Negligence -- Highways -- Liability for Dangerous Conditions Thereon

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In a recent Kansas case[1] an action was brought to recover damages for an alleged wrongful death resulting from an automobile collision which occurred when the car in which the deceased was riding suddenly went out of control and skidded into the lane of another automobile coming from the opposite direction. The skidding and collision were alleged to have resulted from a large accumulation of mud and slime which was carried onto and, without warning the traveling public, allowed to remain, upon a black-top highway by large, heavily loaded trucks operated by defendant. *Held:* defendants' demurrer and motion for a directed verdict were properly overruled. Whether the acts of defendants in bringing the mud and slime onto the highway and leaving it there without posting any warning signs constituted actionable negligence was a proper question for submission to the jury.

Although statutory liability may be imposed upon a state[2] or its political subdivisions[3] for injuries sustained by persons traveling upon

[1] Cuddy *et al.* v. Tyrrell *et al.*, 171 Kan. 232, 232 P. 2d 607 (1951). In substance the evidence in the case was as follows:

Defendant truckers had been employed to remove a torn down oil rig from a field located about one mile from the main highway to another field five miles away. Due to previous rains and snow the ground was soggy and muddy. As the trucks entered onto and turned down the main highway large quantities of mud and slime dropped off into the highway lane for a distance of about 300 feet. None of the mud and slime was removed and neither were any warning signs posted.

About four hours later the car in which deceased was riding approached the point where the defendants' trucks had entered the highway and suddenly swerved out of control and crashed into an oncoming car as a result of the mud film on the highway. Several witnesses testified that they found the highway dangerously slippery prior to the collision due to the mud film which defendants had deposited on the highway, but that the highway was not slippery elsewhere.

The case was sent to the jury by the trial judge and resulted in a hung jury. Thereupon the defendants appealed the action of the trial judge in overruling their demurrer and motion for a directed verdict.

[2] A state is not, in the absence of a constitutional or statutory waiver of its immunity from suit, liable for damage resulting from defects or other dangerous conditions in its highways, but it may assume such liability or it may modify or withdraw such assumption. Taylor v. Westerfield, 233 Ky. 619, 26 S. W. 2d 557 (1930); Engle v. Mayor of Cumberland, 180 Md. 465, 25 A. 2d 446 (1942); Seelye v. State, 178 Misc. 278, 34 N. Y. S. 2d 205 (Ct. Cl. 1942); Pickett v. Carolina & N. W. Ry. Co., 200 N. C. 750 S. E. 398 (1931). See Note, 69 A. L. R. 42 (1930).

In North Carolina liability is assumed on the part of the state by a statute which confers a right of action against the State Highway Commission for any damages sustained by reason of any defect in the highways. However, the Commission is liable only for wanton and corrupt negligence with regard to highways which it has taken over. N. C. GEN. STAT. §§136-97 (1943). See Wilkens v. Burton, 220 N. C. 13, 15 S. E. 2d 406 (1941).

[3] It is generally held that minor political subdivisions of the state such as counties and municipalities are not liable for injuries resulting from defects or other dangerous conditions in the street and highways unless liability is imposed by statute. Stone v. Horn, 151 Ala. 240, 37 So. 2d 111 (1948); Williams v.

the public highways as a result of obstructions, defects, or other dangerous conditions in or upon the public way, this note is primarily directed toward the nature and extent of the liability of individuals and private corporations. As a general rule, liability cannot be imposed upon one who owed no duty to the person injured. While using a public highway, an individual does, however, owe a duty of care to others traveling thereon.[4] He must exercise that degree of care and caution that the ordinarily careful and prudent person, acting in the same or similar circumstances, would exercise for the safety of himself and others traveling upon the highway.[5] Furthermore, it is generally established that one who causes an obstruction, defect, or other dangerous condition in a highway, and who fails to remove the same, or to post a warning thereof, within a reasonable time is liable for injuries resulting therefrom.[6] This is true notwithstanding the fact that a governmental agency may also be liable.[7]

Granted that individuals and private corporations may be held liable

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Wessington, 70 S. D. 75, 14 N. W. 2d 493 (1944); Ellis v. Cannon, 113 Vt. 511, 37 A. 2d 377 (1944).

