THE
LEGAL RESPONSIBILITIES
OF TRAFFIC AGENCIES

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In order that those charged with traffic management may know what sort of acts or omissions in this field have resulted in damage suits, and what sort of court decisions have been handed down, the following analysis of selected cases is presented. A brief statement of legal principles involved, illustrated by a digest of selected cases and decisions, will, it is hoped, give traffic personnel some idea of what to expect in the future.

A somewhat confusing factor is that the subject matter concerns different activities, different agencies, and different jurisdictions. And legal rules vary from jurisdiction to jurisdiction. The interaction of these many and various factors makes this field of law something of a judicial wilderness. Principles and precedents presented here, however, should help guide those who must make their way through it.

First, it is well to understand the terms courts use. Explanations cannot be complete because of limited space. But it is possible to give a working knowledge of legal terms and court procedure. The full effect of what courts do can be grasped only by understanding the words they speak.

LEGAL TERMS AND THE FRAMEWORK OF TORT LAW

In the Anglo-American scheme of law, a person who has been injured by negligent acts or omissions of another can recover in the form of a money judgment. In general the person injured, called the plaintiff, must show:[1]

1. The existence of some duty owed him by the other party;
2. A breach of that duty, either non-action where action was required, or action of an improper or insufficient kind;

[1] Benjamin L. Shipman, "Handbook on Common Law Pleading" 3rd Edition (1923) West Publishing Co., St. Paul, Minnesota, p. 196; American Law Institute, "Restatement of Torts", §281 (1934); American Law Institute Publishers, St. Paul, Minnesota; Wm. L. Prosser, "Handbook of the Law of Torts" (1941), West Publishing Co., St. Paul, Minnesota, p. 175

3. A cause-and-effect relationship between the breach of duty and the damage; and
4. Injury to him of a kind that may be compensated in money damages.

Where a duty is found to run from the defendant to the plaintiff, a *breach* of duty consists in the defendant's failure to exercise *reasonable* care in discharging that duty. A reasonable standard of care is the care a "reasonable and prudent man" would take in the circumstances.

A *reasonable and prudent man* is simply the one who exists in the minds and hearts of a particular jury. At one time he has been construed as a man of infinite wisdom; at another as a man of abysmal ignorance. He has been a man of unbelievable industry; and a man of incredible slothfulness. Not so much his existence in the *minds* of the jury makes him appear so variable a factor, as his existence in the hearts and *sympathies* of the jury. Usually it is the jury who determines the standards of care of the "reasonable and prudent man."[2]

The relationship of cause and effect necessary to produce liability is known as the "proximate cause." Ink has been spilled in considerable quantity to define it.[3] But no one has arrived at a definition satisfactory to other definers. It is like the "reasonable man." Meanings vary with circumstances. In general the term *proximate cause* means that the breach of duty must not have been too far removed in the sequence of events from the occurence that resulted in injury.

[2] Restatement, Torts, §285

[3] Prosser, Torts, p. 311. "The problem of the connection between the act or omission of the defendant and the damage which the plaintiff has suffered usually is dealt with by the courts in terms of what is called 'proximate cause,' or 'legal cause.' There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. . . "Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibilities for the consequences of his conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was the cause of all our woe!' "

"This limitation is sometimes, but rarely, one of the fact of causation. More often it is purely one of policy, not connected with questions of causation at all."

Where the alleged breach of duty, for example, was the placing of an anchored "flasher light" in the center of an intersection and a car was damaged in a collision with it following immediately after a tire blowout, the court held that the "proximate cause" was the *blowout,* not the placing there of the light.[4] But had there been no blowout and had the stanchion been located in a place where low fogs were likely and on a street where all other signaling devices were centrally suspended, the non-removal of the stanchion from such position could have been considered the proximate cause of an accident resulting therefrom.[5]

Damages are normally recovered for pain and suffering, for mental anguish, for loss of earnings, present and prospective, and for medical expenses. *Property* damages are recoverable for actual loss, for the calculation of which there are various formulae. Exact pecuniary compensation for hours of suffering is, of course, impossible to ascertain. The jury, however, makes a determination, largely on bases known only to itself.

A jury's discretion is, however, limited. Occasionally, a certain standard of conduct is said, *as a matter of law,* to be proper, in which case the jury is not allowed to pass upon the issue.[6] For instance, in *Nelson v. City of Seattle,*[7] the erection by the city of a sign five feet high, red with black letters indicating "Danger—Slippery When Wet—15 miles" was held, as a matter of law, to be sufficient discharge of the city's duty to advise motorists of a slippery spot. Occasionally certain conduct by the plaintiff himself is said, as a matter of law, to constitute contributory negligence. In addition, where the jury requires a completely "unreasonable" standard of care, (in the opinion of the judge), or where the jury finds a causal relationship when no reasonable man could find one, (again in the opinion of the judge) the judge may set aside the verdict based thereon and order a new trial. In certain circumstances a verdict for the defendant can be directed.[8]

[4] Fletcher v. State, 143 Misc. 457, 256 N.Y.S. 756 (1932)
[5] Wenzel v. State, 36 N.Y.S. 2d 943, 178 Misc. 932 (1942)
[6] Prosser, Torts, p. 284
[7] 16 Wash. 2d 592, 134 P.2d 89 (1943)
[8] Baltimore and Carolina Lines v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935)

States, cities, counties, road districts, townships, and other political subdivisions may find they owe to all who use the highways, streets, and roads within their respective charge a duty to maintain them in a safe condition. There are many ways in which a highway can be unsafe: Bridges can be defective, signs inadequate, curves too sharp; traffic lights can fail, roads can be bumpy, employees can be negligent, "silent policemen" can be knocked down. Instances are legion. And for each one of them, the appropriate unit, unless otherwise relieved, can be haled into court.

DEPARTURES FROM THE REQUIRED STANDARD OF CARE

For many and various things done or left undone, traffic agencies have been found liable in damages. The following enumeration by no means exhausts the list, but the items explained should illustrate most of the pitfalls. Certain of the following cases could reasonably be placed in several other categories. This classification is not the only one. From the standpoint of agencies trying to determine their possible liability, the analysis used, however, has the advantage of presenting the material in a way likely to correspond with the division of duties and responsibilities within the agencies.

INADEQUATE WARNING OF PERMANENT CONDITIONS

Most of the cases considered in this section concern the liability of states and counties rather than the liability of cities or towns. This is because the term highway is considered as the portion of a traveled roadway outside the limits of city or town and because, apart from the definitional limitation, where a highway maintained by the state passes through a town or uses one of the town streets as part of the route, the control of such portion, and with it responsibility therefor, usually passes to the municipality.[9] Pragmatically, as far as the signs are concerned, this might be

[9] Bell v. South Carolina State Highway Department, 204 S.C. 462, 30 S.E. 2d 65 (1944), but see Wenzel v. Duncan, 24 N.Y.S. 2d 192 (1940), aff'd, 261 App. Div. 1003, 26 N.Y.S. 616 (1941). See also 32 N.Y.S. 2d 233 (1941)

true because the absence or inadequacy of signs is likely to have more serious effects in the wide open spaces where speeds are greater and the proportion of single vehicle accidents increases. Whatever the reason, all litigation concerning signs[10] has been against states or counties.

Of course, the insufficiency of signs may play a varying part in the imposition of liability. It may constitute the only negligence or defect alleged, as in the *Ziehm* cases (p. 7); or it may play a comparatively smaller part, as in the *Wasnich* and *Lusk* cases (p. 9) where inadequate maintenance and failure to erect a guard rail were contributing items. The cases illustrate the importance of signs. It would have been impossible and unwise to have attempted to confine the discussion to cases where the deficiency relating to the sign alone was the basis of the action. Such cases are extremely rare because lawyers tend to allege negligence in every imaginable particular. In order to overlook no item that could possibly score against the defendant, attorneys use shotguns instead of rifles, as it were, in their allegations.

In *Ziehm v. State*[11] the car in which the claimants were riding was traveling south on Transit Road. Orchard Park Road came into Transit Road from the right. Beyond Orchard Park Road and sixteen feet from the edge of Transit Road was a stop sign. There was also a dead-end sign at approximately the same place. Beyond the dead-end sign was a heavily-traveled highway into which Transit Road dead-ended. The surprise and shock of bursting into the streaming glare of the through-highway instead of the serenity of the dead-end of a country road caused the driver to lose control of the car. It collided with a tree and overturned. The Court said: (270 App. Div. 876, cited cases omitted)

"The traffic signs involved in this action were confusing, improperly worded, improperly located, insufficient in height, insufficient in number, not reflectorized or improperly reflectorized, misleading, and an invitation to disaster in the night time, under the peculiar conditions surrounding the intersection . . . . The State made no tests, prior to the accident, as to the adequacy of the traffic signs at

[10] One exception: Nelson v. City of Seattle, 16 Wash. 2d 592, 134 P.2d 89 (1943)
[11] 270 App. Div. 876 (1946)

night. The evidence is undisputed that the traffic signs involved in this accident did not conform to the nationally accepted standards in shape, kind, color, type and markings to be used on and along highways maintained by the state as required by section 95-b of Article 7 of the Vehicle and Traffic Law. The State and The State Traffic Commission were negligent in failing to order the removal of the traffic signs in question and in failing to replace those with signs which would conform, so far as practical, with nationally accepted standards applicable to the intersection in question. The State Traffic Commission was also negligent in failing to adopt rules and regulations for the guidance and protection of motorists at said intersections. (Vehicle and Traffic Law §§95-a, 95-b) . . . The dead end stop sign on the southerly side of Orchard Park Road misled Kaufman into thinking that he was coming to a dead end stop. The stop sign on his right was placed sixteen feet from the edge of the pavement and the face of the sign was turned at a slight angle away from Transit Road. Little wonder that Kaufman became confused when he saw that he was coming to a main, heavily traveled highway instead of a dead-end stop. The testimony is undisputed that nationally accepted standards required that the dead-end stop sign should have been replaced, long prior to accident, with a reflectorized, double pointed arrow, to warn the motorist that he was approaching a main highway, and that the conglomeration of signs south of Orchard Park Road should have been removed as they only added to the confusion."

A stronger statement of the attitude of the New York court would be difficult to imagine.

In *Vande Walker v. State,*[13] the driver of a car was injured in a collision with another car just emerging from an underpass at the bottom of a hill. The road curved to the right down the hill in an eight per cent grade. The "Slow" sign just in front of the underpass had been down for some time—for just how long does not appear—but the highway patrolman knew of it. The driver, seeing the underpass from an angle ahead of him and the other car suddenly emerging from it immediately applied his brakes. The car skidded to the left and into the other vehicle.

The Court of Appeals— the court of last resort in New York— held that the state was negligent in failing to re-erect the sign, and that such negligence was the proximate cause of the accident.

[13] 278 N.Y. 454, 17 N.E. 2d 128, 2 N.Y.S. 2d 483 (1938)

By contrast the lower court had held that though there was a "Curve" sign at the top of the hill, seven feet to the side, and a "Caution-Curve-Underpass" sign seven feet to the side halfway down the hill, since the motor vehicle law required headlights to give ten feet side illumination, the signs were sufficient, reflectors or no reflectors. In addition, said the lower court, the fact that the sign was down was not the proximate cause of the skidding, nor the accident. The rejection by the Court of Appeals of this line of argument indicates the judicial climate of opinion in that jurisdiction.

In *Wasnich v. State,*[13] a truck driver was injured when his truck struck a bump in the highway. The bump had appeared annually for some undisclosed reason. The department had erected a 2 x 2 foot warning-sign with a red flag in a wooden frame above it, 350 feet away. The court held the state guilty of negligence in (1) inadequate maintenance, and (2) failing to display a sufficient warning sign. In *Churchman v. Sonoma County,*[14] the California court held the absence of signs to warn of soft shoulders relieved a driver of the charge of contributory negligence in a case where the claimant was injured as a result of the overturning of the car.

In *Lusk v. South Carolina State Highway Department,*[15] evidence showed that a car went over the outside of the curve on a downgrade. The court ruled the absence of signs indicating the danger, coupled with failure to erect a guard rail, constituted negligence. In *Westover v. City of Los Angeles,*[16] where the plaintiff was injured by being thrown about in the car because of dips in the street, the adequacy of the warning signs—their distance from dips, their discernibility and content—was held a proper matter for jury consideration. Words the court used indicated that in its opinion the sign needed improving.

In *Dawley v. State,*[17] the fact that a village maintained a bridge on a state highway did not relieve the state from the duty of pro-

[13] 183 Misc. 1073, 52 N.Y.S. 2d 32 (1944)
[14] 59 Cal. App. 2d 801, 140 P.2d 81 (1943)
[15] 181 S.C. 101, 186 S.E. 786 (1936)
[16] 20 Cal. 2d 705, 128 P.2d 350 (1942)
[17] 186 Misc. 571, 61 N.Y.S. 2d 59 (1946)

viding adequate warning signs. Failure to do so was the basis of a sizable damage claim. In *Lyke v. State Highway Commission,*[18] however, the failure of the state to provide intersection signs did not result in liability for a truck collision. The court reasoned that under the peculiar facts of the case the addition of a sign would not have helped the driver, since he had failed to see either the intersection itself, the other road, or the other truck.

Occasionally, the presence or absence of traffic guide-lines painted on the highway surface proper has become material in litigation. For example, in the case of *Johanson v. King County,*[19] a two-lane east-west highway had a large yellow strip painted between the two lanes. The highway was doubled in width by adding two more lanes on to the south side of the existing two lanes. It was opened for traffic with the yellow line still centered on the old north half.

The plaintiff was driving west on the left lane of the north half. An east bound car, while attempting to pass two other east bound cars, collided with the plaintiff. This plaintiff claimed the off-center yellow line was "inherently dangerous and of such character as to mislead a traveler"—to wit, the eastbound traveler with whom he collided.

The court denied relief, saying there was no causal connection between the misplaced yellow line and the pulling out of the eastbound car, and that there was no statutory duty to paint directional stripes on the highway. Complaint was made of the absence of speed signs but the court ignored this point, presumably on the ground that speed was not shown to be material.

