

# OVERVIEW OF LIABILITY OF STATE HIGHWAY DEPARTMENTS AND PUBLIC OFFICIALS AND EMPLOYEES FOR HIGHWAY DESIGN, CONSTRUCTION, AND MAINTENANCE

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## INTRODUCTION

The liability of state highway departments and of highway personnel for defective highway design, construction, and maintenance is a difficult area of the law to state in hard and fast rules. It is not that the basic concepts are difficult to understand, rather it is that they are difficult to apply to given factual situations. It is my intention today to highlight a few of the major principles applicable to suits against the state or public official for negligence or defects in the design, construction, or maintenance of highways. Because a suit against a public official or employee in his personal capacity is an alternative open to plaintiffs and is similar in principle, I want to discuss and compare it to suits against the state. Before discussing specifically the areas of design, construction, and maintenance, I want to give you some background information.

## BACKGROUND INFORMATION

As you may know, the suit for negligence against the state highway department is a fairly recent development. Early in our history American courts held that states had sovereign immunity from suit that could only be waived by legislative consent. Today, many states permit, in one way or another, an action against the state for negligence in the performance of certain public functions, including highway operations.

Because of this doctrine of state immunity in the past, many litigants were compelled to find another means of redress in the courts for injuries

caused by highway defects. Claimants as a second choice were relegated usually to suing the highway official or employee in his personal capacity for negligent conduct of his duties.

Several distinctions exist between personal liability and state liability. First, because the state acts through its agents and employees, state liability is based on the doctrine of respondent superior; that is, the master is liable for the acts of his servants. It follows that where the public employee performs a negligent act that does not fall within the exception to liability the state agency may be held liable in a tort suit.

The law of public official and employee personal liability, on the other hand, does not apply the doctrine of respondent superior to officials and employees. For example, a supervisor may not be held personally liable for the negligent acts of his subordinates. The supervisor would be accountable only if he personally participated in the negligent conduct or was negligent in the selection of the employee.

Moreover, it may be noted that the public official or employee is not protected by any umbrella of state or sovereign immunity. In the absence of statute, the general view is that the public official or employee may be held personally liable for his negligence even though the state is immune from suit or liability for the negligence of its agents.

The two areas of law are similar in that the courts have developed certain rules or tests to limit liability to those areas in which it is thought proper to impose liability for negligent conduct. Neither the liability of the state nor of the public official is determined exactly in the same manner as if the suit were brought against a private person or corporation. Thus, states and officials or employees, although there are exceptions, are generally held not liable for performing negligently their *discretionary* functions or activities, or, to put it another way, for performing duties that require the exercise of judgment and discretion. Where state officials or employees are involved, the general rule is that they are not liable for negligence committed during the exercise or performance of an official duty discretionary in nature. The rule of privilege does not apply, however, if the official was acting out of malice, committing an intentional tort, exceeding his jurisdiction or acting outside the scope of his employment (such as by trespassing on the property of another). Similarly, where the state is sued for negligence in the conduct of highway operations, the prevalent defense is that the department is not liable for negligence in the conduct of certain discretionary functions or duties.

The term discretion is not an easy one to define. Any activity involves the exercise of discretion, but here it means the power and duty

to make a choice among valid alternatives; it requires a consideration of alternatives and the exercise of independent judgment in arriving at a decision or in choosing a course of action. Discretionary acts are those in which there is no hard and fast rule as to a course of conduct that one must or must not take. On the other hand, ministerial duties are more likely to involve clearly defined tasks not permitting the exercise of discretion. Ministerial acts are those performed with minimum leeway as to personal judgment and do not require any evaluating or weighing of alternatives before the undertaking of the duty to be performed.

There are several reasons for these rules that result in conditional immunity of the state or the public employee. As you know, under the separation-of-powers doctrine in this country, each coordinate branch of government is vested with certain powers and responsibilities. Because of this separation of powers, the courts are reluctant to second-guess discretionary decisions made by executive bodies; otherwise, the judiciary would be usurping the role of executive departments. Moreover, the courts are thought in certain cases to lack the necessary expertise to make some judgments that are entrusted to expert bodies having specialized knowledge and understanding of the problems in their own area. The courts share the view that to subject public agencies to general liability for errors or defects in the plan or design of public improvements such as highways would result in the submission of the propriety, adequacy, and sufficiency of the design to the judgment, not of competent and skilled engineers, but of a jury of untrained laymen.

Reasons that the courts are reluctant to impose personal liability on a public official or employee are that the public agent, in sharp contrast to a private person, has a duty to act and execute his responsibilities, and the vigorous action needed on the part of public officials and employees to carry out public functions would be seriously impaired if all actions that they are required to perform were subjected to personal liability.