However, some courts impose liability upon political subdivisions without statutory authority. North Carolina holds that a political subdivision may be held liable for injuries sustained as a result of defects or other dangerous conditions in its highways without the necessity of statute. Liability is imposed on the theory that the political subdivision is immune, in the absence of statute, from liability for injuries inflicted in the performance of governmental functions, but liable if the function is proprietary. Accordingly, since the maintenance and operation of highways are considered proprietary functions, a political subdivision may be held liable for injuries resulting from dangerous conditions thereon. Gunter v. Town of Sanford, 186 N. C. 452, 120 S. E. 41 (1923); Pickett v. Carolina & N. W. Ry., 200 N. C. 750, 158 S. E. 398 (1931).

[4] Trotter v. U. S., 95 F. Supp. 645 (W. D. La., 1941); McGough Bakeries Corp. v. Reynolds, 250 Ala. 592, 35 So. 2d 332 (1948); Krauth v. Billar, 71 Ariz. 298, 226 P. 2d 1012 (1951); Elliot v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617 (1949); Marshall v. Southern Ry., 233 N. C. 38, 62 S. E. 2d 489 (1950).

[5] Whieher v. Phinney, 124 F. 2d 929 (1st Cir., 1942); Sills v. Forbes, 33 Cal. 2d 219, 91 P. 2d 246 (1939); Wilhem v. Jackson, Inc., 106 Colo. 140, 102 P. 2d 731 (1940); Webb v. Smith, 176 Va. 235, 10 S. E. 2d 503 (1940).

[6] Ross v. O'Keefe, 135 N. J. 287, 51 A. 2d 23 (1947); Swinford v. Finch, 139 Neb. 886, 299 N. W. 227 (1941); Wilkens v. Burton, 220 N. C. 13, 15 S. E. 2d 406 (1941); Trigg v. Fergerson Co., 30 Tenn. App. 672, 209 S. W. 2d 525 (1948); McCall v. Alphine Telephone Corp., 143 Tex. 335, 181 S. W. 2d 830 (1943); Moore v. Virginia Transit Co., 188 Va. 493, 50 S. E. 2d 268 (1948).

[7] Juliano v. State, 190 Misc. 180, 71 N. Y. S. 2d 474 (Ct. Cl. 1946), *aff'd* 273 App. Div. 936, 77 N. Y. S. 2d 826 (1947); Williams v. Wessington, 70 S. D. 75, 14 N. W. 2d 493 (1944).

As a general rule neither state, political subdivision thereof, nor highway officials having charge of the maintenance of the highway are liable for injuries to travelers caused by defects or other dangerous conditions in the highway unless they have actual or constructive notice thereof. Nicholson v. Postal Telegraph Co., 162 Wash. 603, 299 Pac. 397 (1931). See notes, 2 and 3 *supra*.

Consequently, in dealing with the principal case it is assumed that the state could not be held liable since it did not have actual notice of the condition nor can it be said that four hours is sufficient time from which to imply constructive notice thereof. See: Falkowski v. McDonald, 116 Conn. 241, 164 Atl. 650 (1933); Williams v. Kansas State Highway Commission, 134 Kan. 810, 8 P. 2d 946 (1932); Dirane v. City of N. Y., 240 App. Div. 368, 270 N. Y. Supp. 128 (1934).

for damages to travelers resulting from obstructions, defects, and other dangerous conditions which they have created in the highways, their liability to a great extent depends upon the character of the conditions created. The decision in the principal case may be best evaluated by analyzing the various instances in which persons have or have not been held accountable for injuries sustained by travelers as a result of various conditions created on highways.