Similarly in *Biearman v. Alleghany County,*[20] the plaintiff crashed through the wing wall of a bridge to his personal injury and damage to his car. The northbound highway, before crossing the bridge, curved gently to the left or west. The county had installed a self-illuminating "Narrow Bridge" sign 185 feet from the bridge. The plaintiff alleged negligence in failure to maintain the highway properly in that a "Curve" sign should also

[18] 165 P.2d 288, 160 Kans. 709 (1946)
[19] 71 Wash. 2d 111, 109 P.2d 307 (1941)
[20] 145 Pa. Super. 330, 21 A.2d 112 (1941)

have been erected, that the wing wall should not have been all-white but cross-hatched, and that the white line down the highway ended at the beginning of the curve instead of continuing to the bridge.

The court assumed, *arguendo,* that the county was negligent in the particulars complained of but denied the plaintiff recovery on the ground of his contributory negligence in not reducing speed after seeing the "Narrow Bridge" sign.

The importance of signs to warn of permanent conditions in the highway can be shown by the refusal to impose liability for the reason that adequate signs were posted as well as by the imposition of liability for the failure to post adequate signs. In *Epps v. South Carolina State Highway Department,*[21] the fact that the state had erected the customary warning signs in the proper places was a material factor in holding that the driver of a car was guilty of contributory negligence and the highway department not liable. The plaintiff, driving his vehicle north in dense night fog, on a road that dead-ended in an east-west highway, went beyond the east-west highway and into a ravine, resulting in the death of several occupants. The visability being but 15 to 20 feet, the plaintiff had elected to drive down the center of the road so that he was deprived of the benefits of the signs.

Further cases that illustrate similar points are *Sell v. McPherson Township,*[22] concerning the failure to erect a sign warning of a culvert narrower than the road; *Dickenson v. Cheyenne County,*[23] ruling "no negligence" in a failure to post a sign warning of dead-end on the ground that the road's coming to a dead-end was plainly apparent; *Mason v. Hillsdale Highway District,*[24] where, though it was not exactly clear what the signs were to warn of, the failure to post signs was alleged as negligence causing the plaintiff to skid from ice covered "guide planks" on a bridge into a culvert some distance from the bridge; and *Reaney v. Union County,*[25] in which the county was assumed negligent in failing to

[21] 209 S.C. 25, 39 S.E. 2d 198 (1946)
[22] 152 Kans. 731, 107 P.2d 670 (1940)
[23] 146 Neb. 36, 18 N.W. 2d 559 (1945)
[24] 65 Idaho 833, 154 P.2d 490 (1944)
[25] 69 S.D. 762, 10 N.W. 2d 762 (1943)

post signs warning of sharp curving approach to a bridge but in which the plaintiff was denied recovery on the ground that the statute had recently been rewritten to eliminate this type of fault.

SIGNS TO WARN OF TEMPORARY CONDITIONS

Cases arising from the inadequacy of signs warning the public of temporary conditions in the highway are fewer than those concerning permanent conditions. Perhaps it is because the need for such signs is shorter in duration; perhaps because the cases are more difficult to prosecute to a successful conclusion for legal reasons, such as the requirement of notice to the defendant and the necessity of showing a higher standard of care. Certainly the erection of barriers, the setting out of flambeaus, the closing of highways, the use of flagmen, are the more usual precautions.

If any of these precautions is taken, an additional setting out of signs would not be required. If none of the precautions is taken, liability will be based upon that general ground, rather than upon the failure to post warning signs. The posting of signs, however, is frequently mentioned as one item in the duty of those charged with the maintenance and operation of highways. There are, so far as the writer has been able to discover, no cases holding that the failure to post signs was actionable negligence, per se, where *other precautions* had been taken. For that reason, the cases here mentioned are not extensively analyzed.

In *Thummel v. Kansas State Highway Commission,*[26] a car overran a washout and fell into a creek, resulting in the drowning of all four occupants. While the case involved many other issues beside the one here mentioned, it held that the failure to post signs and to surround the washout with barriers having the proper reflectors and warnings thereon, was an omission in the nature of a breach of statutory duty, though not negligence, and could properly be made the basis of liability. It must be remembered that the two concepts, negligence and breach of statutory duty, are so nearly one and the same thing in the majority of cases that when the court said that a state of facts constitutes a "breach

[26] 160 Kan. 532, 164 P.2d 72 (1945)

of statutory duty"—which results in liability and not "negligence" —which results in no liability—it is really saying that in such circumstances, there should be liability, and that in similar cases in the future there *will* be such liability.

Along somewhat different lines is the case of *Goldfarb v. State.*[27] Water seepage from an adjacent hill formed ice upon a section of highway each winter. The state's employees had scraped and sanded the offending icy section at 3 P.M. to 4 P.M. of the afternoon on which the accident occurred at 6 P.M. Liability was predicated upon the failure to erect adequate warning signs, the only one the state could point to being a "Slow" sign three quarters of a mile away. It obviously would not cover an icy condition on a curve at such a distance away from the sign.

Similarly, the lack of particularity in a sign was held objectionable in *Fritch v. King County.*[28] A six per cent downgrade curving to the left went through an underpass. The defect over which the action arose was a hole two and one-half inches deep in the surface of the pavement at the center expansion line. Against the charge of no signs to warn travelers, the county pointed to a "Slow Danger Ahead" sign, intended for the underpass. The court said that there was no particularity to the sign and hence that it was not adequate. In both cases, it is apparent that in effect there were no signs to warn of the particular conditions complained of and that the sign to which resort was had were posted for other purposes.[29]

THE FAILURE OF MECHANICAL SIGNALS

Here it is necessary to consider separately the liability of the states and the liability of cities and towns for the breakdown of mechanical signals. Mechanical signals are operated by both, but

[27] 178 Misc. 180, 33 N.Y.S. 2d 656 (1942)

[28] 4 Wash. 2d 87, 192 P.2d 249 (1940)

[29] Numerous cases concerning the failure to erect adequate warning signs and barriers are discussed in 27 American Law Reports, Annotated, 937, 36 A.L.R. 413, 86 A.L.R. 1389. (Hereinafter "American Law Reports" will be referred to as A.L.R.) As indicated in the introductory remarks, the failure to post signs is usually only one item of negligence, not the entire basis

the number of signals operated by cities and towns is vastly greater than the number operated by the states. The disparity in litigation arising from such failure is enhanced by the fact that not all states have let down the bar of sovereign immunity protecting them from suits for this type of negligence. There have, as a result, been but two suits against a state, so far as this writer has been able to discover,[30] both of them against New York, and both of them resulted in a determination of state liability.

Cases against cities and towns are more numerous, but uniformly they have resulted in judgments of non-liability. These results have been reached on the theory that the maintenance of traffic signals was part of the control of traffic, a governmental function, for which the city, as a municipal corporation, was not liable. One case concerning cities is considered here for completeness of presentation. Other cases on the same point will be discussed and analyzed in greater detail in the section on the liability of municipalities generally—pp. 30–39.

In litigation developing out of *Foley v. State of New York*[31] is found the clearest statement of the law regarding the failure of signaling devices. The issue there is not obscured behind the confusing doctrine of sovereign immunity. The plaintiff was driving east on Werhle Road. A car driven by a Mrs. Mendy was driving north on Union Road. The cars entered the intersection while the traffic signal was green for the plaintiff and blank for the Mendy car. The resulting collision injured all the occupants of the plaintiff's car.

The trial court (Claims Court) found that the bulb for the red light had burned out and had not been replaced. This condition had existed from 2 P.M. Saturday until 11 A.M. Sunday when the accident took place. The trial court, however, dismissed the claim on the grounds that the failure of the traffic light was not the proximate cause, and that the plaintiff had been contributorily negligent. The Appellate Division (the next higher court) took a different view of the matter, saying,[32]

[30] Foley v. State, 43 N.Y.S. 2d 587 (1943) See text p. 57 for summary of case. Dulinah v. State, 177 Misc. 732, 30 N.Y.S. 2d 799 (1941)

[31] 43 N.Y.S. 2d 587 (1943). This is the final report of the Court of Claims; the case is found at 265 App. Div. 682, 41 N.Y.S. 2d 256 for the first appeal

[32] 265 App. Div. 682, 686

"It is apparent that the absence of the red light not only contributed to the accident that happened, but that it was reasonably foreseeable that some such accident would occur under the situation which was allowed to exist. The mere fact that the acts of the drivers of the cars intervened does not necessarily create a superseding cause, and this is particularly so where the original wrongdoer could have anticipated that the intervening acts might naturally follow the original wrongful act (citations) . . . . It seems clear that the absence of the red light started a chain of events which culminated in this accident. The acts of the drivers whether negligent or not were concurring causes and the failure of the red light still remained one of the proximate causes. We are therefore of the opinion that the court below was in error concluding that the acts of the drivers of the cars involved were superseding acts of negligence sufficient to relieve the State from liability."[33]

When the case went back to the lower court for a new trial[34] new evidence was adduced as to the length of time such bulbs usually burned (3200 to 3300 hours, according to the General Electric Company), the length of time this one had burned (1677 hours), and the duties of the state electrician relative thereto (to maintain it and thirty-one other traffic signals within a *radius of fifteen miles*). This was not considered sufficient new evidence to overcome the earlier holding that the State had had constructive notice through the failure of the light for so long a period—21 hours. The plaintiffs were allowed to recover.

As stated in the introductory remarks of this section, numerous cases involving the failure of traffic signals have arisen where the signals were operated by cities. Recovery has invariably been denied on the theory that the municipality was exercising a "governmental" rather than a "corporate" function.

Illustrative of the cases is *Avey v. City of West Palm Beach,*[35] in which the "stop and go" traffic control system was allowed to remain out of order for an undetermined period—twenty-four to forty-eight hours. A collision resulted. In a four-to-three decision, the city was relieved from liability on the ground that maintaining traffic signals was a governmental function. It was assumed by the entire court that the city had been negligent and

[33] For issue of contributory negligence see pp. 52–57
[34] 43 N.Y.S. 2d 585
[35] 152 Fla. 717, 12 So. 2d 881 (1943)

would have been liable had not the special defense intervened. How tenuous a defense it is is illustrated by the words of the dissent.[36]

"I realize this is a close question, but generally all functions exercised by a municipal corporation, not strictly governmental, are corporate functions. As the city is charged with the duty of keeping its streets in safe condition—as a corporation function—I think the duty to keep its traffic lights in good and safe condition is also a corporate rather than a governmental function. (citations)."

Numerous other cases are cited in the *Avey* case as being precisely on the point with precisely the same result. Some of the cases cited were not on the point but there are enough other cases to support the court. Further cases will be found at p. 30 et seq. in connection with municipal liability. An explanation of the doctrine and an indication of its present standing will be given there.

IMPROPER LOCATION AND MAINTENANCE

This section, as its imposing title would indicate, covers a multitude of sins. Traffic control devices can be improperly located and they can be improperly maintained. The traffic control devices hereinafter discussed are "silent policemen," stanchion type stop and go signals, bumpers, signs to indicate trolley loading zones, and similar devices.

In some of the cases, notably the *Wenzel* case, the stop and go signals, even though functioning without any mechanical breakdown, were considered improperly located because they were in the middle of the street and thus constituted an obstruction to traffic. In others, no liability is imposed for the same improper location per se of the traffic signals, but liability is imposed when the signal becomes inoperative for some reason, thus rendering the stanchion only an "obstruction." In still others, liability is imposed when the device, other than a stop-and-go signal, is regarded as being more of a hazard than a help, though nothing has

[36] 152 Fla. 717, 723

occurred to make it different from what it was originally designed to be.

The common thread that runs through this group of cases, is the idea that streets should be free from obstructions, and that all available driving surface should be left to the traveler. It is to be regretted that the whole question is so bound up with the doctrine of immunity for the governmental functions of muncipalities.[87] At this point, not only with respect to the doctrine of governmental functions but with reference to the whole question, it suffices to say that the law has grown around the idea that municipalities are responsible for "defects and obstructions" in their streets, primarily through the frequent repetition of those terms in statutes of incorporation and other related statutes. As a consequence, it has been easier to impose liability on municipalities if the cause of action could be brought under a heading of *defect* or *obstruction,* rather than under the more general heading of "negligence," hedged in as negligence is with restrictive doctrines abounding in this wilderness of the law. Courts, therefore, are eager to class destructive objects as "obstructions."

The first class of cases—where the properly operating traffic signal was considered so improperly located as to result in liability—is illustrated by *Wenzel v. State.*[88] It involves a state, not a municipality. Within a village on a principal highway, the state had in 1932 taken over for maintenance a traffic control signal mounted on a stanchion three feet in width at the base, and two and one-half feet high. The stanchion, located in the exact center of the highway, was for the purpose of controlling traffic entering from an intersecting street. The plaintiff, at 1:30 A.M. on a rainy night, after passing another car on her right, collided with this stanchion. The three plaintiffs recovered $26,000 for personal injuries and loss of services. Said the Court:[89]

"The State is under the absolute duty of keeping its highways in a reasonably safe condition for travel and is bound to exercise reasonable care to accomplish that end.

[87] See page 43 of Ms

[88] 178 Misc. 932, 36 N.Y.S. 2d 943 (1942); Wenzel v. Duncan, 24 N.Y.S. 2d 194 (1940), aff'd, 26 N.Y.S. 2d 616 (1941), further proceedings, 32 N.Y.S. 223 (1942)

[89] 178 Misc. 932, 936, citations omitted

"The stanchion, under the circumstances, amounted to a nuisance. It could not be seen in the low, rolling fog conditions. It projected into the traveled portion of the highway lane eighteen inches. The light panel was similar in design, size, and appearance to the centrally suspended light panels, and at approximately the same height from the street. It was the only remaining stanchion on Sunrise Highway, all the others having been removed and centrally suspended light panels installed. The failure of the State to adequately warn users of the highway of the existence of this standard amounted to negligence. Low, rolling fogs are of frequent occurrence on Long Island and on a wet misty night, a prudent person might reasonably expect such conditions would so obscure visibility that a stanchion of this type and color would blend so completely into its surroundings as to be invisible to an approaching motorist."

