

Historical Synthesis of Liability Arising out of the Design and Maintenance Function

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INTRODUCTION

The problems which arise out of the possibility of liability from highway defects appears to be of recent vintage. But, in reality, these are old problems which have taken on new meaning as a result of two simultaneous occurrences. The first of these is the erosion of the doctrine of sovereign immunity and the consequent vulnerability of highway people to suit, and the second is the outcry by those factions that imagine all highway personnel to be involved in the process of ecocide.

The long journey in the womb of justice to which the maintenance people have been subjected has not prepared them any better for the blinding flash of the sword of liability than the amniotic fluid protecting the infant in its mother's womb has prepared it for the shrill din and bright light of entry into the world.

So suddenly, the men of the law have been grappled onto as the benefactors of rational thought. We hear statements like, "If anyone can counter the thrust of liability suits, surely it is the lawyers." But countering the thrust of liability suits is not, nor should be, the only function of the lawyer in the field of highway law. We have an opportunity now to turn this colloquium of like-minded people reaching for answers into a tightly meshed and integrated system with a purpose—that purpose being to fulfill the desires of the traveling public and to do so in a safe, orderly and just manner.

The safety is your part, the order is that of the general highway administrators, and the justice is ours. Some of the things I shall say might give offense to my brothers-in-law—liability suits feed a lot of people, therefore, any tampering with the status quo is bound to bring squeals of anguish. But if our duty is to be fulfilled, we will have to rise above the pedestrian inclinations of parochial interests. A new system must be developed.

In line with this thinking, I recently approached a colleague at the Highway Research Board. He conceived of the lawyers as the movers and shakers of the political system and felt that draft codification could be very useful in solving some problems endemic to the maintenance area. Well, it may be that lawyers are the movers and shakers of the legislative system, but if this is so, I contend that it is not in their function of lawyers *qua* lawyers. It is the lawyer as lobbyist, the activator who acts upon the lawyer as representative, the activated who formulates and enacts draft legislation. If this is the answer—a massive assault on the legislative system—then the people you need at your meetings, schools and conferences are the public relation men. As fear of liability has a way of spreading into paranoia, more and more money will be necessary—in fact in direct proportion to the decrease in available time and it is beyond my comprehension to perceive the source of such funds to the average state highway department.

Out of all else that is learned in a school of law, three things explicitly remain for life, and one thing implicitly remains. First, let us discuss the explicit lessons. Of primary importance for us today is the deep pocket theory. The mutual contradictions of space-age society, a growing affluence accompanied by a stasis in the relative wealth of the average man, did not fail to leave their mark on the theorists of the early sixties. And so in keeping with the increasing tendencies to operate the government on welfare lines, a formula was born which would protect against a buckling of individual resources by financial pressures in times of crisis or emergency. The formula reads something like this: society has far more resources than the individual citizen; it is unfair to make the individual citizen cope with financial emergency by himself; hence, society should be made to help the citizen. Or put more simply, the deepest pocket should foot the bill—the deepest pocket being the state.

The second lesson of the law fits perfectly at this point. This lesson holds that you should never let the camel get his nose under the tent. To put it in the vernacular and tie it in with our previous discussion, once someone gets a nose into the deep pocket, the head is sure to follow.

But before we are accused of rank pessimism, let us discuss the third lesson. This lesson states that whatever one lawyer writes, another can unwrite; so there is still light at the end of the tunnel. Why then haven't more solons of the bar stepped forward? A simple reason—the real money is in doing the suing. Those people advancing the theories of liability prevalent today are the sharp ones. No matter what

their motivations, they get the job done. The offices of the states' Attorneys' General are overworked and understaffed today. In addition, the majority of their personnel are the young lawyers learning their trade and preparing to step over the line to the opposite side. While this is a generality and generalities are always unfair, I have libeled no one and merely attempt to point out some reasons for the current state of affairs.

I also mentioned an implicit lesson and this is the most important of all. The law exists to protect the status quo and, if anyone says differently, he is a dangerous man. I don't mean this in as harsh a sense as it sounds, certainly not in the "new left" sense. In the area of tort liability, I feel strongly that everyone should receive just recompense for any injury received at all, but as a taxpayer, I fully realize that it is not in my interests to provide an ever-expanding larder for profiteers, middle-men, and shysters. And I use that term to connote the absolute denigration which it signifies. Thus, the law must operate in this area to ensure just recovery when legitimate, but also, to protect the citizen as taxpayer, and this usually means the status quo.

SOVEREIGN IMMUNITY

The initial consideration in any study of liability resulting from tort claims is that of governmental immunity. This concept finds its origins in early English common law. At its inception, the doctrine was interpreted to hold that "the King can do no wrong", or basically that the King could not be the object of any suit arising out of the wrong doings of his officers without his consent.

