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Governmental Liability for Inadequate Traffic Sign

Robert C. Egger*

IT IS AN ACCEPTED PRINCIPLE OF LAW that an automobile accident is the result of a failure in one or more elements of a three component system made up of driver, roadway, and vehicle.¹ Often investigators look only for the primary cause of an accident.² This line of reasoning will lead to attribution of about 75% of all accidents to driver failure, 15% to highway deficiencies, and 10% to vehicle malfunctions.³ On the other hand, reliance on a theory that accidents are generally the result of the combination of multiple failures would probably show that a combination of highway defect and a driver failure would appear as the cause in at least 40% of all accidents.⁴

In view of this, a good many automobile accidents are due to joint failures by both drivers and those having responsibility for the condition of the highway facility. Many states hold that in the absence of a serious breach of duty by a driver, a gratuitous rider injured in an auto accident has no claim against such driver.⁵ The victim must then look elsewhere to recover his damage. If more than one vehicle is involved, the victim might be able to find an actionable breach of duty by another driver.⁶ There are, however, many single car accidents every year.⁷ If one looks only to driver failure as a cause, most gratuitous riders in these vehicles are left without recourse. However, since as shown above, highway system failures are a concurrent cause in about 40% of all accidents, gratuitous riders, even those involved in one car accidents, often have at least a moral right to look to those responsible for the highway defects.⁸

The fact that nearly all highways are built and maintained by governmental agencies adds enormous complexity to recovery based on highway defect causation.⁹ While there is extremely little precedent for hold-

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¹ Baldwin, *Accident Causes and Countermeasures*, 36 *Traffic Engineering* 31 (March 1966); Erlsten, *Defectively Designed Highways*, 16 *Clev. Mar. L. Rev.* 264 (1967).

² Kimber, C., Captain Ohio Highway Patrol, *Accident Investigation* (presented at "Short Course on Traffic Engineering Studies for Safety Improvements" Ohio State University, October, 1968).

³ Baldwin, *op. cit. supra* note 1.

⁴ *Ibid.*

⁵ Prosser, *Torts*, 451-452 (2d ed. 1955). For trial examination aspects of auto cases, see 1 *Encyc. of Negligence*, c. VI (1962).

⁶ 6 *Blashfield's Automobile Law and Practice* 3, (Lewis, ed., 3d ed. 1966).

⁷ Ohio Department of Highway Safety, 1967 *Ohio Traffic Accident Facts* (1968 ed.) indicates that there were 23,326 non-collision (one car) accidents involving injuries in Ohio in 1967.

⁸ Lewis, *supra* note 6 at 325 (1966).

⁹ See generally, Erlsten *supra* note 1; 4 Lewis *supra* note 6, Chapter 161, 291-340.

ing a governmental agency liable for injury resulting from a defect designed into a highway,¹⁰ there are more than a few cases finding liability based on inadequate highway signing.¹¹ This result is consistent with the nature of our highway system today and the practical economics involved. Highways are still in use today that were built 40 years ago.¹² The technology of road building has steadily developed since that time. The result is that the present system is a mixture reflecting various design policies, and older sections are deficient by modern or even average standards. Other deficiencies may be the result of a supposed or even genuine need to economize.¹³ For instance, extremely high right of way costs may mean that an engineer is forced to design a curve which is more sharp than the usual standards require,¹⁴ or upgrading of only part of a road might have been possible, requiring that the driver going from the new section to the old section adjust his driving technique.¹⁵

Additionally, there are conditions, even where the most modern design techniques are used, which require the special attention of the driver.¹⁶ These include intersections, merging traffic lanes, curves in exit ramps, and reduction in the number of lanes.¹⁷ One of the principal purposes of highway signing is to call the driver's attention to such potential hazards,¹⁸ and, while it may not be practical or even possible to eliminate these conditions, it is relatively cheap to provide highway signs.¹⁹ The duty of governmental agencies to provide adequate highway signing has in many cases been established, but there appears to be wide variation in the tests for situations which establish a duty to sign and the adequacy of the signing itself.²⁰ At one end of the scale is *Moore v. Columbus*²¹ in which a "Dead End" warning sign was not visible because its support was bent and twisted, and a 1969 case of a defective traffic light resulting in liability.^{21a} This condition was given, at the most, the effect

¹⁰ See generally, Erlsten, *op. cit. supra* note 1.

¹¹ See generally, Erlsten, *op. cit. supra* note 1; Annot., 55 A.L.R. 2d 1000 (1957).

¹² E.g., Ohio Dept. of Highways records show that State Route 166 in Geauga County has been a state highway since 1927 and that there has been no major reconstruction since that time.

¹³ Erlsten, *op. cit. supra* at 270.

¹⁴ The connection of Interstate Route 90 and State Route 2 (known as the Innerbelt curve) in Cleveland, Ohio is an example of this.

