of control and plunge into a river, resulting in the drowning death of the passenger and injuries to the driver. The stone was 6 to 8 in. wide, 4 ft long, and 18 in. high. It had been placed in the gravel shoulder by defendant Town of West Boyleston many years before the date of the accident but because of road changes had long since ceased to serve any purpose whatever. In granting recovery for the plaintiffs the Court premised its ruling on the ground that the Town had maintained the obstruction uselessly in the shoulder for many years and was charged with knowledge that it constituted a condition hazardous to motorists.

Culvert in Shoulder

Likewise, the location of a culvert in the shoulder of the road in such posture as to present a condition dangerous to motorists making use of the shoulder may render the State liable in damages for injuries suffered as a result of collision therewith.

Millis v. State, 49 N.Y.S.2d 517 (Ct. Cl. 1944), involved a collision with a culvert parapet wall in which the State was held liable for maintaining such structure in an exposed condition in close proximity to the paved portion of the roadway. It appeared that plaintiff motor vehicle operator was proceeding in broad daylight at a reasonable rate of speed when in order to avoid an oncoming car he moved to the shoulder of the road, and on attempting to return to the paved surface, struck the aforementioned obstruction. The culvert protruded 8 in. aboveground and formed a parapet 9 ft long, 1 ft wide, and was built to within 1 ft of the edge of the paved surface. The Court stated in ruling for the plaintiff that:

> When suddenly confronted with an emergency charged with great potential danger, claimant was called upon to move his car from the path of the oncoming car quickly and safely, in any event quickly. To us it appears that had the shoulder of the road at such time and place been available "without danger to life and limbs," such accident, in all likelihood, would not have happened. . . . No sign warned claimant of a highway defect at the point of accident, consequently, when forced to use the shoulder of the road, he had to rely upon its being in a reasonably safe condition for such purpose. We find the proximate and producing cause of accident herein to be a long existing defect in the public highway; we find further as a concurring and contributing cause thereof, the location upon the narrow part of such highway of a culvert parapet, erected so close to the edge of its paved panel as to render the shoulder dangerous for all highway purposes.

Roberts v. Town of Lisbon, 84 N.H. 266, 149 A. 508 (1930), likewise involves collision with a culvert set in close proximity to the traveled way. The action was for wrongful death brought by the administrator of decedent who was killed while riding as a passenger in the car. At the scene of the accident the paved macadam surface of the highway was narrower than elsewhere because of the presence of a high bank. The culvert in question was located at the foot of this bank. The driver of the vehicle testified that as he approached this narrow section of the highway, he was blinded by the lights of an oncoming car, and in order to avoid a collision, swerved off the paved surface. This action placed the right wheels of his car in a ditch used to carry surface water to the culvert. He further testified that as he was attempting to steer the vehicle back onto the paved surface the right front wheel struck the capstone of the culvert causing him to lose control of the vehicle, which ran up the bank and turned over resulting in the fatal injury. In sustaining the verdict entered below for the plaintiff the Court premised its action on the ruling that the jury could properly find negligence in setting a capstone 12 in. thick at a point where the road narrowed and motorists could be expected to travel on the shoulder in order to allow room for oncoming or passing vehicles.

On the other hand, it was held in *Lucus v. State,* 36 N.Y.S.2d 862 (Ct. Cl. 1942), that the State was not liable in an action brought for injuries sustained when an automobile struck the headwall of a culvert where it was shown that the headwall was nearly 6 ft from the edge of the paved surface and the shoulder on which it was located was smooth, level, and kept in good condition. The Court conceded that the law was clearly settled in New York that the State was under a duty to maintain road shoulders "in a condition reasonably safe for an operator of a motor vehicle to use in an emergency," but ruled that such duty had been met by the particular location of the headwall and by the maintenance of the shoulder in a stable condition. It concluded: "Had the operator of the automobile in which claimant was riding kept his direction he would not have hit the culvert headwall."

Post, Pole, or Tree in Shoulder

Whether or not the erection of a post or pole or allowing a tree to stand in the shoulder of the roadway constitutes negligence is a question of fact to be determined by the circumstances of the particular case. The determinative factor appears to be whether the post, pole, or tree is so positioned in relationship to the traveled way as to constitute a hazard to motorists who leave the paved surface. Because posts, poles, and trees are highly visible (at least during daylight hours) the matter of the positioning of the post, pole, or tree has special relevance to motorists who are forced to make sudden moves onto the berm (such as to escape collision with an oncoming vehicle in the wrong lane) and in which situations little or no time is afforded for maneuver taken pursuant to reflection. The following cases illustrate that whether or not a post, pole,

or tree in the road shoulder constitutes an actionable obstruction is a fact-dependent question to be determined in the light of the circumstances of the particular case.

