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Preface

How to Use Proof of Facts

Articles in Am. Jur. Proof of Facts 3d explain and illustrate how to prove particular facts that are essential to a cause of action or a defense. The orientation of the publication favors the plaintiff's bar because each article is primarily designed as an aid to the lawyer whose client has the burden of proof on the issue under discussion. The publication also serves defense counsel, however, because virtually every article contains one or more sections dealing with defense considerations pertinent to the article's topic, and some articles deal exclusively with proof of facts that are relevant to certain defenses.

Authorship and Topic Coverage

Authorship: P.O.F.3d articles are now authored exclusively by practicing attorneys, trial judges, and experts in various medical and technical fields. The publication makes every effort to insure that its authors possess not only general litigation experience, but also special expertise in the subject of the article to be written.

Am. Jur. Editorial Advisory Board consists of six of the most prominent and most skilled trial lawyers and litigators in the United States, and an engineer who is president of the country's largest technical consulting firm engaged in the study and investigation of accidents and failures. The current members of the advisory board are listed on page ix in the front of this volume. The function of the advisory board is to provide advice and consultation to the publication's editors on developments in trial practice, and on the selection of topics and authors for articles.

Topic coverage in volumes of P.O.F.3d is intended to be broad and cover all important areas of civil and criminal trial practice. Each volume contains an average of six articles. A large portion of the articles in each volume is devoted to personal injury and related subjects, such as products liability, wrongful death, medical and nonmedical malpractice, general negligence, damages, insurance coverage, intentional torts, proof of medical facts and treatment of medicolegal issues, and

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articles on relevant evidence and procedure topics. The remaining articles are devoted largely to civil rights cases, employment litigation, business tort cases, corporate securities and general commercial litigation, intellectual property disputes, environmental and real-property litigation, and other topics of interest to business trial lawyers and general civil litigators. Criminal law articles tend to focus on proof of specific defenses, or relate to forensic subjects that are commonly litigated in the prosecution and defense of criminal charges. Articles on proving technical and scientific facts are also featured prominently in P.O.F.3d coverage.

Replacement program: Articles in Proof of Facts are kept current and up to date by the annual supplementation of each volume. When changes in the subject of an article have become so extensive that the supplementation does not fully or adequately expand the text in the bound volume, a new and modern replacement article will be published. For example, about two-thirds or more of the articles in the First Series, published between 1959 and 1973, have already been superseded in whole or in part by articles published in Second and Third Series volumes.

Article Features

Each Proof of Facts article is crafted to offer the reader certain important features, which are listed below in the general order in which they appear in an article.

Topic statement on the title page of the article states the factual issue covered in the article.

Research References direct the reader to articles in both Proof of Facts and Am. Jur. Trials that are especially relevant to the subject of the published article and that show interdependence of these two trial-practice publications.

Also included are cross-references that direct the reader to articles and other pertinent information in Am. Jur. 2d, Am. Jur. Pleading and Practice Forms, Am. Jur. Legal Forms 2d, Federal Procedure, Federal Procedural Forms, A.L.R. Annotations, and other units of the Research References.

Legal background text explains the factual and legal issues necessary to an understanding of what to prove and how to prove it. It contains a concise review of substantive and procedural law controlling proof of the fact under discussion.

Technical background text is provided in those articles that combine discussion of legal issues with medical or scientific topics. At many trials, the legal issue to be determined is

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controlled by proof of medical, scientific, technical, or forensic facts. Proof of Facts articles show practitioners how to prove such facts.

Article outline gives a broad overview of the contents of the article.

Article index is located at the front of the article to provide quick access to specific points discussed in the article.

Evidence considerations are frequently included in P.O.F.3d articles, providing special guidance for the party with the burden of proof.

Defense considerations are discussed in each article for which they are relevant, looking at the topic from the perspective of the opposing party.

Elements of damages that may be recovered are listed in a convenient checklist, together with a description of factual and legal issues that may affect the recovery of damages in cases involving the particular topic. Extraordinary remedies that are germane to the subject of the article may also be discussed in the sections on damages.

Model discovery division assists the attorney during the discovery phase of the case by offering model forms and other illustrative materials on relevant discovery devices, such as:

—Written interrogatories
—Document production requests
—Requests for admission of facts
—Oral deposition checklists

Elements of proof checklist is a central feature of every article. This checklist provides a comprehensive outline of the facts and circumstances that should he established in order to prove the ultimate fact that is essential to the cause of action or defense. Checklisted items are cross-referenced to sections in the article where the proof of such facts is discussed and illustrated.

Illustrative proofs in a detailed question-and-answer form are a distinctive part of almost all articles. Many of these illustrative proofs are adapted from depositions and trial transcripts in cases that provide good examples of how to prove particular facts. Others are based on factual situations that represent typical cases clients may bring to their attorneys.