This doctrine has been adequately discussed in other sources and it is assumed that the reader has some knowledge of its philosophical and practical applications. The doctrine was adopted into the American judicial system with the state replacing the King as the beneficiary of immunity. There are several early cases dealing with this adoption and focusing on the necessity for the state to remain above the law which it brings forth.¹ We will not here attempt to enter into a discussion of the foundations of the doctrine, either those founded in jurisprudence or in economics.

Criticism has accompanied the doctrine for the better part of a century and, although much maligned and attacked, it retains vitality to this day. The law has been called obsolete and worse, and it ap-

¹ See: *U. S. v. Lee*, 106 U.S. 196 (1882) and *Kawananakoa v. Polyblank*, 205 U.S. 353 (1907).

peared that the case of *Stone v. Arizona Highway Commission*, 381 P.2d 107 (Ariz., 1963), sounded the death knell for the doctrine as it related to highways.

The *Stone* case was an action for wrongful death and injuries suffered in an auto accident. The court accepted the facts as the plaintiff had set forth. The facts stated that, as the plaintiff approached a highway intersection on which recent construction efforts had been undertaken, markings and signing, which had been located at that spot directing traffic to turn left on a curve in the old road, had not been removed. The new road had no such curve and the plaintiff was misled into turning left which resulted in the vehicular collision which is the subject of this suit.

The lower court had dismissed the case on the basis of governmental immunity and in reviewing this decision, Justice Lockwood of the Arizona Supreme Court said rather summarily,

We are of the opinion that when a reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.—

The court looked to the origins of the immunity doctrine and discussed its applicability to cities, county hospitals, and school districts. It is of special importance to us here, however, that the court noted the lessening stringency of the doctrine as regards cities. The reason given by the court is the distinction between ministerial and governmental duties, of which we shall have more to say later.

The court further referred to other cases which dealt with sovereign immunity and participated in the doctrine's denigration.² The court then discussed the theory of *respondeat superior* as the reasoning for absolving individual highway commission employees of liability and imputing such to the state.

The *Stone* decision appeared to be the culmination of a long and persistent fight to do away with sovereign immunity. But the doctrine is dying hard.

² See: *Molitor v. Kaneland Community Unt. Dist. No. 302*, 163 N.E. 2d 89 (1959); *Muskopf v. Corning Hospital Dist.*, 359 P.2d 457 (1961); *Williams v. City of Detroit*, 111 N.W. 2d 1 (1961); *Holytz v. City of Milwaukee*, 115 N.W. 2d 618 (1962); and *Spanel v. Mounds View School Dist.*, 118 N.W. 2d 795 (1962).

A brief discussion of the state of the doctrine at present will serve to give the reader a good view of the implications involved. As regards counties, there are several applications of the doctrine. Generally, however, the courts have interpreted counties to be the political arms of the state, and when acting in that capacity they have been protected by the state's sovereign immunity. There have also been acknowledgements that county operations as related to highways, i.e., maintenance, are in the realm of governmental functions and protected from liability.³ But it has also been held that liability will ensue where county negligence is present, irregardless of the nature of the function.⁴

Counties are also affected through a statutory waiver of a state's immunity and liability has been vested statutorily in other instances.

State highway administrative bodies are affected only through a statutory waiver of immunity and absent such the protection of immunity remains strong.⁵ That the law is changing rapidly in this area is pointed out in the following cases. In *Bazanac v. State, Department of Highways*, 218 So. 2d 121 (La., 1969), the Court of Appeals of Louisiana held that a statute which authorized the state highway department to sue or be sued did not waive tort immunity. But in *Herrin v. Perry*, 222 So. 2d 649, (La., 1969), the Supreme Court of Louisiana ruled that a statute which authorized the highway department to sue or be sued did waive sovereign immunity.⁶

³ But as an example of change see: *Klepinger v. Board of Commr's of County of Miami*, 239 N.E. 2d 160 (Ind., 1968), where bridge repair work was held to be ministerial and where negligence resulted in liability.

⁴ *Rice v. Clark County*, 382 P.2d 605 (Nev., 1963).

⁵ See: *Thomas v. Baird*, 252 A.2d 653 (Pa., 1969), where the Supreme Court of Pennsylvania held that the Turnpike Commission was an instrumentality of the state engaged in a governmental function (where a collision involved a highway truck stopped on a highway) and hence was immune from liability for employee negligence; *Johnson v. Callisto*, 176 N.W. 2d 754 (Minn., 1970), where the Supreme Court of Minnesota was asked to reject by judicial fiat the doctrine of sovereign immunity. The court refused to do so on the grounds that any change would have to be legislative.