The second class of cases involves traffic signals that are not actionable when operative but do become the basis of liability when breakdown or damages occur. It would seem, since all things human or the product of human effort are subject to breakdown, and since all things upon streets over which pass constantly the traffic of a busy city are subject to damage by collision, it would be wise to eliminate the possibility of liability through breakdown and damage by removing the offending objects from the streets. In *Mengel v. St. Louis,*[40] for example, the city of St. Louis operated a traffic signal on top of a concrete slab or block four or five feet square and eighteen inches high. On August 1 an automobile collided with the *ensemble* and shortly thereafter the city removed the light standard, leaving the concrete base. At 1 A.M. August 3 the plaintiff collided with the base and was injured. There was a conflict in the evidence as to whether the concrete base was lighted, and if so, as to whether it was adequately lighted. Said the Court:[41]

"We think that under the facts it sufficiently appears that the instant case involves the alleged breach of the defendant city's corporate duty to keep its streets in a reasonably safe physical condition for travel thereon and that the liability sought to be imposed is not based upon the manner in which the city performed or exercised a governmental

[40] 341 Mo. 994, 111 S.W. 2d 5 (1937)
[41] 341 Mo. 994, 1001

power or function. It is not claimed that the collision occurred by reason of the improper operation or non-operation of a traffic signal. When the signal light post which had stood on this concrete base was removed, leaving this concrete block in the street, it could hardly be, and is not, claimed that the concrete block, itself and alone, in any way served or operated to regulate traffic. It then became a mere obstruction in the street which if unguarded or unlighted, or not properly lighted, would likely be, especially in the nighttime, a physical hazard to vehicles on the street at that point. Our conclusion is that a submissible case was made . . ."

The court having so spoken, returned the case to the trial court for a new trial. Later results are not reported.

The case of *Town of Hobart v. Casborn,*[42] discussed in the *Mengel* case as well as the *Auslander* case at p. 34 was almost identical except that the obstruction, instead of being a traffic signal stanchion, was merely a "post," which had been damaged so that the light on the top was out. A slight variation on the basic situation is offered by *Speas v. Greensboro,*[43] where the signal had been turned off voluntarily, apparently because of the hour, leaving no light upon the device (according to the plaintiff's testimony). The plaintiff, as a guest or passenger in the car, was allowed to recover for injuries suffered in the collision, although the driver was denied recovery on the ground of contributory negligence. Another slight variation in the theme is shown in *Wells v. Village of Kenilworth,*[44] in that the defendant village neglected to turn on the lamps on a pole marking a safety island. The safety island consisted of a cement base eight feet long, three feet wide and about one foot high. (There were two poles to light the island but one had been broken off several nights before by an army truck.) The question of the village's negligence went to the jury.

Along the same line is *Aaronson v. New Haven,*[45] in which a "silent policeman" on a heavy pedestal had been knocked down by an earlier traveler and the plaintiff injured by a collision with

[42] 81 Ind. App. 24, 142 N.E. 138 (1924)
[43] 204 N.C. 239, 167 S.E. 807 (1933)
[44] 228 Ill. App. 332 (1923)
[45] 94 Conn. 690, 110A.872, (1920)

it. The time allowed to repair such mishaps is shown by the facts: the pedestal was knocked down at 6:30 P.M., the police department, twelve minutes away was notified at 7 P.M. and the accident occurred at 7:30 P.M. In this situation, the "silent policeman" was not in the condition in which it was supposed to be, and liability was imposed because of the change from proper to improper condition.

There still remains the third situation where absolutely nothing had occurred to change the traffic control device and yet the agency installing the device was held responsible for resulting injuries. In *Titus v. Town of Bloomfield,*[46] the plaintiff was injured when he collided with a concrete post twelve inches square and forty inches high, without guard or red light to guide persons using the intersection where it stood. The court held the post a defect within the meaning of the applicable statute, but the plaintiff was denied recovery because of failure to file the notice required of him.

The case of *Mayor of Vicksburg v. Harralson,*[47] amusing as it is in some ways, is even more to the point. The city had erected a bumper "five inches high in the center and five feet wide at the base . . . rounded from the highest point in the center on each side to a point level with the surface of the street . . . in order to warn automobiles of the danger of collision at this street intersection." The plaintiff was injured by driving his automobile into it. Said the court:[48]

"The record shows, and it is admitted in the argument of the appellant, that the device called a "bumper" was purposely placed in the street to bump and injure persons traveling over it in automobiles, unless they saw it in time and slowed down to such an extent that the car would go over it without bumping the occupants therein. It is shown to have been a dangerous contrivance or obstruction intentionally placed in the street by the city, and the record indisputably reflects the fact that on account of the deceptive nature of the device most any driver of a car would likely go over it without seeing it, unless he was especially looking for it, or had his attention called to it in

[46] 80 Ind. App. 483, 141 N.E. 360 (1923)
[47] 136 Miss. 872, 101 So. 713 (1924)
[48] 136 Miss. 872, 885

some way. It was dangerous to go over, even at a lawful rate of speed, and is admitted to be exceedingly dangerous when crossing it at an excessive rate of speed . . .

"We do not think the city had the right to place a dangerous device or obstruction in its street making it unsafe, and which would likely injure persons traveling in automobiles over it. The purpose of the bumper was to bump and injure persons in automobiles crossing over it, even at a lawful rate of speed, who might fail to see it or become aware of its presence until they were so close that they would be unable to reduce the speed and prevent an injury when crossing it . . .

"This scheme or method of warning drivers appears to us to be unreasonable, too drastic, and perilous for the pupose intended. The method of injuring one person in order to prevent danger to another is wrong in principle, as we see it, and is not such a reasonable regulation for the public safety as is warranted under the law, but is negligence . . ."

To return to traffic lights proper, in the recent case of *Zeiffert v. Way*,[49] the mere failure of the city to warn travelers of the existence of a stanchion supporting a traffic light was held sufficient to support a cause of action. That seems another way of saying that the stanchion in the street was *per se* actionable, because other warning than the signal itself is seldom if ever given—at least no other warning as to whether it is a stanchion-type or suspended-type signal.

The lengths to which some courts will go to keep their streets free from obstruction is shown by another decision from the same jurisdiction, *Kamnitzer v. City of New York*.[50] The city had erected its poles to support the traffic signals fourteen and one-half inches from the curb. The pole had become bent in some fashion, and visors on the signal lights protruded into the street. A truck passed along the street, struck the visors, and caused the pole to fall on the plaintiff. The negligence of the city in so maintaining the pole was held to be a question for the jury.

The injury caused by a pedestal employed to mark a trolley-loading zone was the occasion for the ruling of the judge in *Shaw v. City of New York*,[51] when he was compelled by precedent to

[49] 60 N.Y.S. 2d 112 (1945)
[50] 265 App. Div. 636, 40 N.Y.S. 2d 139 (1943)
[51] 165 Misc. 765, 1 N.Y.S. 2d 311 (1937)

hold that such regulation of traffic was a governmental function. The decision is set forth at some length at p. 61.

DEFECTIVE CONDITIONS IN HIGHWAYS

Consideration of this subject might well begin by recalling *Churchman v. Sonoma County,*[52] wherein the giving away of soft shoulders of the road coupled with the failure to give adequate warning of the condition was held to be actionable. With it should be considered *Pierce v. State.*[53] Ice upon the highway, resulting from the overflow of a culvert faultily constructed by a farmer, resulted in liability of the state for injuries from a skidding car, despite the fact that the accident occurred within the non-patrol period. *Roger v. State,*[54] was almost identical. In another ruling, the opposite result was reached in Connecticut in *Pape v. Cox, Highway Commissioner,*[55] the decision turning on a deficiency of evidence that the state knew of the icy condition. A technical distinction was drawn between knowledge of the defect and knowledge of the conditions sure to cause the defect.

Defective bridges have been a fruitful source of litigation.[56]

In *McNair v. State,*[57] bumps in the road twelve inches high caused by the replacing of culverts resulted in an action against the state. The court said the "assured clear distance" rule—i.e., that no one should drive so fast the he could not stop within the distance ahead which he could see—did not apply to bumps in the road, but relieved the state on the sovereign immunity rule, discussed at pp. 26–29.

IMPROPERLY DESIGNED TRAFFIC CONTROL AREAS

The case discussed below is the only one on the same subject that the writer has been able to discover. What the court describes

[52] 59 Cal. App. 2d 801 (1943)
[53] 41 N.Y.S. 2d 602 (1943)
[54] 254 App. Div. 927 (1938)
[55] 129 Conn. 256, 28 A.2d 10 (1942)
[56] Farrell v. Placer County, 138 P.2d 382 (1943); Berrien County v. Vickers, 38 S.E. 2d 619, 73 Ga. App. 863 (1946); Dawley v. State of New York, 186 Misc. 571, 61 N.Y.S. 2d 59 (1946)
[57] 305 Mich. 181, 9 N.W. 2d 52 (1943) (See Ms. p. 80)

as a "traffic control area," the highway engineer would probably describe as a "channelization island." Extended discussion is justified on the ground that such areas are becoming of increasing importance.

Calihan v. State[58] illustrates the consequences that may follow from an improperly designed traffic-control area. Route 31 followed Lyell Road west out of Rochester. At the point where Howard Road began and ran to the south, Route 31 separated from Lyell Road and branched off to the northwest, Lyell continuing to run west. When the highway was re-located in 1936 by moving it to the north, a traffic control area was placed in what had formerly been the traveled portion of the highway north and east of Howard Road. It was shaped as a segment of a circle, the circumference (westerly side) being a sandstone curb six inches in height and the chord (easterly side) a concrete rail 2.4 feet high and eighty feet long. The chord ran northeasterly from the intersection of the south line of Lyell road extended and the easterly line of Howard to a point two feet from the state concrete highway. Appropriate widening and repairs of Lyell and Howard roads—previously black top—were completed. It can thus be seen that a traveler coming from the west on Lyell would have the control-area squarely in his path; for such a traveler to gain access to the state highway, it was necessary for him to turn first to his left, or north, and then to the right or east. The state had provided one yellow octagonal sign bearing in black letters the words "THRU TRAFFIC," and in reflector buttons the word "stop." The sign was located in the control-area in which shrubs and bushes had been planted. The county had a "T"-sign on Lyell road 295 feet to the west.

On the morning of January 22, 1941, a taxicab driver crashed into the control area, hit the "stop"-sign, left it 'facing at a slant," and knocked down parts of the railing. The following morning the plaintiff crashed through the control-area and suffered serious injuries. The court in a decision allowing him $22,500 damages said:[59]

[58] 36 N.Y.S. 2d 840 (1942)
[59] 36 N.Y.S. 2d 840, 844, case citations omitted

"We are convinced that the plan, design, and location of the traffic control area were iniquitous and that it was a serious menace to the traveling public to the point of being a nuisance maintained by the State of New York. Clearly it was a trap to mislead and deceive the traveler. On the night of Calihan's accident it was more deceptive than it ordinarily was. About one-half the guard rail was down leaving an open gap to the concrete road beyond. The state's stop-sign was bent, was not square with Lyell road and could not be seen clearly. As this was the only sign which the State of New York had installed to control the flow of traffic at the intersection, it was the duty of the state's employees to eye it vigilantly and to maintain it in proper repair, alignment and position. No actual notice of the disrepair is shown but twenty-four hours was sufficient time to bind the state by constructive notice, especially in view of the history of accidents at this busy arterial highway intersection. (Five official reports—eighteen accidents per testimony. Ed.) . . . . Upon these facts and under these circumstances the State of New York, its officers, and employees, were negligent."

The possible effect of the county's "T" sign on the contributory negligence of the claimant was eliminated by the testimony of the state's division engineer who had approved the plans for the area. He said that motorists were not intended to stop at Howard Road, and that in not stopping for the intersection the claimant had not departed from the proposed scheme of traffic control.

FAILURE OF EMPLOYEES ASSIGNED AS FLAGMEN

Here again the following case is the only one of its kind the writer has discovered. While in a legal sense, the failure of an employee to flag traffic in accordance with his orders is really not too different from the failure of an employee to put oil in flambeaus or to replace signs, or to perform any of numerous other assigned duties, still the case does have interest for both lay and legal readers.

It occasionally happens that the situation created by emergencies on the highway are so inherently dangerous that the usual inanimate signs, light barriers, and markings are insufficient to meet the burden imposed upon the state, and the use of human

signalmen is necessary. The case of *Nelson v. State*[60] is illustrative. The night of April 21, 1940 was dark. Rain and sleet were falling. Rain had fallen continuously for three days, causing a washout of the westerly lane of a three-lane, thirty-foot state highway. The highway ran in a northerly direction, and at the scene of the washout, curved gently to the east in an upgrade. The state had erected a barricade to the north and to the south of the washout, had suspended lanterns from the crosspiece, and had placed flares between the barricades—a distance of approximately 175 feet. The barricades extended into the center strip of the highway leaving the eastern lane only for traffic.

The claimant driving north observed a "red light to the right of the road, a 'Curve' and a "Slow' sign." When he approached the barricade from the south, the westerly or southernmost barrier came into view. The curve to the right with the flares suddenly created an impression in the driver's mind that the whole road was blocked. Brakes were applied, the car skidded to the left into the washout unprotected by any railing. The testimony was that the skidding was caused by two wet patches of mud resulting from a truckload of dirt and gravel dumped beside the washout the day before by the highway department.

Two men had been assigned to the scene to flag traffic and to keep the flares and lanterns lighted. They neglected to flag the traffic. The consequences were fatal to the state's defense, the court saying:[61]

"Flagging of traffic—under the unusual conditions prevailing at the time and place of the accident—it appears to us was indispensable to a full discharge of the duty encumbent upon the State."

WHO MAY AND WHO MAY NOT BE LIABLE

A multiplicity of factors makes this question of liability seem a maze for the litigant—the many persons, agencies, departments; the political units charged with some measure of responsibility in connection with the design, operation, and maintenance of

[60] 178 Misc. 875, 47 N.Y.S. 2d 737 (1942)
[61] 178 Misc. 875, 879

traffic facilities—in the broadest sense of the term—and the enormous variety of possible permutations and combinations of these factors. States, counties, cities, towns, townships, villages, road districts, and individual officers of some of them, have been held liable. Cities, towns, and counties, all have been given more or less authority according to the forty-eight state constitutions and the establishing statutes. Cities have different types of government with differing degrees of liability for each type. The persons charged with the performance of traffic duties bear different relations to the derelictions of themselves and their subordinates. These factors all bear upon the determination of liability.