Trabisco v. City of New York, 280 N.Y. 776, 21 N.E.2d 615 (1939), was an action to recover damages for personal injuries to the driver and for the wrongful death of a passenger in an automobile which struck a utility pole in the shoulder of the road. It was testified at trial that the operator of the vehicle was forced to drive upon the shoulder of the road in order to escape collision with an oncoming car approaching in the wrong lane. In a brief *per curiam* opinion the New York Court of Appeals reversed judgment entered below for defendant and remanded the cause for a hearing on the question of negligence in allowing the utility pole to stand in its particular position and relationship to the traveled way.

Russell v. State, 268 App. Div. 585, 52 N.Y.S.2d 629 (1944), was an appeal to the Supreme Court, Appellate Division, Third Department, from a judgment of the New York Court of Claims denying recovery in an action brought to recover damages for injuries to the driver of and the wrongful death of a passenger in an automobile that collided with a telegraph pole set in the shoulder of the roadway about 10 ft distant from the paved surface. The surviving driver testified that the accident occurred about four o'clock in the morning and was occasioned by the fact that he was blinded by the lights of an oncoming car and swerved to the shoulder to escape the glare where he traveled a distance of about 40 ft before running into the pole. Judgment of the Court of Claims in favor of the State was reversed and the cause remanded by the Supreme Court to determine whether the State was negligent in permitting the pole to be set and remain in its particular position relative to the highway.

Rafferty v. State, 261 App. Div. 80, 24 N.Y.S.2d 689 (1941), was an action to recover damages for injury and death resulting from a motor vehicle colliding with a tree located in the shoulder of the road at a point 32 in. distant from the edge of the paved surface. In denying recovery the Court said that the state of the evidence was such that "to uphold the contention of the claimants ... this Court would have to find that the existence of the tree at the place of the accident constitutes negligence on the part of the State as a matter of law. ... There was no negligence as a matter of law." The Court then went on to rule that the question of negligence in allowing the tree to stand was one of fact to be determined by the jury.

Coss v. State, 11 Misc.2d 856, 175 N.Y.S.2d 958 (1958), *aff'd* 8 App. Div.2d 682, 185 N.Y.S.2d 253, was a wrongful death action involving the demise of a motorcyclist who was killed when his machine collided with a fallen guard post located in the shoulder of the highway. Decedent at the time of the accident was operating his cycle in the company of another motorcyclist, who testified that when both vehicles, traveling side by side, were approaching a curve, he pulled ahead, and on rounding the curve looked back to see the decedent's machine "wobble or zig-zag as if out of control and go on to the shoulder," at which point the vehicle collided with the fallen guard post and decedent was catapulted to his death.

In ruling against the State the Court stated:

> The guard post had been on the shoulder of the road at this location since September, 1955, and the State is charged with notice of the presence of the post. ...
>
> Claimant's intestate, upon being faced with an emergency, was within his rights in using the shoulder of the road, to which he was involuntarily diverted. The use of such shoulder was obstructed by the fallen guard post. This obstruction could and should have been removed by the State prior to the accident.
>
> The proximate cause of this accident resulting in decedent's death, was negligence of the State in its failure to maintain the highway, including the shoulder, in a reasonably safe condition for the benefit of the traveling public.

In *O'Connor v. State,* 198 Misc. 1012, 99 N.Y.S.2d 194 (1950), defendant State of New York was held liable in damages for injuries suffered by plaintiff when he drove his vehicle in the nighttime into an unlighted iron post located in the shoulder of the roadway. It appeared that plaintiff had parked his car on the road shoulder and in starting up and moving forward struck the post which was 6 in. or more in diameter and stood between 18 and 24 in. above the ground. The evidence established that whatever the original purpose of the post had been it had existed in the same location for a number of years without serving any useful function. In ruling against the State the Court said that although "the post did not in any manner obstruct normal driving along the paved portion of the highway, it undoubtedly did constitute an obstruction to persons ... lawfully driving upon said shoulder when occasion so required." Stating that "it has become well established that the State ... is responsible for the maintenance of the highway shoulders in a reasonably safe condition for travel when the necessity for their use arises," the Court concluded that "the iron post did constitute an obstruction of the State highway and that the State was negligent in not having the same removed."