⁶ For a further discussion of sovereign immunity in the recent past, see the following: *Arnold v. Shumpert*, 217 S. 2d 116 (Fla., 1968); *Lusietto v. Kingan*, 246 N.E. 2d 24 (Ill., 1969); *Lowndes County v. Mississippi State Highway Commission*, 220 So. 2d 349 (Miss., 1969); *Phillips v. Town of Forth Oglethorpe*, 162 S.E. 2d 771 (Ga., 1968); *Rappe v. Carr*, 167 S.E. 2d 48 (N.C., 1969); *Shealor v. Ruud*, 221 So. 2d 765 (Fla., 1969).

Also note for special attention: *Rogers v. State*, 459 P.2d 378 (Hawaii, 1969). An action was brought against the state to recover for injuries received in an automobile accident allegedly due to the state's negligence in the placement

On the federal level, sovereign immunity was waived in some instances by the *Federal Tort Claims Act*, Title 28 U.S.C.A. 1346. There is a key section of this act, however, 28 U.S.C.A. 2680, which deals with exemptions from such consent to suit. The act states:

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

- (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a

This section has special importance to us for the simple reason that it excludes discretionary acts from the liability waiver. Traditionally, discretionary has been used synonymously with governmental which is also excluded from liability and many maintenance and engineering functions have been considered as being governmental acts of discretion.

We have discussed heretofore the implications of the concept of sovereign immunity. However, further delineation is necessary prior to looking at specific cases. At common law, liability, in light of sovereign immunity, was dependent upon whether an act could be considered as falling within the "governmental" sphere of activities, or whether it was merely "ministerial" in nature. Likewise, even with the coming of the *Federal Tort Claims Act*, the discretionary exemption provisions, Title 28 § 2680, *supra* the ultimate question would focus on the governmental or proprietary question.

In light of this consideration, it behooves us to clarify the distinction between "governmental" and "ministerial" functions. Throughout this discussion, as in the case law and literature available upon the subject, the term "proprietary" is used interchangeably with "ministerial".

of traffic signs and the painting of the center line stripes. The state contended that the matter was not actionable by reason of the provisions of an exception contained in the State Tort Liability Act which excepted the state from liability for the act of its agents and servants involving the performance of a "discretionary" function or duty. The court held that the placement of traffic signs and the painting of road stripes was an "operational" function, rather than a "discretionary" function, and hence that the state was not exempt from suit under the exception contained in the Tort Liability Act.

statute or regulation, whether or not such statute or regulations be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.—

Before looking at the case law extant on the subject, we looked to *Black's Law Dictionary*, Revised Fourth Edition, in order to obtain a working concept of the phrases involved. *Black's* provided us with the following:

Governmental act—an act in exercise of police power or in exercise of legislative, discretionary, or judicial powers conferred in municipality for benefit of public.

Ministerial duty—one regarding which nothing is left to discretion—a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist.—

The cases are much too numerous to cite which discuss the distinction and by far the great majority concern themselves with non-highway matters.⁷ We will, however, discuss here a representative highway case which depicts the state of the proposition in question.

Prior to this, however, it must be made clear that although the general rule has long held that there is no vested liability for damage occurring as a result of a governmental activity, there is room for discussion as to what exactly qualifies as such an activity. For example, the operation of a state ferry boat as part of the highway system is considered to be governmental,⁸ the protection and promotion of game by the state is considered governmental,⁹ and the maintenance of insane asylums is considered governmental.¹⁰ These examples are used mainly to give the reader a flavor of the breadth of governmental activities.

The case of *Fonseca v. State*, 297 S.W. 2d 199 (Texas, 1957) discussed an action for injuries which was brought against the state as a result of a collision between an auto and a state highway department maintenance truck. The court said:

In *Brooks v. State*, supra, it was expressly held that the location, construction and maintenance of state highways by the Texas Highway Department is a governmental function. It is equally well settled that the state is not liable for the torts and negligence of its officers, agents or servants or employees engaged in the performance of a governmental function, unless it has expressly assumed such authority.—¹¹

⁷ See: 38 *AM. JUR.*, Municipal Corp., §§ 601 et seq., 40 ALR 927, *State's Immunity from Tort Liability as dependent on governmental or proprietary nature of function*.

⁸ *Manion v. State Highway Com'n*, 5 N.W. 2d 527 (1942).

⁹ *Commonwealth v. Masden*, 175 S.W. 2d 1004 (1943).

¹⁰ *Welch v. State*, 148 S.W. 2d 876 (1941).

¹¹ *Amato v. City of New York*, 268 F.Supp. 705 (N.Y., 1967); *Barnum v. State*, 435 P.2d 678 (Wash., 1967); *Krzyształowski v. Fortin*, 230 A.2d 750

So then, it can be postulated that the general rule holds true, that is, that where a division of government performs an act which is within the "governmental" sphere it will be protected from liability. But when the action in question falls within the "ministerial" function, liability will generally ensue.