No effort will be made to detail all the ramifications of the subject. Such is beyond the scope of this paper. Only the large outlines will be discussed. In the course of the discussion particularity will be given to the above vague generalities.[62]

THE STATE—ITS "SOVEREIGN IMMUNITY"

Without its consent, neither the United States nor any state can be sued by a private citizen. The states are expressly protected from suit by the Eleventh Amendment to the Federal Constitution.[63] It is said that the origin of this idea lay in the old common-law notion that The King can do no wrong, but it was not until the sixteenth century that this was fully established at law, and then it was always coupled with the qualification that for every act of the King some minister was always responsible.[64] "When the individual sovereign was replaced by the broader conception of the modern state, the idea was carried over that to allow a suit against a ruling government without its consent was inconsistent with the very idea of supreme executive power.[65] In the absence

[62] No better general commentary and analysis can be found than the series of articles by Professor Edwin M. Borchard, "Government Liability in Tort" 34 Yale Law Journal 129, 229, 36 Yale Law Journal 757, 1039; 28 Columbia Law Review 577, 734

[63] "Prosser, Torts," p. 1063

[64] "Prosser, Torts," p. 1064, citing Holdsworth "History of English Law" 4th Ed. 1935, Vol. 3, 463–469, Vol. 6, 266–267

[65] Prosser, Torts p. 1064, citing Briggs v. Light Boat Upper Cedar Point, 11 Allen, Mass. 157, 162 (1865)

of statute, the general prohibition against suits extends to actions of all types, whether sounding in tort or contract. In all jurisdictions, however, consent to be sued, of a limited nature, is given by statutes, providing either for a Court of Claims or suits in its own regular courts for particular causes of action.[66]

"Even where the possibility of a suit against the state is authorized, however, it is still held that the state is not liable for its torts though it may be for breach of contractual obligations. The immunity is said to rest upon the absurdity of a wrong committed by an entire people, the idea that whatever the state does must be lawful, and the rather doubtful theory that an agent of the state is always acting outside the scope of his authority when he commits a wrongful act. Accordingly, a consent to be sued is held not to waive immunity from liability, and the statutes, however broad in their terms, are construed not to create liability for the torts of state agents."[67] This immunity has been extended to various state agencies, among them state highway departments.[68]

Accordingly, the rule as to the liability of a state for defects and obstructions in its highway has been stated,

"The state is not in the absence of a constitutional or statutory waiver of its immunity from suit liable for damage resulting from defects or obstructions in its highways, but it may modify or withdraw such assumption." [69]

Such statutes exist in comparatively few of the states.[70] They are in general subject to strict construction.[71] Since this right is

[66] Prosser, Torts p. 1064

[67] Prosser, Torts p. 1065 and numerous authorities cited therein. One of these inquires as to whether the claimant is not being permitted to sue in the Court of Claims (New York) merely "to amuse himself." 5 Cornell Law Quarterly 340 (1920)

[68] Broyles v. State Highway Commission, 48 S.W. 2d 78 (1932), citing numerous cases therein on the point; McNair v. State, 9 N.W. 2d (1943)

[69] 40 Corpus Juris Secundum, Highways §249, p. 278

[70] South Carolina, 1942 Code §5887, allowing actions to $4,000 damages; New York, Highway Laws §§58, 12, 46, to be read for most purposes with Court of Claims Act, §8. Seelye v. State, 178 Misc. 278, 34 N.Y.S. 2d 205 (1942); Kansas G.S. 1935, Chap. 68–419; Connecticut Gen. St. 1930, §1481
See generally Prof. Edwin Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort" 9 Law and Contemporary Problems 282, 291 (1942)

[71] 40 Corpus Juris Secundum Highways §249, p. 279, citing Lann v. State Highway Department, 165 S.E. 785, 167 S.C. 84 (1932)

purely statutory, it may be withdrawn or modified by the state whenever it sees fit.[72]

The statutes in South Carolina, Connecticut, and in New York permit recovery for negligence, whereas the Kansas statute does not. The Kansas statute says that any person who is injured "by reason of any defective bridge or culvert on, or defect in, a state highway . . . . may recover from the State of Kansas." In *Blessman v. State Highway Commission,*[73] a state highway from the west ended a wide curve to the northeast at a bridge. Just south (20 feet) of the bridge a township road entered the state highway. The plaintiff alleged that the blending of the sand and gravel of the township road with the concrete of the state highway created an illusion that the highway continued in that direction causing him to drive into the superstructure of the bridge to his hurt. The court denied recovery saying,[74]

"The liability of the state for injuries growing out of defective highways is statutory. It is not founded on the law of negligence, but is created wholly by legislative enactment."

Illustrations the court gave of what is not a "defect on the highway" but which might involve "negligence" were: (1) Snow and ice on the highway—not "structural" nor "in itself defective." Perhaps there might be negligence in failing to remove it within a reasonable time if the state had notice; (2) A high hedge along the highway.[75] ("A defect" is something that interferes with movement over it.) ; (3) A dike obscuring vision;[76] (4) Weeds concealing a stopsign.[77] Would it not be considered negligence in New to have failed to remove the weeds? The court went on to say that a loose plank on a bridge or a hole in the pavement would constitute a defect in the highway.

The court that decided the *Blessman* case is the same court

[72] Engle v. Mayor and City Council of Cumberland, 25 A.2d 446, 180 Md. 465 (1942) The statement in so far as it concerns the state is dictum only, because the suit was against a city

[73] 154 Kans. 703, 121 P.2d 267 (1942)

[74] 154 Kans. 703, 706

[75] *Bohn v. Racette,* 118 Kans. 670, 236 P. 811, 42 A.L.R. 571 (1925)

[76] Moore v. State Highway Commission, 150 Kans. 314, 92 P.2d 29 (1939)

[77] Phillips v. State Highway Commission, 146 Kans. 112, 68 P.2d 1087 (1937)

that in *Thummel v. Kansas State Highway Commission*[78] two years later said:[79]

"The contention might be advanced that the failure to erect an adequate barrier was an omission in the nature of negligence and that the statutory liability is not predicated upon negligence. However, it is alleged that the failure to surround the washout with sufficient and proper barriers, having lights, reflectors, signs, notices or warnings thereon, constituted a defect in the project and from a practical standpoint a contention to the contrary would not be sound."

The court is saying here the *failure to surround the washout* is a defect, not negligence. How much of a change of attitude this quotation represents, it is of course impossible to determine with certainty. On a verbal level, the failure to install warnings here is no less "negligence" than the failure to remove weeds from a sign. An unprotected washout is no more a "defect" than is a covered sign. Verbally the distinction between statutory liability and negligence can be fairly well evaded but this distinction will probably be a useful device for securing justice in individual cases. The dissents in the above case stressed this angle.[80]

"The opinion is perhaps sound from the standpoint of public safety, but the basis of liability is not the public safety because at common law there was no liability arising by reason of the state's failure to provide for public safety. The only liability in this case must be strictly statutory in origin, and all other theories of liability fall if the fundamental foundation does not support them."

An interesting development along the lines of the states' retreat from sovereign immunity can be seen in two Louisiana cases *Arceneaux v. Louisiana Highway Commission*[81] and *Landry v. State*[82] in which the state, apparently by a special act of the legislature, gave the claimants permission to sue in the regular courts of the state for damages suffered by reason of the negligence of

[78] 164 P.2d 72, 160 Kan. 532 (1945)
[79] 160 Kan. 532, 543
[80] 160 Kan. 532, 545
[81] 5 So. 2d 20 (1941)
[82] 17 So. 2d 483 (1944)

the highway commission or its agents. Prior to this time, persons with claims against states had been permitted to sue in the regular judicial system under general statutes authorizing such suits, as in South Carolina, New York, Kansas, and Connecticut; or had been required to present their claims to the state legislature, under statutes authorizing such action. The claims were there handled by committees as ordinary legislation and subjected to all the vicissitudes of political action generally. This was the first instance in which the claims were handled in the judicial system by special legislative permission.[88]

In numerous other states, tort claims against the state are required to be presented to the legislature through special bills. They are subjected to all the uncertainties and vicissitudes of political action generally. It would seem preferable to handle such claims through the regular judicial system.

MUNICIPALITIES

State immunity from liability for torts committed in the performance of its governmental duties has been discussed in the preceding section. No particular emphasis was placed on the fact that the duties performed were governmental functions because all the functions a state performs are governmental. This is not the case, however, with municipalities. They are for the most part corporations (generally called "municipal corporations," to be sure) chartered by the state with power to do a vast number of things not strictly governmental but "private" or "proprietary" in their nature because they might equally well be done by a private corporation.

On the one end are such things as tax collection, the operation

[88] The *Arcenaux* case concerned the negligence of the state in leaving a hole in the highway without warning signs or lights. The Court, though the decision involved questions of pleading in large part, indicated an intention to hold the defendant to strict standards of duty, and the plaintiff eventually denied recovery on the ground of contributory negligence. (12 So. 2d 733, 5 So. 2d 20.) The *Landry* case involved the alleged negligence of the state in failing to post warning signs and in failing to construct properly certain culverts over a bayou near a very tricky intersection. The defendant was relieved on the grounds of contributory negligence. The *Arcenaux* case contains a good discussion of the effect of the waiver by a state of its immunity

of a police department, the formulation, passage, and enforcement of laws. These are strictly governmental. On the other end, are city-run water, gas, and electric supply systems—definitely proprietary. In the vast area between these poles lies the uncertainty. This study is not concerned with much of this area, but it is concerned with the classification of a city's activities in relation to its streets. Of course a city does a lot of things in its streets—sweeps and cleans them; removes snow and ice; provides policemen for them; regulates traffic; provides traffic signals; regulates parking. Rules are not the same for all these activities. To secure anything like a proper understanding of the rules, and of how a city stands in the courts in relation to its street and traffic functions, it is necessary to delve briefly into history.

At old common law, a mere political territorial subdivision such as a county or a hundred (an early English subdivision) was not liable for the negligence of its officers. While in a sense, the subdivision constituted a legal entity, it was not a municipal corporation. It was not self-governing, and its inhabitants enjoyed no privileges or immunities not shared by the rest of the Kingdom. Its officers were not under the control of its inhabitants. Furthermore, there were strictly legal difficulties in getting such a body into court. In the case of a true municipal corporation this was not true, and by the early part of the nineteenth century, the earlier technical objections were swept away. It is now well established in England that a municipal corporation may under proper conditions be held liable in an action sounding in tort.[84]

The same situation exists in this country. As has been previously discussed, the municipality—or municipal corporation—has a dual nature, one public, the other private, and the municipality exercises correspondingly two-fold functions and duties. It is along these lines that liability or non-liability in tort runs. The rule is almost universally recognized that in the absence of statutory provision there can be no recovery against municipal corporations for injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially governmental in character.[85] In the exercise of such functions, the municipal cor-

[84] 38 American Jurisprudence p. 260
[85] Prosser, Torts, p. 1066; 38 American Jurisprudence p. 261

poration is acting for the general public as well as the inhabitants of the territory and in such capacity represents the sovereignty of the state.

The immunity of a state was first extended to a municipality in 1798 in *Russell v. Men of Devon.*[86] The decision was based on fear of an infinity of actions and on the fact that no corporate funds were available from which satisfaction could be obtained. Later decisions have evolved additional explanations:

1. The municipality derives no profit from the exercise of governmental functions;
2. In the performance of such duties public officers are agents of the state, and not of the corporation, so that the doctrine of *respondeat superior*[87] does not apply;
3. That cities cannot carry on their governments if money raised by taxation for public use is devoted to making good the torts of employees;
4. That it is unreasonable to hold the corporation liable for negligence in the performance of duties imposed upon it by the legislature, rather than voluntarily assumed under its general powers;[88] and
5. It would be against public policy to retard and stifle gratuitous governmental activities vitally necessary to the public health and welfare of the population by subjecting municipal corporations to tort liabilities in its activities relative to playgrounds, etc.[89]

As one distinguished writer has said:

"Most writers have agreed that no one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases . . . . There is a noticeable trend in the direction of an extension of municipal tort liability, either by finding that the particular activity is not a "governmental" one, or by discovering special reasons to take it out of the rule. The courts are so bound by precedent . . . that any real reform . . . must come by statutes, which have been passed in a few states, to impose more or less general municipal liability in tort."[90]

[86] 2 Term Reports 667, 100 Eng. Reprint, 359 (1798) 38 American Jurisprudence p. 265

[87] The doctrine of *respondeat superior* is that doctrine whereby the master is made to answer for the negligence of his servant

[88] Prosser, Torts p. 1067

[89] 38 American Jurisprudence p. 266

[90] Prosser, Torts p. 1067 citing numerous law review articles (about 40) and

The classification of particular function is exceedingly difficult, and divergent results have been reached in different jurisdictions and even in the same jurisdictions.[91] The underlying test is whether the act performed is for the special benefit or profit of the corporate entity. If so, it is a corporate act. Numerous other tests have been stated—most of which are circular and conclusion-stating—but they are really of little help in deciding new cases. Since our interest in this subject is a limited one, it is believed wise to proceed to a consideration of the decisions. Further rationalizations will appear in the excerpts.

The planning and laying out of streets and highways is usually regarded as governmental, involving legislative and administrative discretion.[92] The regulation of traffic is likewise so regarded.[93] On the other hand the maintenance and operation of streets is treated by the greater number of courts as a "proprietary" or "ministerial" function, although they have found it difficult to explain why it is less "governmental" than the others.[94] At this point the reader should recall and consider the cases under "Improper Location and Maintenance," p. 16, with particular reference to *Avey v. City of West Palm Beach,*[95] p. 15.

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cases. An article, "California Municipal Tort Liability," in 7 Southern California Law Review 372, at page 415, by Leon Thomas David, lists 31 states as having statutes imposing liability to a greater or less degree: Alabama, Arizona, Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming

[91] 38 American Jurisprudence, p. 267

[92] Hoyt v. City of Danbury, 69 Conn. 341, 37A.1051 (1897); City Council of Augusta v. Little, 115 Ga. 124, 41 S.E. 238 (1902); Shippy v. Village of Au Sable, 65 Mich. 494, 32 N.W. 741 (1887); Urquhart v. City of Ogdenburg, 91 N.Y. 67, 43 Am. Rep. 91 (1883). The headnotes on the Urquhart case read: "Where power is conferred upon a municipal corporation to make local improvements, its exercise is quasi-judicial or discretionary, and for a failure to act, or an erroneous estimate of the public need, a civil action cannot be maintained against it."