¹⁵ *McCormick v. State*, 5 Misc. 2d 582, 161 N.Y.S. 2d 666 (1957).

¹⁶ National Joint Committee on Uniform Traffic Control Devices, *Manual on Uniform Traffic Control Devices*, 53 (1961 ed.).

¹⁷ *Ibid.*

¹⁸ *Id.* at 7.

¹⁹ Ohio Dept. of Highways, *Summary of Contracts Awarded* (for calendar year 1967) indicates that the cost of new construction was about 878 thousand dollars per mile while the cost of a typical warning sign installation was about 70 dollars.

²⁰ 55 A.L.R. 2d 1000 (1957).

²¹ 74 Ohio Law Abst. 136, 139 N.E. 2d 656 (Ohio App., Franklin Co., 1956).

^{21a} *Fankhouser v. City of Mansfield*, 19 Ohio St. 2d 102, 249 N.E. 2d 789 (1969).

of having contributed to the fact that a nuisance, as required for a finding of liability, did exist. On the other end of the scale is *Reynolds v. State*²² in which it was found that the State of New York had breached its duty to warn of a highway curve even though it had provided proper curve warning and advisory speed signs which the driver had seen. The problem was that the advisory speed limit sign stated "35 MPH." Although this limit was based on standard engineering tests,²³ the court found that "25 MPH" should have been posted, and liability was established.

Because the gratuitous rider situation, and others, provide a need for a clear rule as to the standard of care required of a governmental agency with regard to highway signing and because the results of present cases seem to be at great variance, this paper is presented as an attempt to set forth and clarify the existing standards and to propose a practical rule for uniform adoption. Thus, the material below is confined to a study of only the standard by which the adequacy of highway signing is measured in determining the liability of a governmental agency upon an allegation naming the inadequacy of that signing as a proximate cause of damage. The reader is reminded that many collateral issues (i.e. contributory negligence of the claimant, lack of knowledge of the "hazardous condition" by the agency, and temporary control of the highway by an independent contractor) enter the picture in determining ultimate liability.

Sovereign Immunity and the Importance of Statutory Language

It is an elementary principle of law that a government generally may not be sued in tort by a private citizen without its consent.²⁴ Such consent is expressed in the form of statute or constitutional provision.²⁵ Since such a provision is, by its very nature, in derogation of the common law, it is, of course, strictly construed. The exact language thus becomes very important and may have a direct effect upon the care required to avoid liability. For instance, the North Carolina "Tort Claims Act" says the body hearing claims against the State, "shall determine whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State. . . ." ²⁶

²² 35 N.Y. Misc. 2d 757, 231 N.Y.S. 2d 681 (1962).

²³ The engineering test referred to is a Ball Bank Indicator test. This is the commonly accepted field test. See: Baerwald, *Traffic Engineering Handbook* 542 (1965 3d ed.); Ohio Dept. of Highways, Bureau of Traffic, *Manual of Traffic Engineering Studies* Sec. 1.25 (1968).

²⁴ Prosser, *supra* note 5, at 771; 4 Lewis *supra* note 6, at 301.

²⁵ Prosser, *supra* note 5, at 771; *Vater v. County of Glen*, 49 Cal. 2d 815, 323 P. 2d 85 (1958); *Minty v. State*, 336 Mich. 370, 58 N.W. 2d 106 (1952).

²⁶ No. Car. Gen. St. § 143-291 (1965).

The use of only the words "a negligent act" has been the basis of denial of recovery based on negligent omissions or failures to act by Highway Commission employees.²⁷ Also, California tort claims statutes, which speak specifically of signs and signals warning traffic, provide that a public entity is not exonerated of its duty to provide signs etc. where these are "necessary to warn of a dangerous condition which endangered the safe movement of traffic."²⁸ It has been held that the establishment of the existence of "a dangerous condition" is necessary to the claimant's case.²⁹ Additionally, before a duty can be found to be breached it must be found to exist. The duty of a governmental agency to provide and maintain highway and street facilities is, of course, often imposed and/or limited by statute.³⁰ The language of these statutes is also a primary element in establishing an actionable breach of duty.³¹ It goes without saying that the various combinations of those statutes providing for suit against the government and those establishing the duties of governmental agencies to construct and maintain highways and streets have been a major factor in the development of the various rules which exist.

Yet another aspect of sovereign immunity which affects the subject under consideration is the concept that the controlling or regulating of traffic is an inherent governmental function even though the maintenance of streets and highways is not.³² This, at times, results in a different rule being applied for regulatory as opposed to warning signs, or for failure to maintain signs as opposed to failure to initially install them.³³

Existing Standards

A detailed study of three States, Ohio, New York, and California, reveals the wide variations in the standard of care required of a governmental agency with respect to traffic signs. In each case differences in the individual State's approach to the sovereign immunity problems, just discussed, provide unique rules.