GENERAL DUTIES AND LIABILITY AS A RESULT OF SLIPPERY CONDITIONS

In this section we will briefly discuss the general duties of highway personnel and then take a specific case example of the application of the law thereto. Rather than go into each individual requirement of the law, such as barricades, lights and warning signs, I have decided to discuss in detail the ramifications of ice, snow and water on the highway.

Basically, the law of maintenance is that a highway traveler lawfully using the highway is entitled to have that highway maintained in a reasonably safe condition. But it is just as elemental to note that the state does not function in the role of guarantor as regards safety, nor does it insure against injury resulting from obstructions or defects in the highway unless specifically required to do so by statute.

It is of primary importance then to establish that the one significant duty of maintenance operatives, in the absence of statute law to contrary, is to exercise reasonable diligence to put and keep highways in a *reasonably safe condition* for the uses to which they are subject.¹²

While this principle was established some time ago and the intervening years have seen an increased traffic flow and consequent altered traffic patterns, there has been little alteration in this duty to exercise ordinary care and prudence under existing circumstances.

The duty to use proper and reasonable care allows wide latitude in the exercise of administrative discretion. Continuing supervision and inspection are axiomatic, but it is also axiomatic that there is no liability for the consequences of unusual or extraordinary occurrences.

(N.H., 1967); *Brown v. City of Omaha*, 160 N.W. 2d 805 (Neb., 1968); *Lewis v. State*, 289 F.Supp. 246 (Vt., 1968); *Sheffield v. Turner*, 445 P.2d 367 (Utah, 1968); *Smith v. Clintondale School Dist.*, 165 N.W. 2d 332 (Mich., 1968); *Carroll v. Kittle*, 457 P.2d 21 (Kan., 1969); *Maki v. City of East Tawas*, 170 N.W. 2d 530 (Mich., 1969); *Perkins v. State*, 251 N.E. 2d 30 (Ind., 1969).

This list is not meant to be exhaustive, but is illustrative of the generality of the rule.

¹² *Strickfaden v. Greencreek Highway Dist.*, 248 P. 456 (Idaho, 1926).

In the case of *McCullin v. State, Department of Highways*, 216 So. 2d 832 (La., 1968), the plaintiff was injured in an accident arising out of an alleged defect in the graveled road. There was adequate testimony in the case from which the court could find regular maintenance and inspection. In addressing itself to this point, the court said:

The State of Louisiana owes to the public a duty to maintain its highways so they will be in a reasonably safe condition for the traveling public at all times. This duty encompasses an obligation to have an efficient and continuous system of inspection of the highways and bridges. The highway department, however, is not required to maintain a perfect condition of repair or system of inspection, but its officers and employees are required to use ordinary and reasonable care in order to insure that the highways and bridges will be in a reasonably safe condition. (cite omitted).

This duty to use ordinary care referred to by the court has been interpreted to involve an anticipation of defects which could result naturally from use or climatic conditions and in the absence of anticipation thereof, liability may well ensue.¹³

The case of *Shaw v. State*, 290 N.Y.S. 2d 602 (N.Y. Ct. Cl., 1968), involved a wrongful death claim which resulted from an accident in which the occupant of a stranded car was killed when he stood conversing with the occupants of another vehicle which had stopped partially on and partially off the highway and which was struck by an oncoming vehicle. The plaintiff claimed negligence in the maintenance of the highway. There was testimony that there was snow on the road and that it was cold, but it had not snowed on the day of the accident. There were gusts of wind and conditions were similar throughout the immediate area.

In holding that the state was not negligent, the court said:

—In the exercise of reasonable care and maintenance *the state is not required to go to the limits of human ingenuity to accomplish safety of the highway.* (cite omitted). The brief period of time during which the snow condition due to weather and gusty wind conditions had existed was not sufficient to constitute constructive notice to the state which imposed negligence on it for failure to sand. Mere presence of snow or ice on the highway in the wintertime and the mere fact that a vehicle skidded thereon do not constitute negligence on the part of the state. (cite omitted). Under the weather conditions prevailing that afternoon and early evening there was an element of hazard which was obvious and reliance could not be placed on the presumption of the safety of the highway. (cite

¹³ The general rule is that the frequency of inspection depends on the condition, location and circumstances surrounding the alleged cause of the injury.

omitted). The cause of the accident cannot be attributed to the state under the facts herein.— (emphasis added)

It has further been held that the discharge of the duty in accordance with generally accepted engineering standards and practices meets the test of reasonable care.¹⁴

In the January 1971 issue, the magazine *Public Works* discusses a case which was in the area of liability for ice and snow on the highway. This particular case, *Walker v. County of Coconino*, 473 P.2d 472 (Ariz., 1970), which was decided in August 1970, is interesting because it presents a complete discussion in capsule form of the ramifications of the legal aspects in this area.

Stated briefly, the fact situation involved a claimant motorist who after traversing a rise and proceeding on a downhill curve encountered a patch of ice whose dimensions were approximately 100 yards by the width of the highway. The claimant skidded thereon and came to rest with his vehicle protruding into traffic whereupon he was injured when an oncoming vehicle struck his vehicle.