In sum, the courts are balancing two policies: On the one hand, the need for orderly administration of governmental functions, and, on the other, the need to compensate victims of injuries resulting from the negligent performance of government functions. In order to perform this balancing, the common law formulated the discretionary-ministerial test in the area of personal liability that was later applied in negligence suits brought against the state.

It may be noted, too, that a number of states have tort claims acts. These acts constitute a waiver of immunity from suit and liability with

certain exceptions. Although these acts differ from state to state, they are modeled on the federal tort claims act that was enacted in 1946. One common feature of the tort claims acts is the inclusion of a provision immunizing the state or public entity from suit arising out of the performance of certain discretionary functions. The exclusion is based, of course, on the discretionary-ministerial test developed by the court in the law of personal liability.

In those states having a tort claims act with a discretionary function exemption, the term discretion has been interpreted more narrowly than in other states applying the common law. Discretionary acts are really discretionary only where there is a determination of policy based on a consideration of policy-type factors. Usually, such discretion is exercised only at the "planning level." Even though some discretion may be involved in lower, operational-level decisions, courts generally hold that discretion exercised below the planning level is not an exercise of discretion within the meaning of the statutes. Moreover, some courts hold that once immune discretion is exercised at the planning level, the discretion is exhausted and any negligence in the execution of the decision may result in liability.

## HIGHWAY DESIGN LIABILITY

Let's first consider the extent to which highway design is discretionary and immune from liability. It has been generally held that the actual plan and design of a highway are protected from liability because they are functions that involve the exercise of discretion and judgment. Neither states and state agencies nor public officials and employees are liable for errors of judgment in planning and designing public improvements. Where actions have been brought against public officials, states, or highway departments, it has been held, for example, that there is no liability for an injury arising out of a highway plan or design having a defectively designed traffic light, curve, curbs, drain, culvert, intersection, medians, shoulders, safety islands, crosswalks, or highway exits. Similarly, suits against highway personnel have held that the elevation of grade, erection of guard rails, and installation of culverts and traffic control devices are immune from liability, because they are all decisions requiring the exercise of independent judgment and discretion after a consideration of traffic requirements.

The general rule, therefore, is that public entities are protected from liability where the claim arises out of a defectively designed highway. A leading illustration of that principle is *Weiss v. Fote*, a New York case, where it was alleged that the Board of Safety of the City of Buffalo

had approved a traffic light with too short a clearance interval; that is, not enough time was allowed for east-west traffic to clear the intersection before north-south traffic was green-lighted. The court held, however, that the adequacy of the design of this traffic light could not be submitted to a jury for a determination of the negligence of the city.

The court stated :

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

There are exceptions to this general rule of immunity for design defects. Some courts hold that liability for defective design may be imposed if the defect is one of such a character as to be apparent to anyone of ordinary intelligence and judgment; others hold that the defect must be one that was “obviously dangerous” at the time of its approval, or “manifestly dangerous,” or “obviously and palpably dangerous.” Another jurisdiction holds that for the state to be liable for a design defect, it must be one that renders the highway totally out of repair from the very beginning.

An example of a design defect in which the court held the public entity liable is *Paul v. Faricy*. The court held that a traffic island was so negligently designed at its inception that it was obviously and palpably dangerous to the ordinarily prudent man of reasonable intelligence. In that case, the defendant’s vehicle struck the inclined apron of a safety island intended to be used by pedestrians for boarding other vehicles. The front of the safety island facing the on-coming traffic consisted of a concrete apron about 15 ft. long which at its extreme westerly end was 10 in. high and which gradually increased to a height of 2 ft. above the pavement at its easterly end. Adjoining the easterly end of the apron stood a concrete bumper block or pier which rested upon but was not anchored to the pavement.

This block, in which traffic lights were imbedded, was 4 ft. high, about 3½ ft. wide, and 2 ft. thick and weighed approximately 4,200 lb. The apparent purpose of the entire design was to protect pedestrians standing on the safety island, as well as occupants of automobiles colliding with the safety island, in that the concrete apron by its sloping design would slow down a colliding automobile before it was stopped by the 4,200-lb. bumper block.

Of course, the inevitable happened—the 11-year-old plaintiff was standing on the safety island when the car, driven by Faricy, hit the concrete apron, continued forward and upward onto the apron until it struck the unanchored bumper block, which by force of the impact tipped over onto the platform and struck the plaintiff.

The court noted that the general rule was governmental immunity for defects in the plan or design of highways, that the plan was considered and approved by the appropriate body, that a competent engineer, after having examined a number of traffic islands, had designed this island, and that there were some differences in opinion on designing and building a traffic island. However, the city was held liable on the basis that there was no reasonable necessity for the obvious danger presented by the unanchored 2-ton block. The court asked:

“What could be a more palpable source of danger to pedestrians, than an unanchored block weighing two tons and equipped with a ramp to direct the force of colliding automobiles at a point above its center of gravity? As a safety measure, it violated the most elementary laws of physics and presented a danger that must have been apparent to any reasonably prudent man. Those who are charged with the responsibility of exercising a bona fide judgment in matters of structural design are entitled to place great reliance upon the advice of an expert but such expert advice may not be used as a shield to justify a failure to perceive a defect that is wholly unnecessary and which is not only apparent but is so obviously and palpably dangerous that no reasonably prudent man would approve its adoption.”