Ohio is an example of a conservative approach. While in Ohio claims against State agencies are handled by an administrative arm of

²⁷ *Ayscue v. N.C. State Highway Commission*, 270 N.C. 100, 153 S.E. 2d 823 (1967); *Wrape v. N.C. State Highway Commission*, 263 N.C. 499, 139 S.E. 2d 570 (1965); *Flynn v. N.C. Highway Commission*, 244 N.C. 617, 94 S.E. 2d 571 (1956).

²⁸ *Calif. Govt. Code* § 830.8 (1963).

²⁹ *Feingold v. County of Los Angeles*, 254 Cal. App. 2d 622, 62 Cal. Rptr. 396 (1967).

³⁰ *E.g.* *Ohio Rev. Code* §§ 723.01, 5501.02, 5543.01.

³¹ *Belt v. Grand Forks*, 68 N.W. 2d 114 (No. Dak., 1955); *Moore v. Columbus* *supra* note 21; 4 *Lewis* *supra* note 6 at 317.

³² 4 *Lewis*, *supra* note 6 at 330; *Moore v. Columbus*, *supra* note 21; *Mullins v. County of Wayne*, 4 Mich. App. 359, 144 N.W. 2d 829 (1966); *Vickers v. City of Camden*, 122 N.J.L. 14, 3 A. 2d 613 (1939); *Tolliver v. City of Newark*, 145 Ohio St. 517, 62 N.E. 2d 357 (1945).

³³ *Ibid*; Also, the *Calif. Govt. Code*, compare § 830.4 with § 830.8.

the legislature,³⁴ municipalities are subject to suit³⁵ and reported cases dealing with alleged negligence of municipalities with respect to traffic signs are available.³⁶ A key to the conservative standard here is the statutory requirement that the city "shall cause" its streets "to be kept open in repair, and free from nuisance."³⁷ It is well established that this statute is to be strictly construed, in favor of the municipality.³⁸ The result is that a claimant must allege and prove that the condition he complains of amounts to a nuisance.³⁹ The burden of the municipalities is further eased by the holding that traffic control is a strictly governmental function.⁴⁰ In *Tolliver v. Newark*⁴¹ the Ohio Supreme Court sustained the trial court's dismissal on demurrer where the plaintiff alleged that the erection and maintenance of a certain pair of stop signs constituted a nuisance. The court held, "that the regulation of traffic upon the streets of a municipality is a governmental function; that no duty with respect thereto is prescribed by Section 3714⁴² General Code."⁴³ This result has since been modified.⁴⁴ At least one Ohio Court has gone so far as to distinguish the duty with respect to warning signs from that with respect to regulatory signs.⁴⁵ In *Moore v. Columbus*^{45a} the Franklin County Court of Appeals held that the function of a "Dead End" sign was to "serve as a warning and also secondarily to direct traffic"^{45b} and that the erection of such a sign was "not properly characterized as a governmental function."^{45c} The case involved an automobile which ran off the end of a dead end street into a ditch at a location where the "Dead

³⁴ Ohio Rev. Code § 127.11; *Schultz, Ohio Sovereign Immunity*, 28 Ohio St. L. J. 75 (1967).

³⁵ Ohio Rev. Code § 715.01.

³⁶ *Tolliver v. Newark*, *supra* note 32; *Fritz v. Columbus*, 5 Ohio St. 2d 53, 213 N.E. 2d 730 (1966); *Moore v. Columbus*, *supra* note 21.

³⁷ Ohio Rev. Code § 723.01 (formerly General Statutes § 3714).

³⁸ *Larson v. Cleveland Ry. Co.*, 142 Ohio St. 20, 50 N.E. 2d 163 (1943); *Geideman v. City of Bay Village*, 7 Ohio St. 2d 79, 218 N.E. 2d 621 (1966); *Gabris v. Blake*, 9 Ohio St. 2d 71, 223 N.E. 2d 597 (1967).

³⁹ *Seldon v. Cuyahoga Falls*, 132 Ohio St. 223, 6 N.E. 2d 976 (1937); *Mingo Junction v. Sheline*, 130 Ohio St. 34, 196 N.E. 987 (1935).

⁴⁰ *Tolliver v. City of Newark*, *supra* note 32.

⁴¹ *Ibid.*

⁴² Now Ohio Rev. Code § 723.01.

⁴³ *Tolliver v. City of Newark*, *supra* note 32, at 145 Ohio St. 525, 62 N.E. 2d 361.

⁴⁴ *Fankhauser v. City of Mansfield*, 19 Ohio St. 2d 102, 249 N.E. 2d 789 (1969), held that a malfunctioning electric traffic signal could, in itself, constitute an actionable nuisance.