There were no barricades present nor was there any evidence of salt, sand, gravel or cinders on the ice. The day was clear and there had been no storm for two days previous to the accident. There was no evidence that the ice was the result of anything but a natural accumulation.

The court held that no recovery should be granted. There was no evidence of notice, either actual or constructive and even if constructive notice were present, there was no evidence of sufficient time to ameliorate the condition, nor any evidence as to what precautionary measures would have been reasonable.

The crux of this case is the odyssey of the court in formulating its reasoning. In distillate form, the rule of law which emerges from the case is that if a roadway should suddenly and without fault of the governmental body, come by any means into a condition dangerous to travel, the governmental body is liable for damages occasioned thereby if the governmental body fails to act in a reasonably prudent manner under the circumstances. *See in this regard: Babcock v. State*, 191 N.Y.S. 2d 783 (N.Y., 1 1959); *Stern v. State*, 224 N.Y.S. 2d 126 (N.Y., 1962); and *Freeport Transport, Inc., v. Commonwealth, Dept. of Hwys.*, 408 S.W. 2d 193 (Ky., 1966).

¹⁴ *Legg v. City of New Orleans, Department of St. Div. of Tr. E.*, 219 So. 2d 798 (La., 1969).

The general rule which is applicable in slippery condition cases can be summarized as follows: The mere facts of the presence of ice on the highway and a car skidding thereon does not impose liability on the governmental body *per se*. There need be evidence of a cognizable duty and failure to perform that duty before liability can be imputed. As we can see, this general principle is an outline form of the rule of law derived from the *Walker* case. See: *Edwards v. State*, 159 N.Y.S. 2d 589 (N.Y., 1957); and *Gladstone v. State*, 256 N.Y.S. 2d 493 (N.Y., 1965).

There is a split of authority in this case. The *Walker* court discussed a 'natural accumulation of ice' on the highway as being one which, "—occurs where rain or snow falls on the roadway or runoff from thawing snow falls across the street, and subsequently freezes causing ice to form on the road. In such a case the moisture on the roadway results wholly from the elements and is not caused by any act of the governmental body."

So then, liability attaches in the following circumstances:

- (1) ice has been formed by pushing or some other method into diverse shapes or such size and location so as to constitute an obstruction or dangerous condition apart from mere slipperiness. See: *Christo v. Dotson*, 155 S.E. 2d 571 (W.Va., 1967); and *Boylard v. City of Parkersburg*, 90 S.E. 347.
- (2) the condition is unusual in comparison with general conditions (isolated patches). See: *Babcock, Supra.*; and *Jennings v. U.S.*, 207 F.Supp. 143 (D.C., Md., 1962).
- (3) actual or constructive knowledge exists. See: *Babcock, Supra.*; *Jennings, Supra.*; *Stern, Supra.*; *Freeport Transport, Supra.*; and *Wheeler v. State*, 156 N.Y.S. 2d 660 (N.Y., 1956).
- (4) opportunity was present after notice to repair or remedy the condition.

At this point the court cites the case of *Weisner v. Mayor and Council of Rockville*, 225 A.2d 648 (Md., 1967), a case which discussed liability arising out of ice and snow conditions in general terms. Maryland law as laid out in this case conforms to general law in that a person has a right to lawfully use the public thoroughfares and to expect that such will be reasonably safe for passage. Of course, this does not operate in such a manner as to make the government an insurer of safe passage. In citing the earlier Maryland case of *Leonard v. Lee*, 62 A.2d 259 (Md., 1948), the court said: "—Where there are dangerous obstructions or depressions of which *the municipal authorities have actual notice or which have existed long enough to give constructive notice*, a municipality is liable if a person is injured because

of such condition.—” The court in this case further refers to *McQuil-
lan*, § 54.114 pp. 425-427, wherein it was stated that the mere knowl-
edge of a heavy snowfall, or a freeze, does not ordinarily mean notice
of a particular danger.

Hence, the position of the Maryland courts, as summed up in *Weis-
ner*, is:

In dealing with snow and ice cases and the obligation of a
municipality to keep its public ways clear with respect thereto, this
court has been conscious of the need to protect the public from
callous and indifferent municipal administration with regard to such
conditions. —However, it has also been sensate to the undesirable
results which may follow if a Pandora’s Box is opened by exposing
a municipality to liability not kept within reasonable bounds.

Underlying these general rules of liability is the doctrine of reason-
ability—the standard being that of the reasonably prudent man. This
standard has long been established in Arizona as set forth in *City of
Phoenix v. Clem*, 237 P. 168 (1925). In summary version, the stand-
ard is much the same as that discussed in the Maryland cases. The
court also cited the case of *Klatt v. Milwaukee*, 10 N.W. 162, 40
Am.Rep. 759, from which the *Walker* case derived its rule of law.