State Road Equipment or Vehicles Parked on Shoulder

It is, of course, necessary from time to time in conducting work on state roads to park vehicles, machinery, and equipment used by the highway department in the performance of such work on the shoulders of highways. However, the leaving of such vehicles and equipment for any length of time without protection to motorists in the form of adequate warning signs, signals, or devices seems a clear lack of the exercise of due care. Needless to say, this holds particularly true during nighttime hours, when visibility is impaired and the parking of unillumined vehicles or equipment presents a real danger to motorists making use of the berm or shoulder. That such conduct constitutes actionable negligence appears to present little in the way of question.

Illustrative is the case of *Smith v. State,* 146 Misc. 336, 262 N.Y.S. 153 (1933), *aff'd* 240 App. Div. 752, 265 N.Y.S. 981, an action to recover for personal injuries suffered when the automobile being driven by plaintiff during the nighttime crashed into a 2-ton tar bucket that had been

placed by highway department personnel on the shoulder of the roadway on which plaintiff was traveling, and left there for a period of several weeks. Plaintiff testified that in passing another vehicle he aligned his automobile as closely to the other car as safety would permit, but felt his wheels leave the macadam surface and move over the loosely gravelled shoulder until he collided violently with the parked tar bucket, which contained no reflectorized warning device or illumination of any kind to enable it to be seen and identified in the dark. In awarding damages to the injured plaintiff the Court said:

> We must conclude, therefore[,] that the tar bucket at the time of the accident stood on the shoulder of this highway within three or four feet of the macadam roadway; that it was black and unlighted in any way and difficult to observe at night, and that it had stood in practically the same position from four to six weeks.
>
> While it is true that the shoulder of a road is not constructed as a place for vehicles to travel on, yet neither is it constructed as a parking place for the state's highway machinery or other unlighted obstacles for a traveler to collide with if perchance in the nighttime he should be compelled, temporarily, to resort to the shoulder of the road when passing another vehicle, or for any other sufficient reason. . . .
>
> That the state was grossly negligent in the premises here is apparent, and, as it seems to us, beyond all controversy. There is absolutely no excuse for parking highway machinery so close to the traveled portion of the highway as to make such an accident as we are considering here possible.

Effect of Warning Signs

It appears to be clearly settled that the posting of signs warning of dangerous conditions ahead does not in and of itself absolve the State from all liability for accidents proximately caused by such conditions. Whether or not signs bearing the legend CONSTRUCTION WORK, DANGER, etc. are sufficient to relieve the State of liability is a question of fact to be determined by the circumstances of the particular case. In some cases warning signs have been held adequate to absolve the State from liability for hazardous conditions and in other cases such signing has been held insufficient to accomplish blanket protection. The following cases illustrate.

In *Brandon v. State, Through Department of Highways,* 367 So. 2d 137 (La. App. 1979), *cert. den.* 369 So.2d 141, contracts were awarded by the Louisiana Department of Highways to independent contractors for the resurfacing of several miles of highway. It was agreed that after the overlay work had been completed the Department would undertake the job of raising the shoulders to meet the new elevation of the highway. After the resurfacing had been completed, but before any part of the raising of the shoulders had been commenced, an automobile carrying several passengers, because of momentary inattention of the driver, went off the road and turned over, killing one of the passengers and injuring three others. Suit was brought alleging negligence on the part of the Department of Highways in failing for a period of 5 months to take any action to reduce the amount of the drop-off, which was described as constituting "several inches." It appeared from the facts that during the entire period of the 5-month delay in elevating the shoulders, and at the time of the accident, the road was posted with CONSTRUCTION and LOW SHOULDER signs. The State defended on the ground, *inter alia,* that the project was adequately signed for the protection of motorists at all times.

In affirming judgment rendered below for the plaintiffs the Appellate Court dismissed the impact and significance of the signing with the statement that the erection of warning signs may lessen road hazards, but it does not eliminate them. It went on to state that signs left standing over a long period of time with no evidence of construction work being in progress tend to lose their effectiveness, particularly with respect to motorists who regularly use the highway.