[93] Dorminey v. City of Montgomery, 232 Ala. 47, 166 So. 689 (1936); Cleveland v. Town of Lancaster, 239 App. Div. 263, 267 N.Y.S. 673 (1933). Aff'd, 264 N.Y. 568, 191 N.E. 568 (1934). The Dorminey case is noted with extensive citations in 21 Minn. Law Review 459 (1937)

[94] Prosser, Torts, p. 1072

[95] 152 Fla. 717 (1943)

The case of *Auslander v. City of St. Louis*[96] contains as good a discussion of the legal principles that control the decisions as can be found. The plaintiff ran through what was supposed to be a red light at a busy intersection in St. Louis, thinking that, because no lights were burning, the system was inoperative. She collided with another car coming through a green signal. (It will be recalled that in the *Foley* case at p. 14, the plaintiff ran through the green signal and collided with a person facing an inoperative red signal and that in the *Avey* case, at p. 15, the entire system had been inoperative.) The court cited certain generalized discussions of municipal liability and said:[97]

"While we find no case in this state exactly in point, we are constrained to hold that the maintenance and operation by the city of the automatic stop and go signals at street intersections for the purpose of regulating traffic and tending to promote safety is an exercise by the city of its governmental power and for negligence in this respect the city cannot be held liable."

The negligence consisted in the failure of the city to remedy the condition after the police department, admittedly the proper agency, had been notified.

The court went on to analogize the operation of the system to the exercise of the police function, for which municipalities are universally held not liable, and concluded.[98]

"The evidence here is that the care and supervision of these signals was entrusted to the police department of the city and that although the defect in the operation of the signal was discovered by the policeman on duty in that locality and reported to the head of that department, no prompt action was taken to remedy the defect, so that the negligence was that of the police department of the city government. For such negligence defendant city is not liable."

To show how the court reached the conclusion that the operation of traffic signals was not a corporate function, it is helpful to detail the arguments of the plaintiff. The case of *Aaronson v. City*

[96] 332 Mo. 145, 56 S.W. 2d 778 (1932)
[97] 332 Mo. 145, 151
[98] 332 Mo. 145, 154

of New Haven,[100] was cited at p. 19 for the proposition that traffic signals improperly maintained could result in liability. It will be recalled from the discussion of that case that a "silent policeman" had been knocked down in the street and that a motorist had collided with it. Negligence was found in the city's failure to replace the signal and to prevent it from becoming a mere obstruction in the street.

Vicksburg v. Harralson,[101] bolstered the argument. In that case plaintiff was injured when his car came into contact with a "bumper" five inches high in the center, five feet wide at its greatest width, which had been placed in the street near an intersection "to warn automobile drivers of the danger of collisions at this street intersection."[102] Recovery was allowed on the theory that the bumper was a dangerous defect or obstruction to the street. The case of *Titus v. Bloomfield*[103] held that a concrete block without a light on it placed in the center of a street intersection for the purpose of guiding traffic was a defect in the street and rendered the city liable.

In *Town of Hobart v. Cashon,*[104] a traffic signal in the center of a street consisting of a concrete base and an upright standard bearing a light had been damaged in some manner so that the lighted portion was broken. The plaintiff drove his car into it at night and was injured. The court held it had become a mere obstruction and that the city was liable. *Wells v. Kenilworth*[105] involved a signal post where the defendant had neglected to turn on the lights on the post. Whether or not it was an obstruction was held a question for the jury. All these cases were cited for the proposition that a city can be liable for placing obstructions on the street *in the guise* of traffic signals.

Confronted with these cases, the court proceeded:[106]

"These cases are to be distinguished from the present case in that in each of them the plaintiff's injury resulted from a collision with the

[100] 94 Conn. 690 (1920); 110A. 872, (1920)
[101] 136 Miss. 872, 101 So. 713 (1924)
[102] 136 Miss. 872, 881
[103] 80 Ind. 483, 141 N.E. 360 (1923)
[104] 81 Ind. App. 24, 142 N.E. 138 (1924)
[105] 228 Ill. App. 332 (1923)
[106] 332 Mo. 145, 153

signal itself, which the court held to constitute an obstruction to the street, rendering it unsafe for travel thereon. The defendant's liability in such cases, therefore, was based on a failure of the city to keep its streets in a reasonable safe condition for travel thereon by reason of defects in the physical condition of the same. In the present case, plaintiff's injury was in no way caused by a collision with the traffic signal, and it is not claimed that such signal itself constituted an obstruction to travel on such street or rendered the same unsafe. The injury here resulted from plaintiff's collision with the automobile of another . . . and the plaintiff's complaint is . . . that such collision would have been averted had the defendant kept the signal light working so as to have warned the other party of the plaintiff being on the crossing.

"There is a difference, however, between the physical condition of a street and its use by the public. The keeping of a street in a condition reasonably safe for travel thereon has reference to its physical condition and is a different matter than the regulation of traffic on such street. The one relates to the corporate or proprietary powers of the city, while the other relates to its governmental or police powers. This distinction is pointed out in 43 Corpus Juris, 996, as follows: 'The manner in which the highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate powers.'"

The court breaks the distinction down into two parts. The first is that the recited cases deal with collisions between an obstruction and the plaintiff's vehicle, whereas the instant case deals with a collision between another automobile and the plaintiff's automobile. That is clear enough, but what has that distinction to do with the quality of the function involved in the maintenance of traffic control devices as being "governmental" or "proprietary?" What would the court do with a collision between two automobiles caused by the necessity of one's turning out to avoid an obstruction? The collision is just as much a collision caused by the device as before, yet it is with another automobile. The analogy to the police functions and the explanation given for nonliability, that it was the negligence of the police department, surely proves too much. It is equally the negligence of the police department

in not replacing lights on stanchions and obstructions. To be consistent, then, there should have been no liability imposed in those cases. On the contrary, in the *Aaronson* case, the negligence complained of was expressly declared to be that of the police department. The city was held liable notwithstanding that fact.

As for the second distinction, keeping the streets in a safe condition is, to be sure, different from the regulation of traffic. But why should not the proper maintenance of the signals upon which people rely and which they are compelled to obey be considered "the keeping of streets in a condition safe for travel," which is "proprietary" and "actionable," rather than the "regulation of traffic" which is "governmental" and "non-actionable?"

If it be held one and not the other, no real reason appears why one should be "governmental" and the other "corporate." Certainly the quotation from Corpus Juris, after the statement of the conclusion, is not in point, for keeping signals operative is certainly not "making and enforcing ordinances regulating the use of streets." The opinion of the court can probably be explained on the ground that when it spoke of "regulating the use of streets," the case at hand being the failure to keep bulbs burning in its stop and go signals, it had in mind making and enforcing ordinances regulating the use of streets.

To the writer it would seem that the admittedly "governmental" prescription of ordinances for the use of streets would cover such things (applied strictly to the matter at hand) as the decision to install a traffic light or not,[107] the decision as to the timing of the lights in the various directions, and perhaps prescribing of the days and hours on which they would be operated (keeping always in mind the possibility of it becoming an "obstruction" if in the street and not properly lighted.)

But the mere maintaining of operative bulbs or the repair of timing switches and similar functions hardly requires the deliberation and discretion of the town council, nor is any less for the "benefit of the city" than keeping silent policemen upright on their pedestals. The courts, however, have held invariably, at least so far as this writer has been able to discover, that the main-

[107] Martin v. Winchester, 278 Ky. 200, 128 S.W. 2d 543 (1939)

taining of such signals was a governmental function, regardless of the sufficiency of the reasons. The decision must certainly be made one way or the other, and it would perhaps be equally difficult to justify a contrary determination. Notwithstanding this, dissatisfaction with the particular differentiation made here is frequently expressed.[108]

The *Auslander* case was cited with approbation and followed in the *Mengel* case, p. 18, wherein the traffic signal base was held to be an obstruction and actionable. It is in its other aspects, too, in complete accord with a larger number of other cases holding that the failure of mechanical signals does not result in negligence on the governmental function rationale.[109] Some of the more interesting cases are: *Vickers v. City of Camden*[110] (light at intersection of two highways showed green for both highways); *Parsons v. City of New York*[111] ("green light in four directions simultaneously"); *Cleveland v. Lancaster* [112] (signal operative for one highway but not the intersecting highway); *Martin v. Canton*[113] (operative for one street but not another); and *Dorminey v. Montgomery*[114] (inoperative on boulevard, green for intersecting street.)

The holding in the two New York cases, *Cleveland* and *Parsons,* is somewhat surprising in view of the other exceedingly liberal holdings of that jurisdiction. In fact they can no longer be considered authoritative in view of the recent (July, 1945) decision of the Court of Appeals in *Bernardine v. New York.*[115] The plaintiff was injured by a runaway police horse and was allowed to recover. The police force and all things connected with it had

[108] Murray, "Recent Trends in Municipal Tort Liability," 5 Legal Notes on Local Government 353, 354. The author suggests that street maintenance and traffic regulation are so intimately related and involve such cognate problems and policy considerations that the same rules ought to be applied. See also 23 Marquette L. Rev. 216 (1939); 13 Tenn L.R. 59 (1934)

[109] An extensive note on the subject may be found at 161 A.L.R. 1404 (1946)

[110] 122 N.J. L. 14, 3A.2d 613 (1939)

[111] 248 App. Div. 825, 289 N.Y.S. 198 (1936), aff'd, 273 N.Y. 547, 7 N.E. 2d 685 (1937)

[112] 239 App. Div. 263, 267 N.Y.S. 673 (1933), aff'd, 264 N.Y. 568, 191 N.E. 568 (1934)

[113] 41 Ohio App. 420, 180 N.E. 78 (1931)

[114] 232 Ala. 47, 166 So. 689 (1936)

[115] 294 N.Y. 361, 62 N.E. 2d 604, 161 A.L.R. 364 (1945)

heretofore been considered the strongest bastion of municipal "governmental-function" immunity. Said the Court:[116]

"Section 8 of the Court of Claims Act says 'The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to action in the supreme court against individuals or corporation .... None of the civil divisions of the State—its counties, cities, towns and villages—has any independent sovereignty .... The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed .... On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees—even if no separate statute sanctions that enlarged liability in a given instance."

This holding, seeming to say that the cities' immunity is derivative and that since the source has been destroyed the immunity no longer exists, has yet to be fully interpreted and boundaries of its doctrine marked out. Since its rendering, no decisions bearing closely on the traffic signal situation have come down. The editors of the American Law Reports take the position that the case is likely to result in a reversal of the earlier holdings in the situation where traffic signals fail because of municipal negligence.[117]

By way of summary the matter stands, for the present at least, that municipalities are not liable for the failure to keep traffic signals operative. They do, however, seem to be liable for "obstructions in the streets," whatever that term might encompass. It is possible that the posting of "adequate" signs will relieve them from liability from most other undesirable conditions such as "slipperiness."[118]

Before the subject of municipalities is completed, it would be well to tie up a few loose ends. South Carolina refuses to accept the distinction between governmental and proprietary, and finds

[116] 296 N.Y. 361, 364. Cited cases omitted
[117] 161 A.L.R. 367, 1405 (1946)
[118] Nelson v. City of Seattle, 16 Wash. 2d 592 (1943) (see page 5)

no common law liability at all.[119] Florida courts hold that cities under a commission form of government are subject to the same tort liability as private corporations.[120] Ohio has pursued a somewhat uncertain course, abandoning the distinction between governmental and proprietary functions in *Fowler v. City of Cleveland.*[121] The decision was overruled by *Aldrich v. City of Youngstown,*[122] the change in part due, it is said, to a change in court personnel.

COUNTIES, TOWNSHIPS, ROAD DISTRICTS

It is generally held that in the absence of statute, quasi-municipal corporations[123] or minor political subdivisions of a state such as counties, towns, townships, and road districts are not liable for defects in highways.[124] It is said that such an entity "having no representative or governing body, can itself commit no wrong, and the persons in its service or employ are public officers whose duties are defined by law, rather than servants or agents of the district for whose defaults it would be liable.[125]

Occasionally, however, the courts will depart from this line of decisions, and by the doctrine of "nuisance" impose liability

[119] Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228, 36 LRA (NS) 363 (1911)

[120] Prosser, Torts p. 1068. But for amplification see 38 American Jurisprudence p. 272

[121] 100 Ohio St. 158, 126 N.E. 72, A.L.R. 131 (1919)

[122] 106 Ohio St. 342, 140 N.E. 164, 27 A.L.R. 1497 (1922)

[123] Gaynor v. Town of Hempstead 275 NYS 562, 153 Misc. 321 (1934), for distinction between "quasi-municipal" and "municipal" corporations discussed in preceding section

[124] 40 Corpus Juris Secundum 280 citing extensively from 15 states. However, in the case of Flynn v. West Hartford, 98 Conn 83, 118A.517, (1922) the plaintiff drove his automobile into a pile of sand on the highway, completely unguarded. There was a statute on the books (GS § 1414) which had been there since 1672, on which the defendant was found liable, but the court said, (98 Conn. 83, 85) "Apart from the liability under the statute the defendant would be liable under the common law rule for an injury proximately resulting from the presence upon the highway of this pile of sand and earth and excavation, because it was responsible for their existince; it made the excavation; it piled up the sand and earth; and it left them inadequately guarded." The accident happened in broad daylight but the plaintiff freed himself from the charge of contributory negligence by pleading that the sun glared on his windshield and that he relied on the defendant town to keep the highways clear of obstructions

[125] 38 American Jurisprudence p. 260

even in the absence of statute.[126] For example in *Bacon v. Rocky Hill,*[127] the plaintiff was a passenger in a car that overturned as a result of driving over loose stones placed at the top of a hill by a selectman of the town charged with its repair. The town had erected no warning signs. The court held that such a condition created a nuisance and that the town was liable even apart from the statute. The court quoted with approval the doctrine of *Flynn v. West Hartford,*[128] and said,[129]

"The plaintiff could prove that the defendant had created a condition of the highway amounting to a nuisance which would render it legally liable for the injuries she claimed to have suffered apart from any liability under the statute for recovery of damages due to a defective road."