⁴⁵ For the official Ohio Dept. of Highways classifications as to what constitutes either a warning sign or a regulatory sign see Ohio Manual of Uniform Traffic Control Devices.

^{45a} *Supra* note 21.

^{45b} 74 Ohio L. Abs. 140, 139 N.E. 2d 660 (1956).

^{45c} *Ibid.*

End" sign was not visible because its support had been bent and twisted nearly two weeks earlier. As the trial court, in addition to its discussion of the sign, found a need for barriers at the location, it cannot be said that the condition of the sign was the only basis for the finding that the city had maintained a nuisance. However, the Court of Appeals did specifically hold:⁴⁶

The presence of the bent sign, if nothing more, was a part of the physical situation which, in its entirety, the trial judge found to constitute a nuisance. In that conclusion we are satisfied no error was committed.

Thus, taking the most liberal view, it can only be said to appear that Ohio recognizes the condition of traffic warning signs as a factor which may contribute to the finding that a municipality maintained on its streets a physical situation which constituted the nuisance necessary to impose liability. Certainly this does not require a very high degree of care with respect to highway signing.

Where Ohio is conservative, New York is very liberal. New York Court of Claims Act⁴⁷ Section 8 states that the State "waives its immunity from liability" and that its liability is to be "determined in accordance with the same rules of law" as apply to individuals. It has been held that this section should be liberally construed.⁴⁸ The result of this statutory language and judicial construction has been the establishment of an extremely high standard of care which may have been in some cases carried beyond reasonable extremes.

The duty of the State of New York to provide and maintain adequate highway warning signs was recognized as early as 1938.⁴⁹ The rule progressed from the consideration of inadequate signing as a factor in finding that a dangerous highway condition existed due to the negligence of the State⁵⁰ to a point where improper signing could be found to be the sole basis for finding that the State was negligent.⁵¹

The test of the adequacy of the signing has also developed. *Ziehm v. State*⁵² involved a "T" intersection at which the approach from the terminated street was signed in what the court found to be a confusing manner. The court held that these should have been replaced with signs conforming with "nationally accepted standards," thus beginning to recognize the duty to comply with uniform signing practices. However, a

⁴⁶ 74 Ohio L. Abs., at 141, 139 N.E. 2d, at 660 (1956).

⁴⁷ Enacted in 1939.

⁴⁸ *Grant v. State*, 192 Misc. 45, 77 N.Y.S. 2d 756 (1948); *Olender v. State*, 194 Misc. 583, 87 N.Y.S. 2d 578 (1949).

⁴⁹ *LeBoeuf v. State*, 169 Misc. 372, 7 N.Y.S. 2d 621 (1938).

⁵⁰ *Ibid*; also *Dowley v. State*, 186 Misc. 571, 61 N.Y.S. 2d 59 (1946).

⁵¹ *Ziehm v. State*, 270 App. Div. 876, 61 N.Y.S. 2d 99 (1946); *Barna v. State*, 217 App. Div. 261, 45 N.Y.S. 2d 513 (1943).

⁵² *Ibid*.

strict requirement of compliance with these standards had not yet developed, for in *Piragnoli v. State*⁵³ the court found that while the unreflectorized condition of the sign in question and its location were "not in accord with the most recent recommendations," the sign installation was "adequate to warn a reasonably careful driver," and the State was therefore not negligent. The concept that the signing must inform a driver of the nature of the danger (apparently) first appeared in a case involving a highway which narrowed and curved sharply as it approached a narrow bridge.⁵⁴ Here the appellate court upheld the finding of the Court of Claims that the existence of a "Narrow Bridge" sign located about 180 feet before the bridge was inadequate because it failed to also warn of the curve.⁵⁵ This expanded a previous decision where a "Slow" sign was held to be inadequate warning of a very similar condition.⁵⁶

The full recognition of the importance of the *Manual of Uniform Traffic Control*, promulgated by the New York State Traffic Commission,⁵⁷ as a test for determining the adequacy of highway signing can be illustrated by the decision in *Downen v. State*.⁵⁸ Here the claimants were riding in an automobile which left the roadway while the driver was attempting to negotiate one of a series of curves. The claimants contended that the State was negligent in not providing curve warning signs. The State had, however, provided a "Winding Road" sign at a point approximately 2600 feet ahead of the accident location. It claimed that because the highway involved was "not a main road but rather a meandering road," the requirements of the Manual were met. The Court of Claims thoroughly examined the text of the manual regarding curve signs and the "Winding Road" sign. It found that the manual's basic requirement was for curve signs and that an advisory speed should be posted below any curve sign where ball bank indicator test⁵⁹ showed that the safe speed was below 40 miles per hour. Reference was made to the material in the manual describing the use of the "Winding Road" sign, which indicated that the sign was to be used at the beginning of a series of curves on "narrow, slow speed, meandering roads" and not to be substituted for curve signs on "main highways." The ball bank tests made by the State were accepted by the court, and it held that safe speed which could be maintained through the series of curves was at least 47 miles per hour. Using this in conjunction with a finding that the high-

⁵³ 280 App. Div. 849, 113 N.Y.S. 2d 391, *aff'd* 305 N.Y. 586, 111 N.E. 2d 645 (1952).