In *Stanley v. State,* 197 N.W.2d 599 (Iowa 1972), the operator of a large truck was hauling a 15,000-pound load over a portion of highway being resurfaced. Notice of the reconstruction work was given in the form of warning signs, torch pots, and barricades. The driver of the truck was forced to leave the paved surface to avoid collision with an oncoming car, and by reason of a 10- to 12-in. drop-off from the resurfaced pavement to the shoulder the 15,000-pound load was made to shift abruptly, causing the truck to turn over, with resultant severe injuries to the plaintiff who was a passenger therein. The Supreme Court of Iowa affirmed the finding of the trial court that the posting of the warning signs and erection of barricades did not relieve the State of liability for negligence in permitting a 10- to 12-in. drop-off to exist while the resurfacing work was in progress, and that the negligence in the creation and maintenance of a drop-off of such size was the proximate cause of the shift of the weight load and consequent capsize of the vehicle.

In *Miller v. State,* 6 App. Div.2d 979, 176 N.Y.S.2d 817 (1958), resurfacing operations had been completed on a roadway and the shoulders of the road brought flush with the newly elevated surface except for one small area where reconstruction of the shoulder had not been completed, and there existed a perpendicular 6-in. drop from blacktop to shoulder. At this point a motorcycle being operated by decedent at nighttime, with his wife as a passenger on the rear seat, left the paved surface and immediately turned over, throwing the driver to his death and causing severe injuries to his wife. A sign had been erected about one-half mile from the scene of the accident bearing the legend DANGER—ROAD CONSTRUCTION NEW YORK STATE DEPARTMENT OF PUBLIC WORKS. TRAFFIC MAINTAINED. The sign was illuminated at night by pot flares. In holding the State of New York liable for the wrongful death of the motorcycle operator and for the injuries to his wife, the Court ruled that the posting of the sign one-half mile from the accident did not give sufficient warning of the danger ahead, particularly in the light of the fact that the repaving work had been fully completed and the road shoulders brought level with the new surface at all points along the road reconstruction project except the one small area where the accident occurred.

However, in *Tely v. State,* 33 App. Div.2d 1061, 307 N.Y.S.2d 307 (1970), the presence of warning signs was held adequate to absolve the

State from liability for negligence in the conduct of reconstruction work. This case was heard on appeal from a judgment of the Court of Claims awarding damages in an action for wrongful death and personal injuries. The claim arose out of an accident that occurred under the circumstances as follow: An automobile was proceeding along a recently repaved road, the surface of which extended 4 in. above the shoulder of the road which had not yet been restructured, when it swerved from the paved surface onto the shoulder, and on attempting to regain the main traveled way, struck the raised edge of the pavement, went out of control, and collided head-on with a car coming from the opposite direction and carrying the deceased and the injured claimant. The Court of Claims found negligence on the part of the State in failing to post adequate signing warning of the danger.

The Supreme Court reversed, pointing out that the State had erected a sign, approximately one mile from the scene of the accident, reading: DANGER USE CAUTION CONSTRUCTION 2 MI. and that such sign was plainly visible to all motor vehicle operators using the highway including the driver of the vehicle colliding with claimant's car. It held that the posting of additional signs warning specifically of drop-off would have been superfluous, and ruled that the existing signs gave sufficient warning to motorists that construction work was in progress and that caution should be used in driving the entire length of the 2-mile long work area.

This paper now moves from discussion of the liability of the State for negligence in the maintenance of the roadway berm or shoulder to consideration of the effect on liability of negligence on the part of the driver or operator of the vehicle involved in the accident.

Contributory Negligence

The legal effect of the defense of contributory negligence has been well summarized in Prosser, THE LAW OF TORTS, 3d ed., p. 427 (West Publishing Company, 1964), as follows:

> Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault; and the defense is one of plaintiff's disability, rather than the defendant's innocence.

Because of the "all or nothing" effect of the defense of contributory negligence, such plea is an important weapon in the arsenal of the defense. Where proved, the State is absolved from liability notwithstanding satisfactory proof is established of its own negligence.[4]

The plea of contributory negligence interposed by the defendant, like the charge of negligence asserted by the plaintiff, is a matter of proof, and as a result is entirely dependent for success or failure on the particular facts of the individual case.

The cases that follow are grouped according to differing fact situations which serve to illustrate the varying applications of the defense of contributory negligence.

Excessive Rate of Speed

The driving of a motor vehicle at a high rate of speed along the berm or shoulder of the roadway (which is not designed and constructed for high speed traffic) is persuasive evidence of negligent conduct on the part of the operator of the vehicle. And where high-speed travel on the berm or shoulder has been established by the evidence, the plea of contributory negligence has generally been successful.