Where the statute so provides, the above mentioned political subdivisions may be held liable by one injured through a defect or obstruction in the highway.[130]

[126] Prosser, Torts, p. 1074

[127] 126 Conn. 402, 11 A.2d 399 (1940)

[128] See footnote 124

[129] 126 Conn. 402, 409

[130] 40 Corpus Juris Secundum, Highways, §250a, p. 281 notes 41–44, citing from five states for counties, two for towns, four for townships. Additional cases not cited in Corpus Juris Secundum are: Hennessy v. San Bernardino County, 47 Cal App. 2d 183, 117 P.2d 745 (1941); Howard County Commissioners v. Leaf, 8A.2d 756–177 Md. 82 (1939); Backstrom v. Ogallah Township in Trego County, 149 Kan. 553, 88 P.2d 1026 (1939). Said the judge: (149 Kans. 553, 558) "It seems such a little thing for a jury to reach into the public treasury to hand out a generous largess to some hapless individual who thru sheer accident, or thru his own or another's fault, has been injured on a public highway! To curb that natural tendency the legislature has imposed but one arbitrary requirement which it has been the bounden duty of the court to enforce." The "bounden duty" of the court required it to deny the plaintiff relief because the county had not had actual notice of a dips around culvert that had been there six months, (circa); Fritch v. King County, 4 Wash. 2d 87, 102 P.2d 249 (1940); Berglund v. Spokane County, 4 Wash. 2d 309, 103 P.2d 355 (1940); Waller v. Edmund County, 67 S.D. 165, 290 N.W. 484 (1940); Kenzel v. New Gattland Township, 152 Kan. 725, 107 P.2d 207 (1940); Mason v. Town of Andes, 261 App. Div. 354, 25 NYS 2d 738 (1941); Johanson v. King County, 7 Wash. 2d 111, 109 P.2d 307 (1941); Robinson v. Swing, 70 Ohio App. 83, 36 N.E. 2d 880 (1939); Holland v. Allegan County, 316 Mich. 134, 25 N.W. 2d 140 (1946); Dickinson v. Cheyenne County, 146 Neb. 36, 18 NW 2d 559 (1945); Johnson v. Fresno County, 67 Cal. App. 2d 116, 153 P.2d 557 (1945); Biearman v. Alleghany County, 145 Pa. Super. 330 (1940); 21 A.2d 112, Stitzel v. Hitchcock County, 139 Neb. 700, 298 NW 555 (1941); Braun v. Wayne County, 303 Mich. 454 6 NW 2d 744 (1943); Smith v. Snowden Township, 348 Pa. 187, 34 A.2d 515 (1943)

In *Simmons v. Cowlitz County*,[131] the plaintiff on a country road fourteen feet in width drove his car onto the shoulder while passing a care going the other direction. The shoulder, which to all appearances was firm and solid, gave way, precipitating the plaintiff and his wife down a thirty-foot embankment to the complete destruction of the automobile and the serious injury of the wife. The trial-court allowed a recovery on the theory that failure to erect warning signs and barriers at the place constituted negligence. The defendant's motion for judgment notwithstanding the verdict was granted but the higher court on appeal reversed, saying,[132]

"Recovery may be had against a county for injury to the rights of the plaintiff arising from some act or omission of such county . . . Rem. Rev.Stat., §951 (P. C. §8394). Under the provisions of the laws of 1937, chapter 187 (Rem.Rev.Stat.Vol. 7A §6450–1 (P. C. §2697–421) et seq), counties are authorized to perform all acts necessary and proper for the construction and maintenance of county roads. The effect of the statutes cited, when considered together, is to subject counties to the same liability for negligence in the maintenance of their county roads and highways as would in a similar case be imposed on a conventional municipal corporation. Berglund v. Spokane County, 4 Wn. 2d 309, 103 P.2d 355 (1938)."

The court went on to find that the jury might reasonably have found the county negligent in all the circumstances.

This case seems to say that where one statute imposes liability on counties for their acts and omissions, and other statutes impose on them the duty to construct and maintain highways, the county is liable for defects in the highways. It may be matched, however, by numerous cases holding that the mere imposition of the duty to maintain does not result in liability for failure to maintain.[133]

[131] 12 Wash. 2d 84, 120 P.2d 479 (1941)

[132] 12 Wash. 2d 84, 88

[133] "In the absence of an express imposition of liability, liability will not be imposed on counties or similar political subdivisions by statutes committing to them the construction, the maintenance and repair or the general supervision of highways, or by statutes imposing on county officials the duty to remove highway obstructions and punishing them for their knowing failure to do so. However, where the statutes broadly impose on counties liability for injuries arising from their wrongful acts or omissions and other statutes confer on the counties the

For further details, the interested reader is referred to the authorities cited.

HIGHWAY OFFICERS

The question of liability of highway officers for injuries caused by the defective operation or maintenance of roads under their control is one that is cut across by many conflicting doctrines. The resulting body of case law is, as one might imagine, a confusing hodge-podge of irreconcilable decisions, varying from jurisdiction to jurisdiction, and sometimes not reconcilable even within a single jurisdiction. The liability of public officers (and officers charged with duties relative to highways are public officers) is all bound up with the doctrine of sovereign immunity. Many of the same considerations that apply to the doctrine of immunity for the state apply to immunity for its officers.[134] An attempt to distinguish between "ministerial" and "discretionary" is found, and with little success.

In addition, liability is occasionally sought to be predicated upon negligence which constitutes "misfeasance" and immunity granted for negligence which constitutes mere "non-feasance"—a distinction which is very slippery indeed.[135] In general, it may be said that there are a great many more cases in which the officers in their individual capacities have been relieved of liability for one reason or another than there are cases in which they have been held responsible. It is said:

"According to some authorities, highway officials with funds available for the work are personally liable for damages resulting from their negligent failure to keep highways in proper conditions, but other authorities deny liability for mere non-feasance, as distinguished from misfeasance unless created by statute."[136]

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right and duty to construct and maintain highways, it has been held that the county may be held responsible for damage arising from defect or obstruction on a highway due to its default." 40 Corpus Juris Secundum p. 282; notes 48–50

[134] Prosser, Torts §25, §108, p. 1075

[135] Richardson v. Belknap, 73 Col. 52, 213 P. §335 (1923)

[136] 40 Corpus Juris Secundum, Highways §251, p. 285

The authority cited for the affirmative proposition[137] when examined, turns out to be statements in dicta only. However, some cases have been found and will be examined cursorily to illustrate a few of the points discussed above. While none of the cases bear directly on the subject of this inquiry, it may be said that if a county official is liable for failure to repair a bridge, he might with little or no change in legal doctrine be found guilty of failure to erect adequate warning signs. It may also be said that, where liability of the political subdivision itself exists, suit against its individual officers is unlikely, because of additional legal barriers and, more practically, the lesser depth of the pocket.

In *Tholkes v. Decock*,[138] the defendant Tholkes was charged by statute, as road overseer of his highway district, with certain duties relative to the maintenance and upkeep of the road. One of his roads became out of repair, and he employed defendant DeLange to make the necessary repairs. DeLange in the course of his work, removed an old culvert and left the excavation unguarded, without lights or other warning. The plaintiff drove his car into it and was injured.

The court said that it was well-settled in Minnesota that towns were not liable for injuries resulting from defects in the highway, whether from misfeasance or non-feasance of the township officers, and that in Minnesota the liability of public officers for the negligent failure to discharge "ministerial" duties was also well-settled, whether the political unit they represented was liable or not. The court concluded that to extend the immunity of the town to liability for injuries from highway defects to highway officials was "not warranted" and "would result in leaving the injured party wholly without a remedy."[139]

In complete contrast is *Richardson v. Belknap*,[140] where suit was brought against the county commissioners in their individual capacities for their alleged negligence in failing to erect guard

[137] Walter v. Board of Commissioners of Montgomery County, 179 Md. 665, 22 A.2d 472 (1940); Willis v. Milling, 173 Md 28, 194 A.584 (1938); Monk v. New Utrecht, 104 N.Y. 552, 11 N.E. 268 (1887)

[138] 125 Minn. 507, 147 N.W. 648 (1914)

[139] 125 Minn., 507, 510

[140] 73 Col. 52, 213 P. 335 (1923)

railings at the approach to a bridge at which the plaintiff was injured. Said the court:[141]

". . . . (T) he only question that need be considered upon this review (is) whether the county commissioners are liable, as individuals, for injuries caused by their failure to maintain and keep in repair a public highway. In the view we take of this case, as hereinafter appears, it is immaterial whether such failure takes the form of negligence, non-feasance, or misfeasance. . .

"When the duty imposed upon an officer is one to the public only, its non-performance must be a public, and not an individual, injury and must be redressed in a public prosecution of some kind, if at all." (Quoting from *People v. Hoag,* 54 Col. 542, 131 Pac. 400, 45 L.R.A. (N.S.) 824)

"In this state Counties are not liable for torts . . . .

"It would be inconsistent to relieve counties from liability and yet hold the officers liable."[142]

It will be seen that in the Minnesota case the non-liability of counties is offered as a reason for the liability of its officers while in the Colorado case the county's non-liability is offered as a reason for its officers' non-liability. The difference in attitude toward the type of negligence— misfeasance or non-feasance—is equally apparent.

The case of *Binkley v. Hughes*[143] illustrates the same result as the *Richardson* case, but with a different rationale. The plaintiff intestate was killed when his truck crashed through a defective bridge. It was conceded that the county was not liable. The court found no liability for the commissioners saying that it was committed to the rule that in the absence of statute, county commissioners were not liable for mere failure to repair the bridge—which was non-feasance. Non-feasance was doing nothing. Misfeasance is "a failure to use in the performance of a duty owing to the individual, that degree of care, skill, and diligence which the circumstances demand."[144] The court having decided the lapse was non-feasance, from which immunity would result, went on

[141] 73 Col. 52, 53
[142] 73 Col. 52, 56
[143] 168 Tenn. 86, 72 S.W. 2d 1111 (1934)
[144] 168 Tenn. 86, 89

to say that the duty called for by the circumstances could not be classed as "ministerial," because it required the exercise of discretion and judgment.

HIGHWAY CONTRACTORS AND OTHERS

The liability extending to these persons may be found discussed in 40 Corpus Juris Secundum Highways §252; 253, p. 286–289. It suffices here to say that the extension of governmental liability to them is quite limited, and the laws that govern them are the general rules of tort liability.

FACTORS AND DEFENSES IN ACTIONABLE NEGLIGENCE

It would be impossible to discuss all the elements that bear upon actionable negligence. Factors selected are ones believed to hold particular interest for persons charged with traffic control because of constant recurrence of the factors in the cases, or because of the opportunity afforded by a knowledge of them to avoid liability.

NOTICE

In legal theory at least, where it is sought to charge a person with negligence, or the failure to take action, he must have known about what he was supposed to remedy. The reasonable and prudent man is not required to take action without knowledge, nor is he held to omniscience. But of course in all circumstances the absence of knowledge will not relieve the defendant from liability, for the logical result of that "do-nothing, see-nothing, hear-nothing" performance would be no liability whatever. The law has met this dilemma by saying that where someone *should* have known, though he does not, he has had "constructive" notice, and is liable notwithstanding. The same rules apply to traffic agencies.

It would seem, where a highway remains unchanged and is still in the condition in which it was designed and intended to be when it was built, and a person is injured thereby, that notice is

not really necessary. There has been no change of which there could be notice. This is the situation that existed in the Ziehm case, page 7, where the signs were inadequate to warn the driver of the dead-end street. It is equally true of several other of the "sign" cases. The same result is reached where the act complained of was done by the defendant.

So, in *Johnson v Fresno County,*[145] where the county's employees set out flambeaus Saturday which had burned out by Sunday when the accident occurred, it was held that no further notice was required. The county was held to know that the flambeaus would burn out before Sunday night because its servants had set them out. The "notice" that courts talk about in those cases is not the "notice" to which reference is made in this subsection. Notice in this section means information or warning of a change in conditions or equipment. Notice in the case where there has been no change means knowledge that the condition is unsafe. It will be recalled that in the *Calihan* case, p. 23, the state had received five official reports of accidents occurring at the channelization island, and that the taxicab driver had knocked down the state's sign some twenty-four hours before the accident in suit. The "notice" of the accidents, i.e., received through the reports, would go to the standard of care the state had exercised, in that the constant recurrence of accidents should lead it to change the design of the control area. On the other hand, the state was held to have *constructive* notice, since no actual notice was shown, of the change, i.e., the disrepair of the sign, since it had been knocked down twenty-four hours before. (The same situation obtains in the *Wenzel* case, p. 51, where the traffic signal had been installed in the center of the street for many years. There, no notice was required.)

The importance of actual notice is illustrated by the *Aaronson* case,[146] p. 19, in which the "silent policeman" had been knocked down in the street. The police department, notified at 7 P.M., was situated but twelve minutes' walk from the scene. The accident occurred at 7:30 P.M. The jury found that the city had not

[145] 67 Cal. App. 2d 16, 153 P.2d 577 (1945)
[146] 94 Conn. 690

acted with reasonable promptness in restoring the silent policeman to its proper attitude and position. Said the court,[147]

"The city is not liable unless it has either failed to use reasonable care in discovering the existence of the defect, or has failed after actual notice or constructive notice to use reasonable care in repairing it."

The city is, of course, permitted a reasonable time, in view of all the circumstances, after notice in which to act. If the accident had happened at 7:05 P.M. perhaps the ctiy would not have been liable. Or, if all the policemen had been out chasing robbers, and no one was around when the message came in, there might have been no liability, because reasonable care would not have required the city to replace the sign by 7:30 in view of those circumstances.

Constructive notice is often found where there is no actual notice but the defendant should have taken pains to inform himself. Said the court in the *Calihan* case, p. 23:[148]

"As this was the only sign which the State of New York had installed to control the flow of traffic at the intersection, it was the duty of the state's employees to eye it vigilantly and to maintain it in proper repair, alignment, and position. No actual notice of its disrepair is shown, but twenty-four hours was sufficient time to bind the state by constructive notice in view of the history of accidents at this busy arterial highway intersection."