Insofar as immunity for design defects is concerned, the case of *Smith v. Cooper* held flatly that state employees are generally immune from liability for alleged negligence in planning and designing highways. In *Smith* certain officers and employees of the Oregon State Highway Commission were alleged to have been negligent in designing a tight unbanked curve, painting a center stripe to indicate that traffic was to continue straight ahead, failing to post signs warning of the dangerous condition of the road, and failing to erect a guardrail at the edge of the turn where the fatal accident occurred.

The court held, however, that these allegations charged conduct by the executive branch of the government that should not be reviewed by the judicial branch. The court noted that that the decisions that were made to do or not to do these things were dependent upon considerations that a court or jury should not consider, particularly by hindsight, such as the funds available for the project, the amount of additional land necessary to make a more gradual curve, the cost of the land, the loss of the land for recreational or agricultural purposes, the amount and kind of traffic contemplated, and the evaluation of traffic and safety technical data. In *Smith* however, the court suggested that gross negligence in highway design would not be immunized; for example, officials could not design a road to end at the edge of a cliff.

A troublesome question concerning design immunity is whether immunity, once attached, is perpetual? The general rule is that the reasonableness or adequacy of a plan or design is measured by the standards prevalent at the time of its adoption or approval. California, however, is one jurisdiction in which design immunity has been held not to be perpetual. That is, the state has the duty to review a plan and undertake corrective action where changed traffic or other conditions demonstrate that a design has become dangerous in actual practice. Although previous California decisions had held that design immunity remained intact even though changed circumstances had clearly revealed the defects of the plan, these precedents were reversed by *Baldwin v. State*.

In *Baldwin*, the plaintiff had stopped his pickup truck in the fast or inside lane of traffic in order to make a left turn. While stopped there, his truck was struck from the rear by another northbound vehicle, and knocked into southbound traffic, where the truck collided with another vehicle. The plaintiff alleged that the state was negligent in the design of the intersection because of the absence of a left-turn lane and of the failure to warn of the dangerous condition.

The evidence at trial established that in the preceding 3.7 years, 42 accidents occurred at the crossing, causing four deaths. Numerous requests, reports and studies had been prompted by the intersection because of the large increase in traffic since the boulevard was constructed in 1942. Despite this showing the state defended on the basis that the plaintiff's action was barred by the state's design immunity statute. The court, however, reversing its earlier position on the perpetuity of design immunity, held that:

“Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that

the plan or design under changed physical conditions has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.”

Of the other states that have considered the question, New Jersey, in a comment to its design immunity provision has stated that design immunity is perpetual; Kansas courts hold that design must be judged by the standards in existence at the time of the plan’s adoption. One New York decision suggested that there is a duty on the part of the public entity to correct a highway design if it is shown later that changed conditions have rendered the design hazardous in actual use. Although a few jurisdictions (California or New York) may require the highway department to review a plan or design where there are changed conditions, no cases have been found imposing this duty on individuals such as highway officials and employees where they are sued personally.

## HIGHWAY CONSTRUCTION LIABILITY

Where a claim arises out of negligent highway construction, the state will want to defend again as the basis that the negligence is immunized because of the discretion vested in the department; however, negligent construction is more likely to result in liability.

The cases appear to establish three general rules where a claim arises out of negligent construction :

- (1) If the plan or design itself dictates the specifications, schedules, or details of the operation. . . . which, when carefully adhered to, give rise to the claim, the discretionary defense *is* applicable;
- (2) If there is wrongful deviation from, or negligence in carrying out, the design, specifications, schedules, or other details or operation set forth in the overall plan, the discretionary defense is *not* applicable; or
- (3) If the overall plan is only general in terms and silent as to some details, there is a conflict of view as to whether the discretionary defense applies if the remaining details are supplied, negligently, at the time of construction.

Three highway cases involving negligent implementation of a plan or design are *McCauley v. State*, a New York case, *Cameron v. State*, a California case, and *State v. Abbott*, an Alaska decision. In *McCauley*, the decedent skidded through the space between roadside guardposts and plunged over a steep bank into a river. The court held that the

state had a duty to protect against the danger presented by the steep bank that was not met where the positioning of the guardposts did not conform to the contract plans and were far enough apart to permit the decedent's car to pass between them. Thus, the deviation from a plan or design, or the negligent execution or construction of the design, is evidence that the state has not exercised reasonable care.