Harford v. State, 19 Misc.2d 7, 191 N.Y.S.2d 742 (1959), *aff'd* 17 App. Div.2d 680, 230 N.Y.S.2d 284, was a wrongful death action involving the demise of the driver of a vehicle that in rounding a curve left the paved surface and traveled more than 450 ft along the shoulder, before cutting back diagonally across the highway and striking a tree near the highway on the opposite side of the road. Negligence was charged to the State in allowing the existence of a 2- to 4-in. drop-off between the pavement and shoulder, and in permitting stone and gravel to accumulate on the paved surface causing a slippery condition. Evidence given by claimant's witnesses tended to support such allegations. Testimony by the State's witnesses, on the other hand, was to the effect that neither was there an accumulation of stone and gravel on the highway nor was there a drop-off between the road surface and the shoulder. The Court resolved the conflict in the evidence by finding the facts to be as follows:

> (1) That the curve was safe for travel at 50 miles per hour under normal conditions; (2) that the day was clear and bright and if any amount of stone and gravel was on the highway it could have been observed by anyone driving the highway; (3) that the distance from the point where the car first left the highway to the tree where the accident happened was more than 500 feet; (4) that at no time was the car driven by [deceased] under control after it left the pavement; (5) that a car driven at 35 miles per hour if properly braked would stop in 80 feet; that a car driven at 40 miles per hour if properly braked would stop in 144 feet; that a car driven at 50 miles per hour if properly braked would stop in 225 feet.

The Court concluded from these figures that because the vehicle operated by the deceased traveled more than 500 ft before it struck the tree resulting in the fatal injury that it must necessarily have been traveling at an excessive rate of speed, and that the operation of the automobile at an excessive rate of speed constituted negligent conduct on the part of the deceased, barring recovery for his death.

The facts in *Thomspon v. State,* 154 Misc. 707, 277 N.Y.S. 822 (1935), were as follows: The scene of the accident involved two types of roadways. The one was a newly constructed highway paved in concrete to a width of 40 ft. The other was an old brick-paved roadway the width of which was but 17 ft. Where the concrete pavement ended the brick pavement began and the center line was the same for both. A depression existed along the side of the brick-paved highway, apparently caused by vehicles

going onto the shoulder when transferring from the wider cement highway to the more narrow brick road. Plaintiff, when driving his car at nighttime, struck this depression in the shoulder, throwing his vehicle out of control and causing it to crash into a utility pole with great force. Warning of the juncture of the two roads was effected by means of signs reading CONCRETE PAVEMENT ENDS and CAUTION NARROW PAVEMENT AHEAD.

Plaintiff testified that he was traveling at a reasonable rate of speed, but that when the wheels of his vehicle struck the depression, the steering wheel was knocked out of his hands, and he was not thereafter able to regain control of the car. Although there were no witnesses to the accident such testimony failed to persuade the Court, and plaintiff was denied recovery on the ground that he was traveling at an excessive rate of speed at the time of the accident. The Court stated:

> The primary cause of the accident was the condition of the shoulder of the road at the point in question on the night of the accident. This condition, however, could have been overcome but for the careless and negligent driving of the claimant . . . before he encountered the hole in the shoulder and his utter lack of driving after that. . . . When the steering wheel was jerked out of his hands, he never got hold of it again, never put on the brakes, never did anything to stop the wild course of this machine to destruction. This is a picture that tells the story of a high rate of speed. A speed that made the automobile absolutely uncontrollable in the hands of even an experienced driver like [plaintiff] when it received the bump or jolt which was administered to it by this hole in the shoulder.

Where plaintiff was injured when his car was forced onto the shoulder by an oncoming vehicle "straddling" the center lane, and went out of control upon striking an elevated pavement surface in making return to the traveled way, the plaintiff was denied recovery, notwithstanding the admitted negligence of the State in maintaining the shoulder lower than the concrete surface of the roadway for a distance of 150 to 200 ft, on the ground that the proximate cause of the accident was the fact that plaintiff's vehicle was "being operated at an excessive rate of speed" both while traveling on the shoulder and in seeking to reenter the traveled portion of the way. *Kelly v. State,* 282 App. Div. 799, 122 N.Y.S.2d 447 (1953).