In the first instance, the courts have uniformly held that one who unlawfully creates or maintains in or upon a highway a condition which endangers the safety of travelers does so at his own peril and is liable for injuries proximately resulting therefrom.[8] Liability is generally predicated upon the theory that the dangerous condition constitutes a nuisance, without regard as to whether or not there was negligence.[9] Accordingly, persons who, without right or authority, obstruct a highway by erecting and maintaining thereupon fences,[10] gates,[11] low overhanging wires,[12] excavations,[13] or other permanent structures[14] which interfere with travel thereon have been held liable for resulting injuries. In these instances, once it is established that the obstruction[15]

[8] Washington Gaslight Co. v. District of Columbia, 161 U. S. 316 (1896); Tenn. Tel. Co. v. Parsons, 154 Ky. 801, 159 S. W. 584 (1913); Hines v. Western Union Tel. Co., 358 Mo. 742, 217 S. W. 2d 482 (1949); McGraw v. Thompson, 353 Mo. 856, 184 S. W. 2d 994 (1945); Conway v. Kinston, 169 N. C. 577, 86 S. E. 524 (1916); Brobston v. Darby, 290 Pa. 331, 138 Atl. 849 (1927). See notes, 109 A. L. R. 949 (1938); 20 A. L. R. 1440 (1922).

[9] Evansville R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310 (1889); Rockport v. Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017 (1901); Osborn v. Nashville, 182 Tenn. 197, 185 S. W. 2d 510 (1946); Appalachian Power Co. v. Wilson, 142 Va. 468, 129 S. E. 277 (1925). See note, 51 A. L. R. 717 (1901).

[10] Rief v. Mountain States Telegraph Co., 63 Idaho 418, 120 P. 2d 823 (1941); King v. Esteppe, 228 S. W. 2d 391 (Mo. 1950); State v. Godwin, 145 N. C. 461, 59 S. E. 132 (1908).

[11] Scruggs v. Beason, 226 Ala. 405, 20 So. 2d 774 (1945); State v. Hunter, 27 N. C. 369 (1845).

N. C. GEN. STAT. §136-94 (1943) makes it unlawful to construct a gate in such a manner that it will obstruct a highway when opened.

[12] Mississippi Power Co. v. Sellers, 160 Miss. 512, 133 So. 594 (1931).

[13] Bailey v. Columbia Grocery Co., 73 Ind. 503, 124 N. E. 794 (1919); Milstrey v. City of Hackensack, 6 N. J. 400, 79 A. 2d 37 (1951); Salt Lake City v. Sehubach, 108 Utah 266, 159 P. 2d 149 (1945).

[14] State *ex rel.* King v. Friar, 165 Okla. 145, 25 P. 2d 620 (1933) (corner of filling station constructed partially in highway); Commonwealth v. Hall, 305 Ky. 95, 203 S. W. 2d 975 (1947) (stump projecting above surface of road); Harrel v. City of Wilmington, 214 N. C. 608, 200 S. E. 367 (1939) (low wall at end of highway); Yeaw v. Williams, 15 R. I. 20, 23 Atl. 33 (1885) (pole erected in highway).

N. C. GEN. STAT. §136-90 (1943) makes it unlawful to "wilfully alter, change or obstruct any highway . . . leading to or from any . . . place of public worship . . . or hinder or in any manner interfere with the making of any road."

N. C. GEN. STAT. §136-91 (1943) makes it unlawful for any person to "throw, place or deposit any glass or other sharp or cutting substance in or upon any of the public highways of this state."

[15] An Alabama court has defined an obstruction as anything which renders the highway less convenient for the use of the public. Sandlin v. Blanchard, 33 So. 2d 472 (Ala. 1948).

constitutes a nuisance,[16] liability attaches.

There are many instances, however, in which individuals and private corporations have been held liable for injuries to travelers resulting from conditions created upon the highways which were not considered as amounting to nuisances.[17] The cases are not harmonious in their holdings as to what conditions created in a highway do or do not constitute nuisances. An analysis of the cases reveals that: (1) if the condition was unlawfully created and was of a permanent character amounting to an obstruction it is usually held to constitute a nuisance,[18] and liability attaches without regard to the question of his negligence;[19] (2) if, on the other hand, the condition was involuntarily or negligently created and was of a temporary character not amounting to an obstruction it is generally held not to constitute a nuisance,[20] and liability depends largely upon whether or not the person creating it was negligent.[21]

Consequently, where travelers were injured by pipes,[22] logs,[23] doors,[24] and other objects[25] which defendants allowed to project beyond their vehicles upon the highway, it has generally been held that whether the defendants were negligent in creating such hazard was a proper question for the jury. Also, where travelers were injured by colliding with boards,[26] tanks,[27] cables,[28] or other objects[29] placed or dropped

[16] In Milstrey v. City of Hackensack, 6 N. J. 400, 79 A. 2d 37 (1951) a nuisance to a highway was said to consist either in obstrucing it or rendering it dangerous.