⁵⁴ *Rugg v. State*, 284 App. Div. 179, 131 N.Y.S. 2d 2 (1954).

⁵⁵ *Ibid.*

⁵⁶ *Canepa v. State*, 306 N.Y. 272, 117 N.E. 2d 550 (1954).

⁵⁷ Substantially the same as the Manual on Uniform Traffic Control Devices for Streets and Highways *supra* note 16.

⁵⁸ 11 Misc. 2d 555, 174 N.Y.S. 2d 849 (1958).

⁵⁹ This is a common field engineering test for safe curve speed. See *supra* note 23.

way in question was "a meandering as opposed to a main road" the Court found that there was in this case no duty to post an advisory speed and that the posting of the "Winding Road" sign without any additional signs was "sufficient compliance by the State with the provisions of the manual." On these facts the claimants were found not to have sustained the burden of proving the State's negligence. This detailed quotation from and discussion of the *New York Manual of Uniform Traffic Control Devices* in a reported opinion is certainly a clear indication of the fact that the New York Court of Claims had accepted that manual as an almost absolute standard against which to measure the conduct of the agency in control of a street or highway with respect to the erection and maintenance of traffic signs.

Since that time (1958), however, there have been cases from which it appears that the New York Court of Claims has developed a policy of requiring a degree of care that goes beyond the basic requirements of the *Manual of Uniform Traffic Control Devices* to the court's own interpretation of the subtleties the Manual expresses. In a 1960 case, that tribunal refused to accept ball bank indicator tests made by the State with a new car.⁶⁰ It quoted from page 92 of the Manual:

Consideration of sight distance, intersections, accident records, etc. may dictate a speed lower than that determined by the ball indicator. In such cases, the lower speed will be considered the recommended speed.

Apparently from this and other general considerations, the court implied a duty on the part of the State to protect motorists using average cars not just those using "new, modern cars."

This case was later reversed on several grounds. While it was not the primary reason for reversal, the appellate court did specifically accept the maximum safe speed tests made with the new car.⁶¹

In spite of this, the Court of Claims continued in *Reynolds v. State*⁶² to require a standard of care beyond the specific standards of the traffic control manual. This case, as described earlier, involved a curve that was signed with a curved sign and advisory speed as directed by the Manual. Ball bank indicator tests, of which the court made no criticism, showed that the safe speed was 35 miles per hour, and a sign indicating that speed was properly posted. However, the claimant, whose driver had skidded on snowy pavement at a speed between 30 and 35 miles per hour into the path of an oncoming truck, was allowed to recover from the State in part because the advisory speed was found to have been too high. The court, pointing to the nature of the curve as being compound

⁶⁰ *Foley v. State*, 22 Misc. 2d 1012, 203 N.Y.S. 2d 196 (1960), rev'd, 16 Am. Dec. 2d 90, 226 N.Y.S. 2d 6 (1962).

⁶¹ *Ibid.*

⁶² See *supra* note 22.

(one which has a smaller radius in the center) and a history of five accidents in wet or snowy weather, found that the State breached its duty by not posting a 25 mile per hour advisory speed.

While slight support for this reasoning can be found in the material quoted from the Manual above, a result of this type places the traffic engineer in the unhappy position of having his work considered negligent by the court even though he has met the specific requirements of the Manual, but has decided, in good faith, that extraordinary care is not required. Additionally, from an engineering viewpoint, the facts of this case do not indicate a situation which required that an exceptionally low advisory speed be posted. First, the accident history involved wet or icy pavement accidents only. There was no indication of a history of dry pavement accidents. Engineering practice is to post an advisory speed that is the maximum safe speed under conditions of dry pavement and normal visibility.⁶³ Thus, the accident history does not indicate any breach of good engineering practice in posting 35 miles per hour. Secondly, the compound nature of the curve was given as a reason to reduce the advised speed below that indicated by the ball bank test. Since the court did not find fault with the ball bank tests, it must be assumed that they were properly made; in that case the tighter portion of the curve would have controlled the tests, and this condition would have, thus, been given due consideration.^{63a} The third condition considered was the fact that the curve terminated in a hill. Since the accident in question occurred in the middle of the curve, before the start of the hill, this condition could have had little to do with the accident. Even if it cannot be said that no traffic engineer would have reduced the advisory speed below that indicated by the ball bank tests, it can be said that the necessity of such a reduction was, in this case, clearly within a rather unclear area of engineering judgment. Should not the rules of conduct generally applied to professional practice control here?⁶⁴ If so, the rule that an honest mistake of professional judgment cannot be a basis of liability⁶⁵ would certainly have resulted in a finding that here there would be no liability on the basis of a high advisory speed. In short the standard of care imposed by the *Reynolds* case is too harsh. It leaves no room for the traffic engineer to exercise his sincere and honest professional judgment.