The principal question on appeal in *Edwards v. State, Department of Transportation and Development,* 403 So.2d 109 (La. App. 1981), was whether plaintiff, who was seriously injured in a single car accident, was guilty of contributory negligence, thus barring recovery in an action brought by him against the Louisiana Department of Transportation and Development based on alleged negligence in the reconstruction of a portion of highway. The evidence at trial established that the Department had caused a highway to be resurfaced, and that at the time of the automobile accident in question, the overlay stood 3 in. above the shoulder of the roadway. The evidence further established that plaintiff was driving his car along such highway when in rounding a curve he allowed the right wheels of his vehicle to go off the paved surface onto the shoulder, and that in attempting to regain entry onto the main traveled way, the vehicle went out of control, skidded across the highway, and turned over. The plaintiff was seriously injured and suffered traumatic amnesia in respect to the events of the accident, rendering him incapable of testifying at trial in respect thereto.

The lower court found that the Department of Transportation and Development was negligent in allowing the 3-in. drop-off to be in place and that such negligence was the proximate cause of the accident. The trial court further found that plaintiff was not guilty of contributory negligence, and entered judgment in his favor in the sum of $450,000.00 as general damages, and the amount of $46,483.40 as special damages. The Court of Appeal reversed.

The finding of the lower court that the Department was negligent in allowing the drop-off was affirmed. However, plaintiff was denied recovery on the ground of negligence in the operation of his vehicle. As evidence thereof the Court pointed to testimony of witnesses for the State who testified that plaintiff's car was traveling at a speed of 65 to 70 mph when it left the traveled portion of the highway, a speed well in excess of the legal limit of 55 mph. In reversing the substantial judgment rendered below in favor of the plaintiff the Court stated:

> There is nothing in the record to indicate that [plaintiff] could not have remained on the shoulder until he had reduced his speed enough that reentry could have been safely made.
>
> Under these circumstances we hold that the actions of [plaintiff] were substandard. . . . Our findings that [plaintiff's] negligence contributed substantially to the accident bars his recovery.

Driving Behavior of Motor Vehicle Operator As Constituting Negligence Absent Factor of Excessive Speed

Contributory negligence has been held to be a bar to recovery in cases where excessive speed was not involved but the behavior pattern of the operator of the vehicle was found not to be that of a reasonable and prudent man under all the circumstances.

Exemplary is *Lawrence v. State,* 43 N.Y.S.2d 710 (Ct. Cl. 1943), a case in which plaintiff was injured when she drove her car onto the shoulder of the road and on attempting reentry struck an elevation of the riding surface that stood 2 to 2½ in. above the shoulder, causing her vehicle to skirt out of control and crash into a tractor-trailer approaching from the opposite direction. Plaintiff was unable to testify at trial as to the circumstances of the accident and the Court concluded from the testimony of witnesses who observed the same that: "Apparently what happened is that when [plaintiff] saw the other vehicle approaching, she turned suddenly to the right, found that she was on the shoulder, and turned sharply to the left, causing her car to cross her own strip of pavement and go partly in the center strip and to strike the other vehicle." The Court further found that when meeting the oncoming tractor-trailer plaintiff had "ample room to pass on the concrete pavement without striking the other vehicle" and hence there "was no necessity or reason for turning her car to the right." Additional facts as found by the Court

were that plaintiff failed to "apply her brakes in an attempt to control her car while it was partly on the shoulder of the highway," and that "even with her car partly on the shoulder she could have driven to a place where the surface was level." The Court concluded from all the facts as found that "the accident would not have happened if the driver had used proper care in the operation of her car and that it has not been established that the depression in the shoulder caused or contributed to the accident."

In *Gould v. State,* 130 Misc. 776, 225 N.Y.S. 299 (1927), plaintiff was injured when he drove a distance of 150 ft with the left wheels riding on the shoulder of the road and the car went out of control when the right rear wheel collided with the elevated surface of the traveled way in attempting to make reentry thereupon. In holding that plaintiff was guilty of contributory negligence barring recovery the Court pointed out that the "concrete highway was concededly in perfect condition, and the highway was practically straight for a considerable distance in both directions from the point of accident, and the condition of the paved portion of the highway and the shoulder was entirely visible to a reasonably prudent driver. . . . [Plaintiff] was perfectly aware that he was off the concrete pavement for a distance of upwards of 150 feet. Had he stopped, as any reasonably prudent driver would have done, he could have regained the pavement with no difficulty."

It appeared in *Worden v. State,* 221 App. Div. 671, 224 N.Y.S. 675 (1927), that an automobile left the paved surface of the highway and traveled a distance of 110 ft on the shoulder of the road before striking a ditch therein 1 ft wide and 6 in. deep, which collision caused the vehicle to overturn, resulting in injuries to the claimant. The Court ruled that notwithstanding the existence of the hazardous ditch in the shoulder of the road, recovery must be barred by reason of the negligent conduct of the driver in continuing to operate the vehicle, without reason or good cause, for a distance of 110 ft along the shoulder of the roadway, when he could easily, within a shorter distance, have turned the vehicle back onto the paved surface and thereby avoided collision with the ditch.