Similarly in the *Foley* case, p. 14,[149] the intersection light had failed at 2 P.M. on Saturday and had not been replaced up to 11 A.M. on Sunday nor had any report of its failure reached the state representatives. Said the court:[150]

"It is no reflection on the conduct of the Amherst policemen to say that the state's duty to maintain the signal light required it to have the same checked systematically and with greater frequency than once in

[147] 94 Conn. 690, 696
[148] 36 NYS 2d 840, 845
[149] 43 NYS 2d 585 (1943)
[150] 43 NYS 2d 585, 587

twenty-one hours. There is no proof in the record that any state employee had examined the signal even once daily. Nor indeed, had ever examined it from the moment it was installed three of four years prior to the accident. It must be said, therefore, that the State of New York had constructive notice that the light had failed and was negligent in its duty of maintenance."[151]

Constructive notice on the other hand received a narrow interpretation in *Pape v. Cox, Highway Commissioner.*[152] The plaintiff was injured as a result of the skidding of his car at a curve on the highway from Middlebury to Waterbury. At the scene of the accident, the highway curves to the north and is banked sharply. Trees immediately south of the curve, forty feet in height, cast a shadow over the road and caused ice to form upon the concrete from condensation. The skidding occurred about 8 on the morning of the 20th of November. The state's employees had inspected the spot the afternoon before at 4 P.M. and found it free from ice or frost. Temperature conditions were such (available from maximum and minimum readings) that ice might well form. The court, after stating that actual or constructive notice was necessary for liability to ensue, said,[153]

"It is also an established principle that the notice which a municipality must receive as a condition precedent of liability for injuries received by reason of a defective highway is notice of the defect itself which occasioned the injury and not merely the conditions naturally productive of that defect and subsequently in fact producing it."

In other words, knowledge of conditions, i.e., the temperature and atmospheric conditions, that normally produce ice on the spot is not sufficient to constitute notice or knowledge of ice on the highway. At this point the opinion becomes quite unsatis-

[151] Other interesting cases concerning constructive notice may be found in *Arceneaux* v. *Louisiana Highway Commission,* 5 So. 2d 20, 15 So. 2d 638 (1941) (p. 29), of hole in highway; *Howard County Commissioners* v. *Leaf,* 8A.2d 756, 178 Md. 82 (1939), of hole in road; *Fritch* v. *King County,* 4 Wash. 2d 87, 102 P.2d 249 (1940), of 2-½" depression in paved surface near underpass at bottom of hill, (p. 13); *Robinson* v. *Swing,* 36 N.E. 2d 880, 70 Ohio App. 83 (1939), constructive notice through filing with city of plat of area where defective street was located

[152] 129 Conn. 256 (1942)

[153] 129 Conn. 256, 259

factory and says that there was no evidence in the record to support the trial court's finding that ice in dangerous amounts had been on the highway long enough to charge the state with constructive notice. Ice in dangerous amounts there undoubtedly was at 8 o'clock in the morning, and the plaintiff's wife and son alleged that they had skidded on the spot at 11 P.M. the night before. The court said that this was no proof that the ice had been dangerous a long time and continued.[154]

"It would impose too heavy a burden upon the highway department to hold it to the duty of inspecting to discover any icy condition, as to the duration of which there is no evidence other than an inference..."

As regards the general question of when notice will be implied, the applicable considerations have been stated:

"In determining whether notice should be implied, the character of the highway as to frequency of use, the nature of the defect as being plainly visible or the reverse, the nature of construction, as being such that a defect may reasonably be expected to develop, and that similar accidents had happened at the same place will be taken into consideration, and, if the defect is latent, notice of its existence will not, in the absence of special circumstances be imputed. Notice that the highway at a particular point is generally defective will affect the municipality with notice of particular defects at that point. So notice of defect is sufficient to charge the municipality with notice of a particular danger arising therefrom."[155]

Frequently statutes require that the defendant must have *received actual notice.* Holdings under these statutes are commonly very strict.[156] Other statutes refuse to allow the imposition of liability until the expiration of a stated period after receipt of actual notice.

[154] 129 Conn. 256, 261

[155] 40 Corpus Juris Secundum, Highways §263, p. 313

[156] Williams v. Wessington Township, 14 N.W. 2d 493 (1944) (Statute relieving defendant for first twenty-four hours after receipt of actual notice); Backstrom v. Ogallah Township in Trago County, 149 Kans. 553, 88 P.2d 1026 (1939); Kenzel v. New Gattland Township, 152 Kans. 752, 107 P.2d 207 (1940) both requiring five days

EFFECT OF CHANGED TECHNOLOGICAL CONDITIONS

Though traffic control devices may have been proper when installed, that fact alone is not regarded as sufficient to excuse the traffic agency of a charge of inadequacy at the time of the accident. In the case of *Wenzel v. State,*[157] in which on a foggy night a car ran into the one fixed-base traffic signal on a highway where all other signals were centrally suspended, the court said:[158]

"The stanchion as originally erected was proper and conformed to standards approved for traffic control devices. Our questions, however, must be answered in light of the circumstances surrounding the accident.

"Lawful inception will not exonerate the State from consequences of conditions which changing circumstances render hazardous, and but for the state's negligent omission could be avoided."

EFFECT OF FAILURE TO APPROPRIATE MONEY

It is said by some authorities[159] that lack of funds to make necessary repairs may under some circumstances excuse a political body from liability for damages arising from highway defects in cases where it would otherwise be responsible, but not where the duty of maintenance or repair is absolute or where the funds could have been procured. As one might expect where there are insufficient funds to do all that needs to be done, the question of the exercise of "discretionary" as opposed to "ministerial" acts becomes involved in the discussion[160] with the results that usually follow those determinations—liability for negligence in the performance of ministerial acts but immunity for negligence in the performance of discretionary acts. The defense of insufficient funds seems not to have been raised with any frequency in recent years. However, in the *Wenzel* case discussed in the previous section, the court said,[161]

[157] 36 N.Y.S. 2d 943 (1942) (see p. 17)
[158] 43 N.Y.S. 2d 943, 945
[159] 40 Corpus Juris Secundum, Highways §252, p. 286
[160] Monk v. New Utrecht, 104 N.Y.S. 552, 11 N.E. 268 (1887)
[161] 43 N.Y.S. 2d 943, 946

"It is contended that the failure of the State legislature to appropriate moneys for the building of a parkway and the reconstruction of the traffic signal system along the route of Sunrise Highway exonerates the State from liability. This contention is without merit when viewed in the light of the circumstances. Abatement of this particular nuisance could easily have been accomplished without changing the design of the highway, particularly since others had been removed without waiting for the special appropriation."

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a defense with which nearly all persons are familiar. The rules relating to it, however, may not be nearly so familiar. A general discussion may add to the understanding of the subject, so that its application and its limitations may be more readily comprehended.

Contributory negligence is an effective defense to all tort actions of the type under consideration in this paper. However, unless misunderstanding ensue from the broad statement of the rule above, it is necessary to gain an understanding of exactly what constitutes contributory negligence. Many of the rules discussed in the opening section of the paper relating to actionable negligence—that is, negligence on the part of the defendant—apply equally well to contributory negligence—or negligence on the part of the plaintiff.[162] While in actionable negligence the duty owed by a defendant is the duty owed to the plaintiff, or to the class of persons of which the plaintiff is a member, in contributory negligence the duty owed by the plaintiff is the duty to himself. A person using a street or highway is bound to use reasonable care and prudence for his own safety.[163] If he does not do so, and the failure to do so contributes materially to the damage suffered by him, he is precluded from recovery.

The books are full of statements to the effect that the care the plaintiff must take need not be the "highest degree of precaution," or "extroadinary care."[164] Exactly what degree of care under all the circumstances is required is to be determined by the jury,

[162] Prosser, Torts §52

[163] 25 Am Jur p. 741. 40 Corpus Juris Secundum, Highways §268, p. 317

[164] See note 163

subject to the limitation of the court's control discussed in the opening section of this paper, and the words that are used to describe the standard of care are all comparatively meaningless apart from the context of particularized circumstances. There is practically no act or omission that can be said absolutely to constitute contributory negligence.[165]

The negligence or fault of the plaintiff must be such that it contributes to the damage, i.e., that it contributes to the event causing the damage. As described above in the preceding discussion, the contributory negligence must be said to be a "proximate cause" of the injury. For instance, if the plaintiff was guilty of negligence in driving at night without a tail light, and was injured as the result of the collapse of a defective bridge, the inoperative condition of the tail light could hardly be said to have contributed to the accident. Similarly, a plaintiff driving wildly and at an unreasonable rate of speed down a tortuous mountain road would no doubt be found guilty of contributory negligence if he ran over the edge at a curve improperly marked, because the driving at such speed would doubtless be held to contribute to the accident.

With these general propositions in mind it would be well to consider a few of the more common instances of alleged contributory negligence. Of course, contributory negligence is ultimately a fact for the jury, as well as the determination of the facts that go to make up the alleged negligence. For example, as in the usual case where the plaintiff alleges that the state had posted no signs to warn of a slippery curve, there are two questions involved: (1) Was the plaintiff going 15 miles per hour (as he says) or 50 (as the state says)? (2) If going 30 (as he probably was) is it below the required standard of care to go 30 (or 15, or 50) in view of the facts that the road had been slippery at the preceding curve, the plaintiff lived right around the bend and knew of the slippery condition (in fact had skidded there twice the week before), and that he knew perfectly well his tires were completely without treads.

A frequent basis of the charge of contributory negligence is the violation of rules of the road or of various traffic regulations. Some jurisdictions[166] have allowed recovery, though the plaintiff

[165] Prosser, Torts p. 285
[166] 25 Am Jur, p. 748

had violated traffic regulations, where the injury followed upon collision with a defect or obstruction in the highway, upon the ground that the rule in question was intended only to facilitate traffic and to prevent injury to other travelers and does not operate to restrict the movement of a traveler where other travelers are not immediately concerned. Consider, for example, *Jeffords v. Florence County*,[167] in which the plaintiff was injured and his automobile damaged when his car ran over an unguarded ditch on the left-hand side of the road. Said the court:[168]

"A proper construction of the statute does not require that one should at all times stay in the right of the center of the road, but it means that a party must take the right when he is meeting one, so as to give the party coming from the opposite direction his right of way unobstructed. A party has a right to travel on either side of the road, provided no one is coming from the opposite direction, and provided he is not obstructing the passage of any person."

This distinction concerning the "proper" side of the road is not made in all jurisdictions.[169] While the previously cited position of the court is not entirely clear as to whether or not the regulation was violated, or whether or not the violation, if there was one, failed to contribute proximately to the injury, it is true as a general rule that in order for a violation to constitute contributory negligence it must be a contributing cause. The question of violation of statutes is an exceedingly involved one, and an examination of it in adequate detail would extend the scope of this paper unreasonably.[170] There are also different types of statutes that produce different legal results. It has been said:

[167] 165 S.C. 15, 162 S.E. 574, 81 A.L.R. 313 (1932)

[168] 165 S.C. 15, 21, quoting from Walker v. Lee, 115 S.C. 495, 106 S.E. 682 (1921)

[169] See Annotation, 12 A.L.R. 458 (1921)

[170] Restatement, Torts, §286. VIOLATIONS CREATING CIVIL LIABILITY The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

a. The intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
b. The interest invaded is one which the enactment is intended to protect; and,
c. Where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,
d. The violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action

"It is entirely possible that a statute may impose an absolute duty, for whose violation there is no recognized excuse . . . Neither reasonable ignorance nor all proper care will avoid liability . . .

"No such construction will be placed upon a statute unless it is clearly intended. In the ordinary case all that is required is reasonable diligence to obey the statute, and it has frequently been recognized that a violation of the law is reasonable and may be excused."[171]

Thus in *Brotheron v. Day and Night Fuel Co.,*[172] the defendant's driver had violated a statute in allegedly not displaying the proper tail signals on his heavily loaded truck. The plaintiff crashed into the rear of the truck on a steep grade. The court while saying that violation of the statute was ordinarily negligence *per se,* it was not negligence *per se* in this case because the lights had been burning (so the truck driver said) at the last stop and there was no way for him to discover the fact that they had gone out in the heavy rain. While this case, it is true, applies to actionable negligence rather than contributory negligence, the same principles apply to one as to the other.

There is hardly a statute or rule of law that will not bend before the force of extraordinary circumstances.

One rule frequently discussed in cases dealing with inadequacy of signs is the "assured clear distance" rule, i.e., that a person will be deemed contributorily negligent if he is driving at such a rate of speed that he cannot stop within the length of his vision ahead of him.[173] It is, however, not universally applied,[174] and it is frequently said that it does not apply to holes or bumps in the road.

In *McNair v. State,*[175] for example, the plaintiff was proceeding north along a gravel roadway at approximately 35 miles an hour. The highway contractor, in the course of repairing the roadway had removed a small culvert and replaced it with a larger one on the east, or right half, of the roadway, so that the new tile pro-

[171] Prosser, Torts p. 272

[172] 192 Wash. 362, 73 P.2d 788 (1937)

[173] Extensive annotations may be found at 37 A.L.R. 591, supplemented 73 A.L.R. 1026; 44 A.L.R. 1403, supplemented: 58 A.L.R. 1493, 87 A.L.R. 900, and 97 A.L.R. 546

[174] Annotations: 44 A.L.R. 1404; 58 A.L.R. 1493; 87 A.L.R. 900; 97 A.L.R. 546; 77 A.L.R. 598

[175] 305 Mich. 181, 9 N.W. 2d 52 (1943), at page 22

jected about six inches above the old road bed. Atop this was another foot of sand, which the contractor ramped off for a distance of five to ten feet each way. North of the culvert was a depression in the highway of eight or ten inches in depth which could not be readily seen from the south. There were no signs to warn of construction, or of the bump.

The plaintiff claimed that as a result of the collision with the irregularities in the road surface described above, he sustained a compressed fracture of the spine. Said the court:[176]

"In our opinion, the rise in the road caused by the construction of the new culvert together with the depression in the road immediately north of the culvert created a condition which takes the case out of the rule that a driver of a car is guilty of contributory negligence if he fails to drive at such a speed as to be able to stop in the assured clear distance ahead . . . The assured clear distance rule is applied when there is a collision with trucks or other objects not a part of the road."

The court, however, went on to relieve the state on the ground of sovereign immunity.

On the other hand, the court in *Epps v. South Carolina State Highway Department,*[177] in which the plaintiffs were injured on a foggy misty night, allegedly as a result of the state's failure to erect adequate signs, said,[178]

"The visibility being only fifteen to twenty feet it was negligence as a matter of law, in the light of the other facts and circumstances of this case, for the car to be operated at a speed greater than that in which it could be stopped within such distance."

The charge that the plaintiff was contributorily negligent in driving at an excessive or improper rate of speed is frequently made, both on statutory basis and as a matter of common prudence. The solution to the question, if a statute is involved, is quite complex.[179] If the charge is based on common prudence only, the question is usually one for the jury, to be settled in the light of

[176] 9 N.W. 2d 52, 57
[177] 209 S.C. 25, 39 S.E. 2d 198 (1946)
[178] 39 S.E. 2d 198, p. 202
[179] See p. 54 et seq.

all the circumstances. It is believed that no useful generalizations can be made.