In applying this standard, some courts have ruled *as a matter of
law*, that there is no liability for natural accumulations regardless of
notice or length of time and regardless of whether conditions are gen-
eral or isolated where mere slipperiness is the only danger presented.
See: Commonwealth v. Brown, 346 S.W. 2d 24 (Ky., 1961), wherein
ice had been on the highway with highway department knowledge for
36 hours prior to an accident. The department had in no way con-
tributed to the condition—it simply had not cleared the snow or ice
at the locus of the accident. The court here held that there was no
affirmative duty on the part of the state to remove snow and ice even
though the state had assumed that responsibility on a regular basis for
years. This was considered to be a gratuity.

Additionally, based on the recognition that a governmental body
cannot control the falling of snow and ice and the freezing thereof—
it is felt in some quarters that it would place an impractical burden
on the government to require it to keep its highways free of ice in
the winter. *See: Nebel v. City of Pittsburgh*, 126 A.2d 449 (1956).
Also see: City of South Bend v. Fink, 219 N.E. 2d 441 (Ind., 1966);
Eckerlin v. State, 184 N.Y.S. 2d 778 (N.Y., 1959); *Dodd v. State*,
223 N.Y.S. 2d 32, *Tetreault v. State*, 269 N.Y.S. 2d 812 (N.Y.,
1966); and, the dissenting opinion of Justice Montgomery in *Common-*

wealth v. General & Excess Insurance Co., 355 S.W. 2d 695 (Ky., 1962).

But, the *Walker* court held that to limit liability according to the obstruction philosophy reiterated above is unreasonable. According to the court, "Ice in its natural state of slipperiness appears to this court to be at least as dangerous to travel as ice which has been pushed or trampled into humps or ridges." Thus, the court advances the doctrine of modification by relevant circumstances, these being, the size of the road network; the location of danger in isolated rural sections; and the availability of money, manpower, and machinery. The court also feels that certain minimal precautions are required, among them being the posting of flares, barricades or other warning signs near the danger area.

PERSONAL LIABILITY OF HIGHWAY OFFICIALS

Liable

There has been a continuing confusion in this area as to the personal liability of highway officials for injuries suffered as a result of negligence in the performance of ordained duties. There has been ample attestation to the seemingly irreconcilable conflict involved in the judicial process, but enough material exists in this area to carve out a general majority rule, with certain modifications, as well as minority rule. Stated in its simplest form, the majority rule establishes that personal liability will accrue to a public official, but as a rule only where the duty is ministerial.¹⁵ Governmental acts are exempt as we discussed earlier. The extant case law in this area goes back into the 1800's and we will discuss some of these early decisions. But right now I'd like to mention some recent applications of the law by liability minded jurisdictions. In a recent Oregon case, the courts held that although county employees may be liable for their negligent acts, the highway commissioners are not subject to the doctrine of *respondet superior* for those actions. The court further held that a county engineer could be held personally liable where there is a duty to supervise and order specific details and where such duty is exercised in such a manner as to create a dangerous situation.¹⁶

¹⁵ *Mathis v. Nelson*, 54 S.E. 2d 710 (Ga., 1949); *Tholkes v. Decock*, 147 N.W. 648 (Minn., 1914); *Smith v. Zimmer*, 125 P. 420 (Mont., 1912); *Ham v. Los Angeles County*, 189 Pac. 462, 468 (Cal., 1920); *Palmer v. Marceille*, 175 A. 31 (Vt., 1934); *Robertson v. Monroe*, 109 A. 495 (N.H., 1920).

¹⁶ *Ogle v. Billick*, 453 P.2d 677 (Ore., 1969).

An important Pennsylvania case which deserves discussion in some detail is the case of *McSparran v. H. J. Williams Co.*, 249 F.Supp. 84 (Pa., 1965). This case involved a suit against a county superintendent of highways and his successor upon the theory that they owed a statutory duty as well as a common law duty towards the plaintiff's decedents, of generally maintaining the highway in a safe and proper condition.

It was alleged that a breach of duty in maintaining and supervising the repair of a sinkhole in a highway which was allegedly the instrumentality of death, led to the accident.

The main issue was delineated by the court as being whether the doctrine of sovereign immunity in Pennsylvania precludes an action against the defendants for their individual torts.

Since the highest state court had not ruled on this issue, which would have been precedent for this federal court under the doctrine in the *Erie* case, the federal court was left to decide the rule of law.