Lesser Standard of Care Required in Emergency Situations

However, it has been indicated in at least a few cases that when confronted with an emergency the degree of care owed by a motor vehicle operator faced with sudden danger is not the same degree of care required of drivers confronted with a situation that allows time for deliberation and choice rather than reflexive action taken in the face of imminent peril.

State, Department of Transportation v. Manning, 288 So.2d 289 (Fla. App. 1974), was an appeal from a $100,000.00 judgment entered on a verdict for plaintiff in an action brought to recover damages for serious injuries suffered by the plaintiff who, in seeking to avoid collision with an automobile coming from the opposite direction in her lane of traffic on a two-lane road, steered her car onto the shoulder at a point where there was a considerable drop-off, and in attempting to regain entry to the paved surface, lost control of the vehicle, veered across the highway, and struck another oncoming motor car in a head-on collision. Defendant Department of Transportation contended that the proximate cause of the accident was the negligence of the plaintiff in failing to continue to drive along the shoulder of the road until a point had been reached where forward movement was sufficiently reduced as to make safe reentry on the paved surface.

In rejecting this contention and affirming the judgment entered below for the plaintiff the Court stated:

> Where one is confronted with a sudden emergency which is not of his own making, he is not held to the same degree of prudence which might otherwise be expected. The jury could have and apparently did conclude that the plaintiff when faced with the sudden emergency of an unusual drop-off in the shoulder of the road acted in such manner as was not negligent under the circumstances.

In *Kerner v. State,* 45 N.Y.S.2d 648 (Ct. Cl. 1943), the evidence established that plaintiff was driving his automobile on a two-lane roadway when, on approaching the crest of a hill, a truck appeared from the opposite direction moving at a high rate of speed and occupying the center portion of the highway. In order to avoid the threatened collision plaintiff veered to the right placing both of the right wheels of his vehicle on the shoulder of the road. At the point of departure from the paved surface and for a distance of several hundred feet there existed a drop-off of 5 to 7 in. because of the unstable character of the shoulder materials, which consisted of loose pebbles and dirt. The evidence established that the State knew of this condition, and had made repeated but fruitless efforts to remedy the same, by pushing the shoulder composition up against the exposed perpendicular concrete edge with a road machine. The evidence further established that after passing the oncoming truck plaintiff attempted to regain entry to the elevated paved surface of the highway, but in so doing skidded out of control on the wet pavement and crashed into a telephone pole causing his injuries. In holding that the State was guilty of negligence in failing properly to maintain the shoulder and that contributory negligence on the part of the plaintiff was not established, the Court said:

> The contention of the Attorney General that the driver herein was guilty of contributory negligence is not supported by sufficiently convincing testimony. . . . When confronted with the emergency, the conduct of the driver . . . was commensurate with that of a reasonably prudent man under similar circumstances. It isn't so much what he might have done after deliberation, but what he did in extremis, that fixes the standard.

Thus, the contributory negligence cases announce the rules as follows:

1. The driving of a motor vehicle at an excessive rate of speed along the berm or shoulder of the road is persuasive evidence of negligent behavior on the part of the operator thereof.

2. Absent excessive speed, the entire behavior pattern of the motor vehicle operator just prior to the accident will be examined and taken

into consideration in determining the question of alleged negligence in the operation of the vehicle. The test to be applied is whether his conduct was reasonable and prudent under all the circumstances.

3. But the driver of a vehicle who through no fault of his own suddenly finds himself in a situation carrying the potential of extreme danger is not held to the same standard of care as is required of a driver confronted with a situation that allows time for deliberation and choice between alternative courses of action. The test to be applied is whether his conduct was that which might reasonably be expected of other drivers placed *in extremis* by sudden encounter with unexpected danger.

CONCLUSION

Reference is here made to the rules of law set forth at the commencement of this paper establishing the duty of care owed by the State in the maintenance of the paved surface or traveled portion of the highway. It is readily seen that exactly the same rules may be restated in setting forth the duty of care owed by the State in the maintenance of the berm or shoulder of the highway.