Illustrative forms for motions and supporting court papers may be provided in articles dealing with the determination of facts that is typically done by a trial judge on the basis of motion papers and normally without a contested evidentiary

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hearing. Some articles will also contain illustrative forms of relevant pleadings, such as complaints and petitions.

Model jury instructions appearing in some P.O.F.3d articles will set forth the principles of substantive law and the rules of evidence by which factual determinations are made concerning the subject of the article.

Artwork and illustrations are features of many P.O.F.3d articles where they are relevant and helpful to an understanding of the text or proof. Many such diagrams and drawings are suitable for enlargement into full-size courtroom exhibits.

Special Subscriber Services

In addition to the regular features of P.O.F.3d articles, the publication offers its subscribers other related products and certain highly valuable reader services.

Taber's Cyclopedic Medical Dictionary is the P.O.F.3d medical dictionary. This distinguished and authoritative lexicon is widely used in the legal profession by attorneys to understand and explain essential medical terms and concepts.

P.O.F. General Index: The Third Series is a continuation of the First and Second Series of Am. Jur. Proof of Facts. The Am. Jur. Proof of Facts General Index contains a comprehensive index to all articles in the First, Second, and Third Series. The General Index is recompiled and republished annually. Index update pamphlets are issued with each new volume of the Third Series; these supplements contain a cumulative index to all articles in the Third Series published after the current General Index.

Quick-Access Guides, consisting of lists of titles of articles by volume and by topic, are an important feature of the General Index. A list of outside authors and contributors and a list of drawings and diagrams are also included in the Quick-Access Guides, along with a table of articles in the First or Second Series that have been replaced or superseded by later articles. The Quick-Access Guides are located at the beginning of the first volume of the General Index. A categorical list of articles in P.O.F.2d and P.O.F.3d is also included in the Quick Access Guides.

P.O.F.3d Blurb: A P.O.F.3d Blurb is issued with the publication of each new volume of Am. Jur. Proof of Facts. The blurb tells at a glance the topics covered in the volume, provides instructions for shelving the General Index and Quick Access Guides, and provides information about contacting a Proof of Facts editor.

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PROOF OF THE ROADSIDE HAZARD CASE

*Daniel J. Christensen, J.D.**

Scope

This article discusses the law of negligence as applied in cases alleging negligent design, construction, or maintenance of roadsides. The article focuses on the proof of facts and circumstances necessary to support an injured plaintiff's claim for relief as well as a defendant's claims of immunity or affirmative defenses.

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I. BACKGROUND

A. PRELIMINARY MATTERS

§ 1 Introduction: Scope of article

Every day in this country, new roads are built and the burden upon the governmental and private entities managing those roads increases. Often these entities, for a number of reasons, are incapable of designing, constructing, or maintaining these roads, or areas along the roads, in a reasonably safe fashion. Sometimes when the efforts of the governmental and private entities fall short, people get hurt. Whether those entities should, in turn, be held liable for a person's injuries, however, can be a difficult question.

This article addresses that question, however, only as it relates to people being injured[1] by roadside hazards.[2] Cases involving claims of negligent design, construction, or maintenance of a road, as opposed to a roadside, are outside the scope of this article.[3] For example, whether a curve was too sharp, a pothole too big, or an intersection properly located is not

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[1]Cases regarding loss or damage to real or personal property will not be discussed.

[2]For purposes of this article, "roadside" will include the area outside the outer edge of the right-of-way limits. The area normally used by drivers or pedestrians traveling the street or highway is the "road" and, therefore, defects within that area will not be addressed.

[3]For references discussing the negligent design, construction, or maintenance of roads and bridges, see Liability in connection with injury allegedly caused by defective condition of private road or driveway, 44 A.L.R. 3d 355; Existence of actionable defect in street or highway proper as question for court or for jury, 1 A.L.R. 3d 496; Liability of governmental entity or public

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addressed. Similarly, cases alleging negligent use, maintenance, or omission of road signs and pavement markings are not covered by this article unless the cases pertain to a failure to warn of a condition or hazard existing on the roadside.[4] Therefore, situations involving things like inadequate markings at a construction zone, improper passing zones, or faulty traffic signals are outside the scope of the article. However, a case regarding a governmental entity that failed to warn a driver of a soft shoulder or a case involving vegetation obstructing a sign is discussed.[5]

Cases that are not based on a negligence theory are not included. Causes of action other than negligence are discussed only if they pertain to an issue present in a negligence case alleging a roadside hazard.[6]