[17] In Rief v. Mountain States Tel. Co., 63 Idaho 418, 120 P. 2d 823 (1941) the court said, "It is not every obstruction in a street or highway that constitutes a nuisance. . . . Anything which does not amount to a substantial obstruction of a street or an inherent interference wtih the free and comfortable enjoyment . . . does not amount to a nuisance per se."

[18] Walls *et al.* v. Smith & Co., 167 Ala. 138, 52 So. 320 (1910); Bailey v. Columbia Grocery Co., 73 Ind. 58, 124 N. E. 784 (1919); King v. Esteppe, 228 S. W. 2d 391 (Mo. 1950); Milstrey v. City of Hackensack, 6 N. J. 400, 79 A. 2d 37 (1951); Harrel v. City of Wilmington, 214 N. C. 608, 200 S. E. 367 (1939); State *ex rel.* King v. Friar, 165 Okla. 145, 25 P. 2d 620 (1933).

[19] See note 9 *supra.*

[20] Hobbs-Western Co. v. Carmical, 192 Ark. 59, 91 S. W. 2d 605 (1936); Simonsen v. Thorin, 120 Neb. 684, 234 N. W. 628 (1931); Francis v. Gaffey, 211 N. Y. 47, 105 N. E. 96 (1914); Wood v. Carolina Tel. & Tel. Co., 228 N. C. 605, 46 S. E. 2d 717 (1948). See notes, 3 A. L. R. 2d 1 (1948); 81 A. L. R. 1000 (1931).

[21] See notes 22-25 *infra.*

[22] O'Neal v. Kelly Pipe Co., 76 Cal. App. 2d 577, 173 P. 2d 685 (1945); Ice v. Gardner, 183 Okla. 496, 83 P. 2d 378 (1938).

[23] Brewer v. Moye, 200 N. C. 589, 157 S. E. 871 (1931).

[24] Robinson v. White Fuel Corp., 326 Mass. 636, 96 N. E. 2d 144 (1950).

[25] Hobbs-Western Co. v. Carmical, 192 Ark. 59, 91 S. W. 2d 605 (1936) (crossties).

[26] Mair v. Whittmore Co., 289 Mass. 261, 194 N. E. 92 (1935); Bray v. Boston Lumber Co., 161 Va. 686, 172 S. E. 296 (1934).

[27] Batts v. Newman, 3 N. J. 503, 71 A. 2d 121 (1949).

[28] Colonial Trust Co. v. Brewer, 363 Pa. 101, 69 A. 2d 126 (1949).

[29] Pittman v. Sather, 68 Idaho 29, 188 P. 2d 600 (1947) (rocks); H.-F. Const. Co. v. Jordan, 250 Ky. 455, 63 S. W. 2d 501 (1933) (rocks); Braughn v. Platt, 123 Tex. 486, 72 S. W. 580 (1934) (piece of ice).

upon the highways by defendants, whether the defendants were negligent in placing or dropping such objects thereon has usually been held to be a question for the jury. For instance, in a situation somewhat analogous to the one involved in the principal case, a Missouri case reached the same result:[30] There the collision occurred when the plaintiff's car struck some coal which the defendant had dropped on the highway, thereby deflecting plaintiff's car into the lane of an oncoming car. The court held that whether defendant was negligent in placing the coal upon the highway was a proper question for the jury and that the defendant's motion for a directed verdict was properly overruled. The ground for liability of such persons was explained in a leading Nebraska case[31] which held that "When one engaged in the lawful use of a highway causes an obstruction or other hazardous condition to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said hazard is calculated to do injury to travelers upon the highway."