However, a fundamental distinction lies in the *application* of the rules. And the linchpin of differentiation in the application of the rules is the ultimate fact that the paved surface and the shoulder or berm are designed and constructed to serve different purposes. To posit an extreme example, the placement of a utility pole or permitting a tree to stand in the midst of the main traveled way unquestionably (absent extraordinary circumstances) constitutes negligence as a matter of law. As has been seen in this paper, such is not the case where the pole or tree is located in the shoulder or berm of the road. The question there becomes one of fact as to whether an impermissible dangerous condition has been allowed to exist.

The underlying principle having application equally to maintenance of both the paved surface and the berm or shoulder is that the State is under a duty to make the way *reasonably safe* for public use. If such governing rule, as given application to maintenance of the berm or shoulder, can be stated in a phrase, it is as follows.

The state is under a duty to maintain the shoulder or berm of the roadway in a condition reasonably safe for use by the public subject to the limitation that the berm or shoulder is not designed, constructed and engineered for purposes of ordinary travel. Highway users are charged with knowledge that the berm or shoulder is but an adjunct or auxiliary of the main traveled way, and when departing the paved surface, for whatever reason, the duty is imposed on the vehicle operator to make such expeditious return to the main traveled way as is consistent with safety, and to conduct vehicular operation in such manner as is consistent with imputed knowledge that the berm or shoulder of the roadway is not held open for public use as a riding surface in the same manner and to the same extent as the paved surface is held open for public use.

Such rule, as broadly stated, will fit the facts and be compatible with the results in the decided cases dealing with the duty of care owed by the State in maintenance of the berm or shoulder of the highway.

[1] Such statement by the Court prompts the observation that a word of caution is in order in respect to generalizations sometimes found in text writings indicating that the courts are seriously divided on the question of the duty of care owing in respect to the shoulder or berm of the roadway. Insofar as such statements prompt the conclusion by the reader that there is wide modern support for a rule of nonliability, the same are misleading.

[2] See the following New York cases set forth later herein wherein the emergency doctrine did not operate as a bar to recovery: Waterman v. State, 24 Misc.2d 783, 206 N.Y.S.2d 380 (1960), p. 18; Protzman v. State, 80 App. Div.2d 719, 437 N.Y.S.2d 147 (1981), *aff'd* 56 N.Y.2d 821, 452 N.Y.S.2d 570, 438 N.E.2d 103, p. 20; Taylor v. State, 262 App. Div. 657, 30 N.Y.S.2d 712 (1941), p. 33; Shaw v. State, 196 Misc.2d 792, 93 N.Y.S.2d 513 (1949), *aff'd* 278 App. Div. 871, 104 N.Y.S.2d 273, *aff'd* 303 N.Y. 644, 101 N.E.2d 760, p. 37; Arno v. State, 20 Misc.2d 995, 195 N.Y.S.2d 924 (1960), p. 38; Millis v. State, 49 N.Y.S.2d 517 (Ct. Cl. 1944), p. 40; Trabisco v. City of New York, 280 N.Y. 776, 21 N.E.2d 615 (1939), p. 43; Russell v. State, 268 App. Div. 585, 52 N.Y.S.2d 629 (1944), p. 43; Coss v. State, 261 App. Div. 80, 24 N.Y.S.2d 689 (1941), p. 44; O'Connor v. State, 198 Misc. 1012, 99 N.Y.S.2d 194 (1950), p. 45; Smith v. State, 146 Misc. 336, 262 N.Y.S. 153 (1933), p. 47; Miller v. State, 6 App. Div.2d 979, 176 N.Y.S.2d 817 (1958), p. 50; and Kerner v. State, 45 N.Y.S.2d 648 (Ct. Cl. 1943), p. 62.

[3] The decisions referred to are included in the listing of New York cases, *supra*.

[4] As pointed out previously in this paper, in jurisdictions where the comparative negligence doctrine obtains, contributory negligence serves as a partial defense. That is to say, speaking generally, it is the rule in certain of the jurisdictions applying the doctrine of comparative negligence that the plea of contributory negligence operates as a partial defense where the plaintiff is found guilty of less than 50 per centum of the total fault, and as a complete defense where 50 per centum of more of the negligence is found attributable to the plaintiff. In other jurisdictions applying the comparative negligence doctrine the plea of contributory negligence serves, if proved, as a partial defense where the plaintiff is found guilty of any degree of negligence.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, and others concerned with liability cases involving accidents occurring in the shoulder and berm areas of state highways. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as a concise reference document regarding state liability involving the degree or standard of care required in respect to maintenance of the highway berm or shoulder.

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2101 Constitution Avenue, N.W.
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