While the New York cases discussed so far, have for the most part involved highway curves, New York's harsh standard is by no means confined to that type of situation. Failure to provide signs adequately

⁶³ Ohio Manual of Uniform Traffic Control Devices *supra* note 45 at 98; "National" Manual on Uniform Traffic Control Devices *supra* note 16 at 71.

^{63a} *Ibid.*

⁶⁴ Prosser *op. cit.* *supra* note 5 at 133.

⁶⁵ *Ibid.*

warning of an intersection at which a traffic island and other traffic channelization devices had been erected was the basis of liability in *Firenze v. State*.⁶⁶ Also, while no such claimants have succeeded in holding the State liable, it has been suggested that an allegation by a claimant that the State was negligent for failure to warn of such speculative conditions as deer crossings stated a sufficient cause of action.⁶⁷

Additionally, New York courts have held governmental agencies liable in cases based on a breach of duty with respect to regulatory signs as well as warning signs. The "Stop" sign is firmly established as a regulatory as opposed to a warning sign,⁶⁸ and New York courts have recognized this.⁶⁹ Liability has been found, however, in the situation where the State has failed to initially install such signs.⁷⁰ The failure of the State to maintain "Stop" signs has also resulted in liability.⁷¹ Further, it is readily apparent that the *New York Manual of Uniform Traffic Control Devices* establishes the basic duty in cases involving regulatory signs as well as those involving warning signs.⁷² It is apparent then that New York does not view the provision of traffic regulatory signs as an inherent governmental function so as to preclude liability. In fact, it does not appear that liability based on the inadequacy of regulatory signs differs in any way from that based on inadequacy of warning signs. New York applies the same high standard of care in situations involving either type of signing.

A review of the California position with respect to the liability of a governmental agency for failure to provide or maintain traffic signs is important not only because it is an example of a position somewhere between those of conservative Ohio and liberal New York, but also because California Code "Tort Claims" amendments enacted in 1963 specifically refer to traffic signs.⁷³

One aspect of the California "Tort Claims Act" is to provide for the liability of public entities for injuries which are the result of public property being in a dangerous condition.⁷⁴ The intent of Section 830.4⁷⁵ ap-

⁶⁶ 208 Misc. 663, 145 N.Y.S. 2d 74, *aff'd* 1 Am. Dec. 2d 934, 150 N.Y.S. 2d 572 (1955).

⁶⁷ *Morrison v. State*, 204 Misc. 222, 123 N.Y.S. 2d 105; also 204 Misc. 224, 123 N.Y.S. 2d 111 (1952).

⁶⁸ *Manual on Uniform Traffic Control Devices*, *supra* note 16 at 27.

⁶⁹ *Applebee v. State*, 284 App. Div. 532, 132 N.Y.S. 2d 519 (1954); *Robinson v. State*, 38 Misc. 2d 229, 237 N.Y.S. 2d 601 (1962).

⁷⁰ *Robinson v. State*, *supra* note 69.

⁷¹ *Gurevitch v. State*, 284 App. Div. 717, 134 N.Y.S. 2d 664 (1954).

⁷² All cases, *supra* notes 69 and 71.

⁷³ Calif. Govt. Code § 830.4 and 830.8 (1963).

⁷⁴ See generally, Law Revision Commission Comment, § 835, Calif. Govt. Code, 32 West's Annot. Calif. Code 185 (1966 ed.).

⁷⁵ § 830.4 California Government Code: *Failure to Provide Traffic Control Signals or Signs*.

(Continued on next page)

appears to be to exclude the failure to provide regulatory signing as basis for such liability.⁷⁶ This in conjunction with Section 830.8⁷⁷ which provides that liability is possible where there is a failure to warn of "a dangerous condition," indicates that California makes a distinction between the liability of a public agency for a breach of duty to provide regulatory signs and the liability for a breach of duty to provide warning signs.⁷⁸ However, it appears that even with respect to a regulatory device an actionable breach of duty can arise, once the device is initially provided, if the device installed created a dangerous condition because it was not complete or was in itself defective.⁷⁹ Also, while lack of proper regulatory signs cannot be the sole basis for a finding that a condition sufficiently dangerous to impose liability existed, it can be recognized as an element of an entire condition which was sufficiently dangerous.⁸⁰

With respect to liability based on inadequate warning signs, the cases reported so far seem to indicate that the existence of a "dangerous condition" is an indispensable element. *Pfeifer v. County of San Joaquin* and *Feingold v. County of Los Angeles* both indicate that a duty to provide warning signs arises only where there is a "dangerous condition" of which to warn.⁸¹ The term "dangerous condition" is defined in the code as a condition which would provide a "substantial" as opposed to a "minor, trivial, or insignificant" risk of damage to property or injury to person.⁸² It does appear, however, that a failure of the governmental entity to warn of a highway condition which amounts to a "concealed

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A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right of way signs, or speed restriction signs, as described by the Vehicle Code or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

⁷⁶ Law Revision Commission Comment, § 830.4 Calif. Govt. Code, 32 West's Annot. Calif. Code 176 (1966 ed.).