That the plaintiff may have known of the defect complained of is material to the question of whether or not he has been contributorily negligent. Such a person cannot complain of the failure of the state or other unit to erect the warning notices required by statute or the standard of ordinary care.[150] Persons with prior knowledge of defects inadequately advertised are, of course, comparatively few. And even as to them, knowledge that the highway was once out of repair affords no defense to the state if the circumstances were such that it could reasonably have been anticipated that the defect had been repaired.[151]

The possible charges of contributory negligence a city might interpose where the plaintiff is injured as a result of defective signals have never been litigated because the immunity of governmental functions rule has made it unnecessary. In the Foley case, p. 14, concerning the state of New York where such a defense was not available, it will be recalled that the action was brought by the person going through the green signal, and not by the person running through the inoperative "red" signal. Possibly the latter may have been guilty of contributory negligence in failing to stop, but the former was allowed to recover on the residuum of the state's negligence in allowing the light to remain unrepaired so long. Said the court,[152]

"The Court of Claims dismissed the claim on the ground that she was contributorily negligent . . .

"When the Foley car approached the intersection, Mrs. Foley observed the traffic lights and knew that traffic at the intersection was controlled by traffic control signals and that she had the green light in her favor. The green light was at least an invitation for her to proceed . . . (T)hat correspondingly a red light would warn the Mendy car to stop. She had no notice that the red light was not working. She had a right to assume that it was working and that Mrs. Mendy would obey it, although she was still required to use reasonable care under the circumstances (citing case). Her care was at that moment measured on the assumption that all lights were working, not on the assumption

[150] Raymond v. Sank County, 167 Wis. 125, 166 N.W. 29, L.R.A. 1918 F425 (1918)
[151] 25 Am Jur p. 753 and cases cited
[152] 41 N.Y.S. 256, 258

that the red light was out. The very fact that the traffic lights would naturally cause her to relax the vigilance which she might have used if there were no traffic lights at all . . . . A careful examination of the evidence leads us to the conclusion that a finding that she failed to use reasonable care is against the weight of evidence."

THE PLACE OF TRAFFIC ENGINEERS

In order that the function of traffic engineers and traffic engineering may be properly understood, it is necessary to recall again what has already been said about the determination of actionable negligence. The point that must not be forgotten is that the standard of care required under the circumstance is that care which the reasonable man acting with due regard for the rights and interests of others would take. This is to be determined by the jury.

The standard of care may or may not be found to be higher than the standard of care usually exercised by the community. The usual standard of care or the custom of the community in like situations is however evidence of what is due care. It is of course obviously impossible to allow the soft-drink bottler of one community to establish the standard of care for himself or even for the entire industry to set such a standard. Thereby careless methods would be adopted and the industry would have no incentive to make progress in the direction of safety.[183]

Just so, it is impossible to allow the standard of what is done in the community, the country, the state, or the nation in the way of traffic control devices and practices to become the standard in every civil case. The better view is said to be[184] that every custom must meet the challenge of "learned reason" and can have only the evidentiary weight its nature deserves.

It is at once apparent that testimony that customary precautions have been taken or that the precautions "meet approved engineering practice," may not be sufficient to relieve against the charge of negligence. Likewise, that the precautions taken were

[183] Laub v. Graham Chero. Cola Botting Co., 176 N.C. 256, 97 S.E. 27, 4 A.L.R. 1090 (1918)

[184] Allen, "Learned and Unlearned Reason," 36 Juridical Review 254 (1924) W. Green & Son Ltd., Edinburgh

not those recommended as being the best is not negligence *per se,* for what is recommended may well be above what is required of the reasonable man. Nevertheless, evidence of what is usual or what is the custom is introduced in nearly every case where the issue of due care is material. It is presumably given by the jury the weight that is due to such testimony, discounted a bit perhaps if offered by the officers or employees of the agency whose alleged negligence is being brought into question.

An instance of the first situation where the argument was made that precautions taken were in accordance with established highway engineering practices can be found in *Nelson v. State*[185] discussed at p. 25, in connection with flagging. It will be recalled that the washed-out area into which the plaintiffs skidded had been protected by lanterns and barricades. The state had contended in part that the area was amply protected in accordance with established engineering and highway practice. The short shrift the court makes of the defense is shown by its one-sentence answer.[186]

"We have found that the protection afforded by the state at the time and place of accident was insufficient to prevent the occurrence of (the?) accident herein."

An illustration of the second rule that the use or the recommendation of use of better facilities in other places does not result in negligence for that reason alone can be seen in *Wenzel v. State of New York,*[187] discussed at p. 51 in connection with improperly designed traffic control devices. It will be recalled that a stanchion type traffic signal on a highway where all others were centrally suspended resulted in a collision on a foggy night. Said the court:[188]

"The State was generally aware of the danger inherent in a fixed base traffic stanchion. Its Traffic Commission, created under chapter 910 of the Laws of 1936, had adopted the manual on uniform traffic control devices and for several successive years had made reports to the Legislature recommending the removal of traffic stanchions and the

[185] 178 Misc. 875, 36 N.Y.S. 2d 737 (1942)
[186] 178 Misc. 875, 878
[187] 178 Misc. 932, 36 N.Y.S. 2d 943 (1942)
[188] 178 Misc. 932, 935

substitution of centrally suspended light panels and had followed this up by ordering their removal *'as constituting a danger to traffic, and where necessary such signs or signals shall be replaced by one conforming to standard of Commission.'* (Annual Report of Traffic Commission, 1936, 1937, 1938, and 1939

"These reports, however, are not conclusive as to the existence of a nuisance and do not render the State liable in negligence, unless *in fact* (emphasis supplied) a dangerous and negligent condition actually exists as viewed in the light of surrounding circumstances. At most such reports are only admissions against interest. Wigmore, Evidence 3rd Ed. §282."

Testimony of traffic engineers as to established practice is influential. In *Murphy v. City of Asbury Park,*[189] where the plaintiff was injured when he collided with a street light (for illumination, not traffic control) in the center of the street, the plaintiff produced two qualified highway engineers who testified that bases along Ocean Avenue had been improperly installed in a manner not in accordance with generally accepted good engineering practice of that time (1921).

They testified that the standard of safety for this type of installation in the center of a traveled highway required that the bases be surrounded by an island with curbing to protect travelers from the hazard formed by their construction in the center of the street. The testimony was the backbone of a finding of negligence on the part of the city.

As illustrated by the cases above, the evidence of what is usual, or customary, or approved engineering practice, bears only on the determination by the jury of what the required standard of care is. That is its place in legal theory. That it may have greater importance in the eyes of the judges, or one judge at least, is shown by the remarks of Justice McGeehan in the case of *Shaw v. City of New York,*[190] mentioned at p. 64, wherein the court said much that shows how highly regarded traffic engineering is.

The action was against the city and an individual for negligence in the maintenance at night of a stanchion, without lights, designating a safety zone for trolley loading and unloading. The defendant individual drove his car into the stanchion and the

[189] 49 F. Supp. 39 (1943)
[190] 165 Misc. 765, 1 N.Y.S. 2d 311 (1937)

plaintiff was injured as a result of the collision—exactly how the injury occurred does not appear. The action against the city was first dismissed on the ground that the control of traffic was a governmental function for which the city was not liable, following *Parsons v. New York City.*[191]

After the trial, the opinion in *Murphy v. Farmingdale,*[192] was rendered, holding it an issue of fact as to whether or not a traffic control stanchion without lights was unreasonably dangerous, and by implication, that the governmental function defense was not available. The rehearing was sought on the strength of the *Murphy* case. In the instant (*Shaw*) case the court refused to alter its earlier decision, but it said,[193]

"The question as to the visibility of traffic lights and signs and their location enters into almost every automobile accident case today. In many instances, these signals are responsible for misleading the parties concerned in the accident, but the city avoids liability upon the doctrine expressed in the *Parsons* case...

"The erection and the operation of a traffic control system in a city like New York should not be entrusted to unqualified men. This function requires the services and ingenuity of highly trained engineers who are specialists in this particular field of endeavor and who can best protect the city from possible liability. No longer is the officer on beat or his superior qualified to cope with this situation simply because at one time he had the power and ability to disperse a crowd or to keep traffic moving at a certain locality.

"...Certainly if the city is to remain immune from suits in matters pertaining to the control of traffic, it owes to the taxpayer as well as to non-taxpayers the duty of seeing that New York City has at least protected them with a system that is modern, scientific, and safe.

"Otherwise, the courts will be loath to grant immunity to a city that flagrantly flaunts scientific safeguards and experiments with untried devices of untrained, unskilled, and unqualified men in this field.

"The impact caused damage to the pedestal as well as death to the driver. His blood was not dry on the pavement when the signal pedestal was re-erected on the very same spot. Does the city expect the court to be blind to the fact that the pedestal in question is a dangerous obstruction on the highway of which the city now should have ample

[191] 248 App. Div. 825, 289 N.Y.S., 198, *aff'd*, 273 N.Y. 547, 7 N. E. 2d 685 (1934)
[192] 252 App. Div. 327, 299 N.Y.S. 589 (1936)
[193] 165 Misc. 765, 767

notice, or will the city still claim immunity upon the theory that the regulation of traffic is a governmental function?"

CONCLUSIONS

It has been said that God gave monkeys tails, but that men had to draw their own conclusions. But one conclusion can be drawn from the state of the law with respect to the financial responsibility of traffic agencies today.

What immunity from liability for inadequate traffic-devices and for improper practices traffic agencies possess exists at the sufferance of legislatures. Tort law has developed to the point where the financial responsibility of a public agency can be readily established. Social consciousness has developed to the point that the people are ready to impose liability on their governing bodies.

The courts have long been straining at the bonds of precedent. Dissatisfaction with the restraining doctrines of sovereign immunity and its little half-brother, governmental functions of municipal corporations, has long been expressed by the influential text writers of our time, and by the courts themselves, even when they felt themselves bound to follow precedent on the mandates of higher courts.[194] When those barriers are removed, those traffic agencies who have not mended their ways will be engulfed in a flood tide of pent up litigation.

Under the impact of the automobile and the increased use of the highways, through which the lifeblood of the nation runs, the states have begun to retreat from the bastion of sovereign immunity. The states have been operating highways since 1789, or since they have become states, yet it is only within the last quarter of a century that they began to make themselves liable for defects and negligence.[195] The legislation pertaining to counties and municipalities has had a somewhat longer history, and has gone much further in the same direction.[196]

[194] Shaw v. City of New York, 165 Misc. 765 (1937) at p. 163; Avey v. City of West Palm Beach, 152 Fla. 717, (1943)

[195] See Note 69

[196] See Note 90. It is suggested, however, in an article by Charles W. Took, "The

In 1946 the United States Government, the "grand pappy" of them all, passed the Federal Tort Claims Act.[197] "The ancient principal of sovereign immunity from suit, long abandoned by the United States in the field of Contract, has been further undermined by passage of the Federal Tort Claims Act which grants to the Federal courts jurisdiction over actions against the Government for the negligence of its employees. The doctrine of immunity, inherited by this country from eighteenth century English law has been frequently attacked as an anachronism unsuited to democratic society because of the unfairness to individuals with just claims against the government."[198]

While it is not believed that the Federal government will find itself involved in many suits for traffic control deficiencies, this recognition of the social undesirability of the doctrine of sovereign immunity passed upon by the greatest law making body of our time, representative of all the people in the nation, can be nothing if not significant of things to come. Coming events cast their shadows before.[199]

The purely verbal distinctions and logical horrors that exist in the extensive ramifications of legal doctrines thriving in the field of municipal liability and parading through the reports under the labels "governmental" and "proprietary" functions have been the subject of much comment. "A relentless barrage of unsympathetic criticism has been directed against the concept upon which the structure of the tort law of municipal corporations has been built . . . Although critical comment appeared before 1900 widespread interest in the problem among legal commentators seems first to have been stimulated by a notable series of articles by Professor Edwin M. Borchard of the Yale University School of Law. Since

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Extension of Municipal Liability in Tort" 19 Va. Law Review 97, 116, (1932) that the opposition of local officials is an effective hindering force

[197] Pub.L.No. 601, 79th Congress, 2nd Session (Aug. 2, 1946); Tit. IV, 15 U.S.L. Week 50; 92 Cong. Record, July 26, 1946 at 10283. The Act is Title IV of the Legislative Reorganization Act of 1946, Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946) 29; Hearings before the Joint Committee on the Organization of Congress pursuant to H.Con.Res. 18, 79th Con., 1st Sess. 1945)

[198] Comment, 56 Yale Law Journal p. 534

[199] For further discussion see Walter P. Armstrong and Howard Cockrill, "The Federal Tort Claims Bill," 9 Law and Contemporary Problems 327 (1942)

that date there have appeared in the law reviews alone over two hundred leading articles and student comment on pertinent judicial decisions."[200]

The trend is to the extension of liability. "The current of criticism has been that it is better that losses due to tort-constituting conduct shall fall upon the municipality rather than on the injured individual; and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of administration of government, which should be distributed by taxes to the government.

"Whether as a result of this criticism or not, there is a noticeable trend in the direction of an extension of municipal tort liability, either by finding that the particular activity is not a 'governmental' one, or by discovering special reasons to take it out of the rule."[201] And again, "The modern tendency is to restrict rather than extend the doctrine of municipal immunity. The courts and law writers are coming more and more to feel the injustice of the entire doctrine. And the tendency of courts, revolted by the hardships resulting from this doctrine in individual cases is to introduce fictions and artificial distinctions in order to avoid the full rigor of the doctrine."[202]

The revolt of the courts is nowhere better expressed than by Justice McGeehan in *Shaw* v. *City of New York,*[203] quoted from at more length on p. 61.

"The courts will be loath to grant immunity to a city that flagrantly flaunts scientific safeguards and experiments with untried devices of untrained, unskilled and unqualified men in this field."

[200] John St. Francis Repko, "American Legal Commentary on the Doctrines of Municipal Tort Liability," 9 Law and Contemporary Problems 214, (1942). The articles referred to by Professor Borchard are the ones cited in note 61

[201] Prosser, Torts, p. 1068

[202] 38 Am Jur., p. 266

[203] 1 N.Y.S. 2d 311, 314 (1937)