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officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of a highway, 45 A.L.R. 3d 875; Governmental tort liability as to highway median barriers, 58 A.L.R. 4th 559; Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway, 61 A.L.R. 2d 425; Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 A.L.R. 3d 11; Public Authority's Failure to Remove or Guard Against Ice or Snow on Surface of Highway or Street, 21 Am. Jur. Proof of Facts 2d 299; Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from failure to repair pothole in surface of highway or street, 98 A.L.R. 3d 101; Public Authority's Failure to Repair Pothole in Surface of Highway or Street, 21 Am. Jur. Proof of Facts 2d 251; Personal injury liability of civil engineer for negligence in highway or bridge construction or maintenance, 43 A.L.R. 4th 911; Negligent Design or Maintenance of Curve, 14 Am. Jur. Proof of Facts 3d 527; Actions Against Road Contractors for Inadequate Warning of Construction Hazards, 72 Am. Jur. Trials 215.

[4]For references discussing the negligent use, maintenance or omission of road signs, signals, and pavement markings, see Highways: governmental duty to provide curve warnings or markings, 57 A.L.R. 4th 342; Defective Design or Setting of Traffic Control Signal, 6 Am. Jur. Proof of Facts 2d 683; Establishing Liability of a State or Local Highway Administration, Where Injury Results from the Failure to Place or Maintain Adequate Highway Signs, 31 Am. Jur. Proof of Facts 3d 351; Highways: governmental duty to provide curve warnings or markings, 57 A.L.R. 4th 342; Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge, 2 A.L.R. 4th 635.

[5]See § 31.

[6]For example, nuisance is discussed as it relates to avoiding defense immunity claims. See § 19. While other claims may be available in roadside hazard cases, such as nuisance, breach of warranty, or engineering malpractice, they are not discussed in this article. See Hricko, Roadside Hazards—

This article commences with a discussion of the forgiving roadside concept around which centers much of the law and rules regarding roadside hazards.[7] Then, the process of identifying potential defendants and selecting experts is addressed.[8] Next, the article examines the issues pertaining to what duties, if any, a defendant has in reducing, eliminating, or warning of roadside hazards.[9] Causation is discussed next as it pertains to roadside hazard cases.[10] The article then explains the most common defenses and immunity claims defendants assert in roadside hazard cases.[11] Next, damage and proof checklists are provided to efficiently guide practitioners in preparing their roadside hazard cases.[12] A brief list of important articles and helpful cases pertaining to each of the more common roadside hazards is supplied, as well as a sample complaint and written discovery for a roadside hazard case.[13]

§ 2 The forgiving roadside concept

One-third of all traffic-related fatalities occur when a single vehicle leaves the road and strikes a fixed object or overturns.[1] On freeways, where the problem of intersection accidents is removed, this figure increases to over one-half of all fatalities.[2] And, on rural roads, two-thirds of all fatalities are single-vehicle collisions where the vehicle has left the road.[3] In spite of these alarming figures, roadside design and maintenance was not seriously discussed until approximately 40 years ago.[4] It was at this time, in the mid-sixties, when the "forgiving

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Responsibility and Liability, FEDERATION OF INSURANCE COUNSEL QUARTERLY, 4-5 (Fall 1974).

[7]See § 2.

[8]See §§ 3, 4.

[9]See §§ 5 to 10.

[10]See §§ 11 to 16.

[11]See §§ 17 to 27.

[12]See §§ 28, 29.

[13]See §§ 28 to 32.

[1]AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 15 (1977); AASHTO, Roadside Design Guide 1-1 (1996).

[2]AASHTO, Highway Design and Operational Practices Related to Highway Safety 37 (1974).

[3]AASHTO, Strategic Highway Safety Plan 46 (1997).

[4]AASHTO, Roadside Design Guide 1-1 (1996).

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roadside concept" emerged.[5]

The forgiving roadside concept's premise is that it is known that vehicles leave the road surface. Aware of this concept, the highway engineer has a duty to ensure that when a vehicle leaves the road, the least amount of damage or injury possible occurs.[6] The best way to achieve this result is to create a "clear zone" on each side of the road that is free from all fixed objects and other nontraversible hazards to the extent possible.[7] If a dangerous condition cannot be fixed or removed, it should be protected with a barrier of some sort, but only if the barrier poses less of a threat of injury than the subject condition.[8]

Industry experts' guidance regarding the width of the appropriate "clear zone" began with general guidance of approximately 30 feet.[9] This guidance became more specific over time, and in 1977, the American Association of State Highway

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[5] AASHTO, A Policy on Geometric Design of Rural Highways 126 (1965); AASHTO, Highway Design and Operational Practices Related to Highway Safety (1967).

[6] AASHTO, Roadside Design Guide 1-3 (1996).

[7] AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 15, (1977) ("[A] major emphasis has been placed on the elimination of hazardous roadside conditions and on the improvement of traffic barriers to shield those hazards that cannot be eliminated.").