⁷⁷ § 830.8 California Government Code: *Failure to Provide Traffic Warning Signals; Exception.*

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to and would not have been anticipated by, a person exercising due care.

⁷⁸ *Dahlquist v. State*, 243 Cal. App. 349, 52 Cal. Rptr. 324 (1966).

⁷⁹ *Teall v. City of Cudahy*, 60 Cal. 2d 431, 34 Cal. Rptr. 869, 386 P. 2d 496 (1963).

⁸⁰ *Dahlquist v. State*, *supra* note 78; *Gardner v. the City of San Jose*, 248 Cal. App. 2d 798, 57 Cal. Rptr. 176 (1967).

⁸¹ *Pfeifer v. the County of San Joaquin*, 67 Cal. 2d 177, 60 Cal. Rptr. 493, 430 P. 2d 51 (1967); *Feingold v. the County of Los Angeles*, 254 Cal. App. 2d 544, 62 Cal. Rptr. 396 (1967).

⁸² § 830 Calif. Govt. Code (1963).

trap" can amount to an actionable breach of duty where one is injured as a result of that lack of warning.⁸³

The recent case of *Hilts v. County of Solano*⁸⁴ shows that the definition of what constitutes a hidden trap is not greatly restricted as a matter of law. The fact situation here, involved a collision between two trucks at a "dog-leg" (offset) type intersection. There was evidence of a history of accidents at the location, and testimony of a consulting traffic engineer that the presence of trees near the intersection combined with differences in elevation between the roadway and the surrounding land tended to restrict visibility at the intersection. The appellate court found that the evidence was sufficient to support a jury finding that "the subject intersection was a trap to a person using the street with due care." This certainly does not indicate that only very unusual, extremely dangerous conditions constitute a "hidden trap."

The *Hilts* case also shows that the adequacy of any warning devices provided is also an issue to be decided by the trier of fact. Here provision of just any type of warning is not enough. In this case intersection warning signs had been in place on all approaches. The court said in reference to this:⁸⁵

Here the warning signs that were installed were such as to warrant the inference that they did not accurately depict the intersection and might themselves have been partly responsible for the dangerous potential of the intersection.

On this basis it found that the immunity provisions of Sections 830.4 and 830.8 of the California Code did not, as a matter of law, apply.

Thus, it can be said that a California governmental agency can be held liable where injury has resulted from its failure to provide adequate signs warning of a "hidden trap" on its street system. Also, while there is no liability for a failure to provide regulatory signing, once such signing is provided, it must be maintained so as not to create in itself a dangerous condition.

Proposed Standard

As indicated by the wide range of the existing rules there is need for an examination of the factors which would combine to form the elements of any widely accepted rule as to the standard of care required of a governmental agency with respect to its duty to provide adequate traffic control signs.

Because of its stature in the field of traffic engineering and control, the "National" *Manual on Uniform Traffic Control Devices*⁸⁶ must be an

⁸³ *Dahlquist v. State*, *supra* note 78; *Callahan v. City and County of San Francisco*, 249 Cal. App. 2d 593, 57 Cal. Rptr. 639 (1967).

⁸⁴ 71 Cal. Rptr. 275, 265 A.C.A. 178 (Calif. App., 1st Dist., Div. 1, Aug. 26, 1968).

⁸⁵ *Ibid.* at 285.

⁸⁶ National Joint Committee, *supra* note 16.

important part of any such rule. The history of this work goes back to 1927 when the American Association of State Highway Officials published the *A.A.S.H.O. Sign Manual*. In a joint venture of the American Association of State Highway Officials and the National Conference on Street and Highway Safety produced the first *Manual on Uniform Traffic Control Devices* in 1935. The current edition, published in 1961, was prepared by the National Joint Committee on Uniform Traffic Control Devices which is composed of traffic experts appointed by the National Association of County Officials; the American Municipal Association; the American Association of State Highway Officials; the Institute of Traffic Engineers; and the National Committee on Uniform Traffic Laws and Ordinances.⁸⁷ The Manual thus represents over 30 years of work by traffic control experts representing the professional groups most concerned with traffic control. All States have adopted this Manual in one form or another.⁸⁸ Some States such as Ohio and New York provide for the promulgation of a state manual, that substantially conforms to the "National" Manual, by the Highway Department or Traffic Commission.⁸⁹ Most States require that local agencies comply with the State Manual.⁹⁰ Such widespread acceptance makes the Manual the "bible" of traffic engineering, and in the States which by statute require promulgation of a State Manual, that manual has at least some of the indicia of being an administrative regulation. Certainly, the provisions of the Manual should be given great weight in determining the fact of a breach of a governmental agency's duty to provide traffic control signs.