Looking to the inferior state courts, in the case of *Simonson v. Martin*, 35 Pa. Dist. & Co. R.2d 1 (C.P.Pike County, 1963), the judge held that a plaintiff has the right to maintain a trespass action to recover damages for negligent performance of official duties by state highway officials in their individual capacities and such action would not be barred by sovereign immunity. This court further based its reasoning on the case of *Meads v. Rutter*, 122 Pa.Super, 64, 184 A. 560 (1936), where the court used the following language:

An employee or officer of the commonwealth is not a member of a privileged class—exempt from liability for his individual tort. It would be unfortunate, indeed, if one, who has sustained a wrong by an individual, would be remediless and not able to sue him the same as any other citizen because he was an agent, officer or employee of the commonwealth. Like all others, he must personally answer for his wrongful acts, as the doctrine of respondeat superior does not prevail against this commonwealth. The rule that a state is not liable for the negligence or misfeasance of its officers or agents, except where the legislature voluntarily assumes liability, is well recognized (citations). 'The immunity of the state does not extend to its officers, and as a general rule state officers and agents are personally liable in tort for unauthorized acts committed by them in the performance of official duties.' (citations).

That reasoning was accepted by this court in holding that defendants could be sued as individuals for their alleged negligent acts. Such action, in the eyes of the court, is not precluded by the doctrine of sovereign immunity.

Along these lines, a Nevada court had earlier decided that as sovereign immunity did not extend to the county in the negligent operations of roads, it would not extend to individual county officials.¹⁷

A 1960 case in Illinois¹⁸ involved an action for wrongful death against the county superintendent of highways and the road commissioner for the township. They were charged with negligence in failing to properly warn, maintain or repair a road, which negligence resulted in the decedent's demise.

The court looked to precedent and stated that prior to *Molitor v. Kaneland Community Unit Dist., No. 302*, 163 N.E. 2d 89, the cases of *Town of Waltham v. Kemper*, 55 Ill. 346 and *Nagle v. Wakey*, 43 N.E. 1079 had denied recovery on the grounds of governmental purpose. But in *Molitor*, the court had said that the basic concept underlying tort law was that liability follows negligence. Accordingly, and in the absence of any reason why liability should not be attached to the individuals here, the court refused to dismiss the case but remanded it so that the defendants could answer the allegations. However, a later Illinois case, discussed in the next section, effectively counters this case.

But the earliest applications of liability in these cases arose from an implication of the powers and duties of the highway commissioners under general law.¹⁹ Hence, the early rule of law was that liability vested in power and control over roads,²⁰ with the further proviso that there be present notification of the defect.²¹

Finally, the early courts evinced an unbelievable sophistication in this area as shown in the case of *Wurzbarger v. Nellis*, 130 Pac. 1052 (Cal., 1913), where the court differentiated between the degree of care to be exercised by a road supervisor in a rural district as compared to a city district. In citing *Eliot on Roads* (3d.Ed) § 497, the court said:

—Care is proportioned to the danger that may be reasonably apprehended, and duty is measured by the means, opportunities, and obli-

¹⁷ *Rice v. Clark County*, 382 P.2d 605 (Nev., 1963).

¹⁸ *Kitto v. Wattleworth*, 164 N.E. 2d 817 (Ill., 1960).

¹⁹ *Baltimore County Com'rs v. Wilson*, 54 A. 71 (Md., 1903).

²⁰ *Black v. Guernsey Co.*, 31 Ohio Cir. Ct. 659 (Ohio, 1909); *Smith v. Wright*, 24 Barb. 170 (N.Y., 1857); *Hover v. Barkhoof*, 44 N.Y. 113 (N.Y., 1870); *Warren v. Clement*, 24 Hun 472 (N.Y., 1881); *Doeg v. Cook*, 58 P. 707 (Cal., 1899); *Anne Arundel County Com'rs v. Carr*, 73 A. 668 (Md., 1909).

²¹ *Theulen v. Viola Twp. of Audubon County*, 117 N.W. 26 (Iowa, 1908).

gations supplied and imposed by the law upon the officers to whom is committed the care and control of the public ways of the state. It would be plainly unjust to measure the obligations and duties of officers in charge of rural highways by the rules which govern officers placed in charge of the streets of a town or city. What would be care and diligence on the part of the one class of officers may often be culpable negligence on the part of officers of the other class.

Not Liable

The minority jurisdictions have advanced many reasons for granting immunity from suit, ranging from no liability in the absence of statute,²² to no liability in the absence of notice,²³ to no liability for the performance of a governmental function.²⁴ But the very earliest decisions were devoid of even these reasons. Case after case stated simply that there was no individual liability for injuries sustained by reason of defective highways,²⁵ especially in the absence of a showing of malice or willful negligence.²⁶ The case of *Templeton v. Beard*, 74 S.E. 735 (N.C., 1912), provides some interesting insights into judicial thinking along these lines. This case involved an action against the commissioners for maintaining a dangerous condition by failing to provide a bridge over a creek.

The court dismissed the action, holding that no action would be against individual board members because there was no charge of malicious or corrupt action, in the absence of which the case involves the exercise of discretionary powers. According to this court, general recognition extended to the fact that in the absence of statutory language to the opposite, even ministerial officers acting on questions properly arising within their jurisdictions are not liable to suit by individuals.