Furthermore, where travelers were injured as a result of ice,[32] oil,[33] and other slippery substances[34] placed upon the highways by individuals and private corporations, whether the latter were negligent in placing such substances thereon has usually been held a proper question for the jury. For instance, in a Missouri case,[35] plaintiff's car skidded into and collided with an oncoming car. The skidding was alleged to have been caused by an accumulation of mud which the defendant had permitted to wash down upon the highway from a lane which he was grading adjacent to and above the highway. In accord with the principal case, it was held that whether defendant was negligent in permit-

[30] Maher v. Donk Bros. Coal Co., 323 Mo. 799, 20 S. W. 2d 888 (1929).

[31] Simonsen v. Thorin, 120 Neb. 684, 685, 234 N. W. 628, 629 (1931) ("Whoever places an obstruction in a public highway even by an involuntary act and without negligence, is under an obligation to remove the same or is required to use ordinary care to warn the traffic on said highway of the dangers incident to said hazardous condition."). *Accord:* Kuska v. Nichols Const. Co., 154 Neb. 58, 48 N. W. 2d 682 (1951); Granthum v. Watson Bros. Transp. Co., 142 Neb. 362, 6. N. W. 2d 373 (1942).

In Wood v. Carolina Tel. & Tel. Co., 228 N. C. 605, 608, 46 S. E. 2d 717, 720 (1948) the court, in referring to objects permitted to fall upon a highway said, "the maintenance of an object in a public way constitutes negligence when it renders the way unsafe for the purpose to which that portion of the street is devoted."

[32] Massey v. Worth, 9 Del. 211, 213, 197 Atl. 673, 675 (1938) ("An artificial discharge of water upon a public way at a time when it would naturally freeze and make such way slippery and dangerous for public travel may render the person so discharging it liable for injuries caused thereby.").

[33] In Delgado v. Billerica, 323 Mass. 483, 82 N. E. 2d 591 (1907) plaintiff passenger was injured when her taxi skidded as a result of tar which had been spread over the entire width of the highway without warning thereof. *Held:* The evidence was sufficient to take the issue of the town's negligence to the jury. *Accord:* Hughes v. Lassiter & Co., 193 N. C. 651, 137 S. E. 806 (1927).

[34] See notes 38-39 *infra.*

[35] Lang v. J. C. Nicols Inv. Co., 227 Mo. App. 1123, 59 S. W. 2d 63 (1933).

ting dirt to wash from the newly graded road upon the highway and accumulate thereon, and whether his negligence, if any, was the proximate cause of the collision were proper questions for the jury. In a South Dakota case,[36] decided only four months before the principal case, the plaintiff brought an action for injuries sustained when the truck in which he was a passenger skidded an overturned on the highway. The skidding was alleged to have been caused by Bentonite, a slippery substance when wet, which defendant had spilled and negligently left on the highway. It was held that the condition which defendant had created, even though hazardous, was not the proximate cause of the injury but, rather, that the independent acts of the driver with whom the plaintiff was riding produced the injury. However, the language[37] of the South Dakota court indicates that, had not distinguishing facts existed,[38] it would have reached the same result rendered in the principal case.

There are certain instances in which the courts have refused to hold individuals or private corporations liable for injuries to travelers caused by conditions which the former created in the highway. Thus, the courts have held it lawful, within certain limits,[39] to obstruct or place objects upon a highway for the purpose of erecting or repairing a building on land adjoining,[40] or for the purpose of taking goods or merchandise in or out of an adjoining landowner's premises.[41] Consequently, persons who make such temporary, reasonable, and necessary obstructions of a highway usually are not held liable to travelers who are injured

[36] Norman v. Cummings, 45 N. W. 2d 839 (S. D. 1951).

[37] *Id.* at 841, "It is the duty of every traveler to avoid any unusual or unreasonable use of the highway and by such use obstruct it or make it dangerous for travel, and the damages resulting from failure to perform that duty may be recovered by any person who sustains injuries therefrom."

[38] In the South Dakota case there was evidence that the highway was slippery when wet, that large signs warning of such condition were posted along the highway, and that other cars had been passing along the area in question all day without injury. In the principal case, on the other hand, there was evidence that the highway was not slippery when wet, that no warning signs of such a condition were posted, and that other persons traveling upon the area in question had had extreme difficulty in retaining control of their car.