Another exception to design immunity is presented where the highway in actual use has a design feature that was not approved in the overall plan or design of the highway. In *Cameron v. State*, plaintiff's automobile went out of control on an S-curve that the court found to be a dangerous condition because of an uneven superelevation. The state was not protected by its design immunity statute, because the uneven superelevation was not an included feature of the highway design.

In the case of *State v. Abbott*, the negligent execution of a policy-level decision was not protected or immunized by the discretionary function exemption in the Alaska Tort Claims Act. Plaintiff was severely injured when the car in which she was riding skidded out of control on a sharp curve and struck an oncoming truck. At the time of the accident, the road was covered with ice and had not been sanded in accordance with the state's standard operating procedure. The court held the department liable, because once the state made the decision to provide winter maintenance, the program could not be implemented negligently. The court stated:

“Once the initial policy determination is made to maintain the highway through the winter by melting, sanding, and plowing it, the individual district engineer's decisions as to *how* that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision. Once the basic decision to maintain the highway in a safe condition throughout the winter is reached, the state should not be given discretion to do so negligently. The decisions at issue in this case simply do not rise to the level of government policy decisions calling for judicial restraint. Under these circumstances the discretionary function exemption has no proper application.”

## HIGHWAY MAINTENANCE LIABILITY

Where a claim arises out of negligent *maintenance*, the state or public official or employee is most likely to be held liable. The cases dealing with the maintenance area, however, seem to recognize some immunity for maintenance planning where the individual officer or

employee is sued personally. Thus, where maintenance activity gives rise to a claim against a public official or employee, the courts hold that the individual is not liable for the exercise of discretion in deciding the need for repairs, the time and place of making repairs, the materials to be used, or the method of making repairs. The courts have held public officials and employees liable for ministerial acts such as leaving open culverts across a highway or failing to warn of and guard against open excavations. Moreover, the operation of motorized vehicles is generally held to be a ministerial function.

As I stated, the discretionary function exemption construed in state liability cases is not so broad. Because maintenance planning is not thought by the courts to be a true exercise of discretion in the sense of evaluating and assessing basic policy factors, the performance of maintenance tasks is considered to be low level, operational-level activity. It does not matter if the maintenance duties require the exercise of some discretion such as the choice of materials to be used or the time of making repairs. Thus, states have been held liable for negligence in locating road signs and center stripes; for the decision as to the type of highway barrier to be used; and for the allocation of men and materials required to remove snow and ice from the highway. All were held to involve operational-level functions that were not protected by the discretionary defense. Because maintenance is viewed as routine house-keeping, low level, operational-level activity that is not discretionary in nature, states are most likely to be held liable for negligent maintenance. In sharp contrast, some personal liability cases recognize that maintenance planning, like design, involves the exercise of discretion.

## SUMMARY

To summarize briefly, the matter of tort liability of state highway departments for design, construction, and maintenance negligence has received varying treatment by the courts. Most jurisdictions recognize an exemption from liability for negligence in the performance of or failure to perform, discretionary activities. Where highway operations are at issue, the question often becomes whether the activity or decision involved falls within the exemption from liability for discretionary functions or duties.

The cases generally hold that the design of a highway is discretionary, because it involves high-level planning activity with the evaluation of policy factors. Moreover, design functions, considered to be quasi-legislative in nature, are usually immune from "second-guessing" by the courts, which are inexpert at making such decisions. Design

immunity statutes represent a further effort by legislatures to immunize governmental bodies from liability arising out of negligence or errors in a plan or design where the same was duly approved under current standards of reasonable safety.

The courts have noted exceptions to design immunity: (1) where the approval of a plan or design was arbitrary, unreasonable, or made without adequate consideration; (2) where a plan or design was prepared without adequate care; (3) where it contained an inherent, manifestly dangerous defect or was defective from the very beginning of actual use; and (4) where changed conditions demonstrate the need for additional or remedial state action. The latter duty to review a plan or design because of changed conditions has not been applied, to my knowledge, thus far in suits against highway officials and employees.

Negligent construction is not likely to be immunized by reason of the discretionary defense, particularly where the condition deviates from the approved plan or design or where there is negligence in implementing the plan or design, such as by introducing a feature never considered in the design phase. Construction negligence may be protected from liability where the plan or design specifies in detail how a feature is to be completed and the specifications, carefully adhered to, give rise to the injury.

Negligent maintenance is least likely to be immune from liability. Courts tend to consider this phase of highway operations as routine housekeeping necessary in the performance of normal day-to-day government administration. Highway maintenance is exercised at the operational-level, and even though discretion to some extent is involved, the discretionary decisions to be made are not policy-oriented. Only in suits against public officials and employees have the courts recognized that maintenance planning requires the exercise of discretion.