²² *Binkley v. Hughes*, 73 S. W. 2d 111 (Tenn., 1934).

²³ *Sells v. Dermody*, 86 N.W. 325 (Iowa, 1901).

²⁴ *Longstreet v. Mecosta County*, 200 N.W. 248 (Mich., 1924); *Stevens v. North State Motor*, 201 N.W. 435 (Minn., 1925); *Genkinger v. Jefferson County*, 93 N.W. 2d 130 (Iowa, 1958); *Iseminger v. Black Hawk County*, 175 N.W. 374 (Iowa, 1970); *Board of County Com'rs v. Darst*, 117 N.E. 166 (Ohio, 1917).

²⁵ *Worden v. Witt*, 39 P. 1114 (Idaho, 1895); *Garlinghouse v. Jacobs*, 29 N.Y. 297 (N.Y., 1864); *McKenzie v. Chovin*, 1 McMull. 222 (S.C., 1841); *Youmans v. Thornton*, 168 P. 1141 (Idaho, 1917); *Huffstutler v. Crabtree*, 197 Ill.App. 191 (Ill., 1915); *Scovill v. Longe*, 204 Ill.App. 82 (Ill., 1917); *Richardson v. Belknap*, 213 P. 335 (Colo. 1923); *Lynn v. Adams*, 2 Ind. (2 CART.) 143 (Ind., 1850); and *McConnell v. Dewey*, 5 Neb. 385 (Neb., 1877).

²⁶ *Crowder v. Emery*, 206 Ill.App. 562 (Ill., 1917); *Thompson Caldwell Const. Co. v. Young*, 294 F. 145 (N.C., 1923).

In such cases, the officers are clothed with a quasi-judicial capacity and the general principle, as quoted in *Mechem* on public officers, becomes:

The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the quasi judicial officer as well; and it is well settled that the quasi judicial officer cannot be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be.—

Finally, an Illinois case in 1969 presented an intriguing alternative to the vulnerability of government officials occurring through the loss of sovereign immunity. In the case of *Lusietto v. Kingan*, 246 N.E. 2d 24 (Ill., 1969), the appellate court held that the defendant's duty of supervising the maintenance of the portion of the state highway where the fatal accident involved here occurred, was one he owed to the public generally and not to an individual, hence he could not be held individually liable to the plaintiff, and, further, the defendant was protected by the immunity that exists in favor of public officials when performing duties which are discretionary in nature and not ministerial.

The area within the defendant's control covered 240 miles of highway in five counties. He had 30 men under his supervision. He had gone to the scene of the accident subsequent thereto and had personally supervised the repairs. There was evidence that he had known that this section of the highway was in need of repair for a long time.

The surface of the road was marred by potholes—no warnings or barricades were present in the immediate area. The court said:

We believe that the law is clear that a state highway employee may be sued and held individually liable for certain negligent acts committed by him in the course of his employment.—

The court further went on to say:

—a legal duty must exist in favor of the person injured and imposed on the person whose conduct produces injury. In effect this precludes the use of government employment as a shield—

But in this case the plaintiff seeks to impose liability solely on the basis that the defendant is a government employee. The court felt that there was a misconstruction here in trying to impose the state's duty to maintain the highway upon the individual. The individual's duty to supervise was and is a condition of employment. A violation of such, unless coupled with some particular responsibility of which there is also a violation does not lead to the liability of the individual. The court here cited the earlier case of *Nagle v. Wakey*, 43 N.E. 1079, in which

it was held that a duty to an individual might ensue in personal liability, but a duty to the public would not.

Additionally, the court continued that the defendant's duties were not ministerial, but they were governmental in that they required discretion. There is discretion in choosing which holes to fill and which not to fill. All this is done within financial, manpower and equipment limitations. The court then said: "It is a well established principle of the common law that an immunity exists in favor of public officials when they are exercising their official discretion on matters which are discretionary in nature and not ministerial.—"

At this point, the court discusses the principle of the doctrine of public officials immunity.

—the duty to keep highways in repair was a duty which required the exercise of judgment and discretion and that in performing this duty the commissioners were clothed with discretion as to the practicability of making improvements as to the best methods to be employed, they were therefore protected by this theory of immunity.—

It is this theory which the court accepts here. The court further said that although *Molitor v. Kaneland Comm. Unit School Dist.*, 163 N.E.2d 89, abolished governmental immunity it did not alter the doctrine of public officials' immunity. The case of *Kelley v. Ogilvie*, 212 N.E. 2d 279, decided after the *Molitor* decision recognized the doctrine, and since no overt overruling of *Nagle* cited above, in which the doctrine is first expressed, has taken place in the state supreme court, this court accepts the principles of that case as law.