[39] The condition created thereby must not be allowed to continue for an unreasonable time. Jones v. Hedges, 123 Cal. App. 742, 12 P. 2d 111 (1932); Whittaker v. Town of Brookling, 318 Mass. 19, 60 N. E. 2d 85 (1945). Furthermore, while the condition thus created continues, the person so creating it is bound to use ordinary care to warn and protect passers-by from any damages to which they are exposed. Kaps v. Consolidated T. & E. S. Co., 279 N. Y. 739, 18 N. E. 2d 687 (1939).

[40] Hasselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009 (1904); Kahn v. King Petroleum Corp., 13 N. J. Super. 334; 80 A. 2d 460 (1951); Culbertson v. Alexandria, 170 Okla. 37, 87 Pac. 863 (1906).

[41] Chase v. Merchant, 315 Mass. 684, 54 N. E. 2d 51 (1944); Jones v. Hayden, 310 Mass. 90, 37 N. E. 2d 243 (1941); West v. City of N. Y., 265 N. Y. 139, 19 N. E. 864 (1889); Collins v. Leafey, 124 Penn. St. 203, 16 Atl. 765 (1889).

thereby.[42] The courts have also held that there is no liability where the condition created on the highway is slight or its location and character are such that there could be no reasonable likelihood of an accident resulting therefrom.[43] Accordingly, a Washington court[44] held that ordinarily an accumulation of oil and grease deposited on a highway by passing automobiles would not permit recovery against the motorists depositing the same, nor against the public body whose duty it is to keep the highway in repair, for an accident arising out of the slippery condition. The court based its decision on the ground that the vehicle operator knows of such conditions, and in using the highways, takes upon himself the risk of injury arising therefrom. The court further held, however, that the rule is different where the situation is unusual; as, for example, where motorists deposit an unusual amount of oil and grease on the highway, or where a city restricts traffic to such a narrow space in a street that unusually large deposits of oil and grease is dropped thereon, giving rise to a hazardous condition, either the motorists or the city may be held liable for injuries sustained by travelers as a result of a slippery condition caused thereby. It seems that the latter rule laid down by the court supports the decision in the principal case; for there the accumulation of mud was indeed unusual.

From the foregoing analysis, it seems that two conclusions may be drawn with regard to the liability of private persons and corporations for injuries to travelers proximately[45] resulting from conditions created or maintained upon a highway. If the condition amounts to a nuisance there is liability for resulting injuries without regard to the question of negligence. If, on the other hand, the condition does not amount to a nuisance liability will depend upon the existence of negligence. In the principal case, the decision of the court seems entirely correct in submitting the issue of negligence to the jury.

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[42] Brey v. Rosenfeld, 71 R. I. 28, 48 A. 2d 177 (1946).
In order to absolve such persons from liability for such conditions, all these uses must be reasonable, temporary and such as is usual and customary in connection with the particular business or construction. O'Neil v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694 (1930).

[43] Bennett v. Ill. Power & Light Co., 355 Ill. 364, 189 N. E. 899 (1934); Snyder v. State Highway Commission, 139 Kan. 150, 30 P. 2d 102 (1934); Miss. Power Co. v. Sellers, 160 Miss. 512, 133 So. 599 (1931); Wood v. Carolina Tel. & Tel. Co., 228 N. C. 605, 46 S. E. 2d 717 (1948).

[44] Gabrielson v. Seattle, 150 Wash. 157, 272 Pac. 723 (1928).

[45] Although proximate cause is seldom in issue in these cases, in order to recover for an injury resulting from a hazardous condition in a highway, such condition must be shown to have been the proximate cause of the injury. Arnold v. Bd. of Comm'rs, 131 Kan. 343, 291 Pac. 762 (1930); Fiddler v. Lafayette, 226 Mich. 635, 198 N. W. 262 (1924); Chapman v. Town of Lee, 80 N. H. 484, 119 Atl. 440 (1922); McCreary v. Thurston, 300 N. Y. 683, 91 N. E. 2d 333 (1950); Harton v. Forest City Teleg. Co., 146 N. C. 429, 59 S. E. 1022 (1907); Sheley v. Swing, 65 Ohio App. 109, 29 N. E. 2d 364 (1940).