A review of the contents of the Manual further substantiates this proposition. Both the "National" Manual and the various state manuals not only provide specifications with respect to size, shape, color, and legend of traffic signs, but also provide guide lines for the use of these signs and other traffic control devices.⁹¹ While in some instances conditions warranting the use of a particular sign are described by an objective standard, the conditions warranting the use of many signs are defined by specific tests.⁹²

With the Manual providing a widely accepted, detailed standard for providing traffic signing, which in many states has the weight of administrative regulation, certainly it would not be unwise to adopt a rule in which a failure to comply with its provisions established a *prima facie*

⁸⁷ *Ibid.* at 1; Marsh, Why Adhere to the Manual on Uniform Traffic Control Devices?, 33 Traffic Engineering (4) 13 (Jan. 1963).

⁸⁸ Traffic News, 33 Traffic Engineering (4) 12 (Jan. 1963).

⁸⁹ E.g. N.Y. Veh. & Traf. L. § 1680; Ohio Rev. Code § 4511.09.

⁹⁰ *Op. cit. supra* note 88; e.g., N.Y. Veh. & Traf. L. § 1682; Ohio Rev. Code § 4511.11.

⁹¹ National Joint Committee, *op. cit. supra*, note 16 at 9.

⁹² *Ibid.*; compare conditions for application of the "Hill" sign p. 65 with those for the turn sign p. 55, the reverse curve sign p. 58, and the "Low Clearance" sign p. 71.

breach of duty. This would mean that where the defendant agency had provided a level of signing below that required by the Manual, it would have the burden of showing that such signing was adequate. Where the defendant agency had complied with the Manual, the claimant would have the burden of showing that sound engineering judgment required extraordinary care. This is essentially the rule that the New York Court of Claims applied in the *Downen*⁹³ case, but carried too far in the *Reynolds*⁹⁴ case.

A second element of the proposed rule would be adoption of the California position that a governmental agency cannot be held liable for failure to provide regulatory, as opposed to warning, signs. This aspect of the proposed rule is supported by cases which hold that the regulatory aspect of traffic control is an inherent governmental function.⁹⁵ There is also precedent that to allow recovery based on a failure to provide regulation amounts to making the controlling agency an insurer of the safety of its highways.⁹⁶ This immunity with respect to provision of regulatory signs should not, however, be extended to protect an agency which has freely made the decision to install a regulatory device but has installed that device in such a way that it has in itself created a dangerous condition,⁹⁷ or an agency which has failed to properly maintain a regulatory device.⁹⁸ This result is necessary largely because, by making the initial installation, the agency has invited reliance on the device; and highway users, acting within the scope of their reliance, may unknowingly place themselves in a dangerous position.⁹⁹ Additionally, it should be noted that the Manual, because it clearly categorizes regulatory and warning signs, would also be of great help in making the necessary distinctions involved here.

Conclusions

In review, it can be said that inadequate traffic signing is a major contributing factor in many highway accidents. However, because nearly all streets and highways are under the control of a governmental agency, the principles of sovereign immunity add great complexity to the problem of actual recovery based on inadequate signing, and as shown by a study of decisions in three major states, the rules as to the required standard

⁹³ *Downen v. State*, *supra* note 58.

⁹⁴ *Reynolds v. State*, *supra* note 22.

⁹⁵ *Supra*, note 32.

⁹⁶ *Perry v. City of Santa Monica*, 130 Cal. App. 2d 370, 279 P. 2d 92 (1955).

⁹⁷ *Teall v. City of Cudahy*, *supra* note 79.

⁹⁸ *Dudam v. City of San Mateo*, 167 Cal. App. 2d 593, 334 P. 2d 968 (1959); *Schauf v. Southern California Edison Company*, 243 Cal. App. 2d 450, 52 Cal. Rptr. 518 (1966).

⁹⁹ *Rose v. Orange County*, 94 Cal. App. 2d 688, 211 P. 2d 45 (1949); *Teall v. City of Cudahy*, *supra* note 97.

of care are at great variance. Finally a standard rule which includes both the use of the Manual on Uniform Traffic Control Devices as the basic test of the adequacy of traffic signing and immunity with respect to the function of traffic regulation, is proposed. While wide acceptance of this rule is doubtful because it would involve basic policy changes in the area of sovereign immunity, one can always dream Utopian dreams and hope for its acceptance.