[8] AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 15, (1977).

[9] "For warranting purposes, a 30-ft. zone adjacent to the traveled way is recommended as the minimum for being clear of roadside obstacles; a zone of more than 30-ft. width is desirable. If the 30-ft. zone cannot be cleared of roadside obstacles, due to practical or economic reasons, guardrails may be warranted for the roadside areas." HIGHWAY RESEARCH BOARD, Location, Selection and Maintenance of Highway Guardrails and Median Barriers, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 54 at n. 4 (1968); AASHTO, Highway Design and Operational Practices Related to Highway Safety 37 (1974) ("For adequate safety, it is desirable to provide an unencumbered roadside recovery area that is as wide as practical on the specific highway section. Studies have indicated that on high speed highways, a width of 30 feet or more from the edge of the traveled way permits about 80 percent of the vehicles leaving a highway out of control to recover when normal operating speeds are below 70 miles per hour."). In a study conducted by the Insurance Institute for Highway Safety (IIHS), "[a]bout 90 percent of the objects [struck by vehicles leaving the road] were within 11 meters (35 feet) from the pavement edge and 98 percent were within 15 meters (50 feet)." Insurance Institute for Highway Safety, Priorities for Roadside Hazard Modification, TRAFFIC ENGINEERING, Vol. 46, No. 8 (Aug. 1976).

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Transportation Officials (AASHTO)[10] published a relatively sophisticated formula for calculating the proper clear zone width.[11] AASHTO's formula combined the road's speed limit, average daily traffic (ADT), and slope of shoulder to calculate the clear zone width.[12] The higher the speed limit, the larger the road's ADT, or the greater the shoulder's slope, the larger the required clear zone.[13] This same type of calculation is used today.[14]

The clear zone concept is applicable not just in new roadside design, but also, in existing roadside upgrades and maintenance.[15] Routine maintenance functions such as removal of roadside vegetation and drainage management are also affected by the clear zone concept.[16]

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[10] AASHTO was originally the American Association of State Highway Officials (AASHO). The organization changed its name to AASHTO in 1973 to reflect its broader scope of interest. This article will refer to the organization simply as AASHTO to avoid confusion.

[11] AASHTO, A Guide for Selecting, Locating, and Designing Traffic Barriers 16 (1977); see Appendix A.

[12] AASHTO, A Guide for Selecting, Locating, and Designing Traffic Barriers 16 (1977).

[13] AASHTO, A Guide for Selecting, Locating, and Designing Traffic Barriers 16 (1977); see also Appendix A.

[14] AASHTO, Roadside Design Guide 3-4 (1996); see also Appendix B.

[15] AASHTO, in its A Guide for Selecting, Locating, and Designing Traffic Barriers, published in 1977 stated at page 3-4:" Existing highways should be upgraded when feasible to eliminate hazardous conditions. . . . This guide will have applications to both new and existing roadways. . . . A survey of existing facilities should be made and substandard conditions should be identified with reference to the guide."

See also AASHTO, Highway Design and Operational Practices Related to Highway Safety 37 (1974) (emphasis provided): "A coordinated effort to provide a forgiving roadside must be made in design, construction, maintenance, and traffic control stages of project development if there is to be success in reducing the sizable number of fatal and other serious accidents which occur each year off the roadway."

See also AASHTO, Highway Design and Operational Practices Related to Highway Safety 1-2 (1967): "An intensive crash program to remove roadside hazards on existing streets and highways and to engineer the roadsides of new facilities with safety as a major criterion should have a paramount place in the highway program of each state. . . . Constant field checks of the operating conditions with existing and new designs are recommended for evaluation of their effectiveness and cost efficiency."

[16] See AASHTO, A Guide for Selecting, Locating, and Designing Traffic Barriers (1977); see also AASHTO, Roadside Design Guide (1996).

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§ 3 Potential defendants

Because roadside hazard cases typically involve at least one governmental entity, plaintiff's counsel should promptly identify all potential defendants. Most governmental entities have statutes or ordinances requiring plaintiffs to give notice of their claims within a certain time after the incident.[1] Often, the amount of time within which a plaintiff must provide notice of his claim is very short.[2] If a plaintiff does not give such notice, his suit may be barred entirely.[3]

Identifying all potential defendants can be difficult in roadside hazard cases because different governmental and private entities may be involved in the design, construction, and maintenance of a particular area of the roadside. Sometimes more than one entity is responsible for a particular roadside feature, and other times different entities are responsible for different aspects of the roadside without any overlap.[4] Whatever the case may be, if the plaintiff sues an entity alleging it failed in its duty to the plaintiff, when in

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[1]For example, under the Federal Tort Claims Act (FTCA), a plaintiff has two years to file his Standard Form (SF) 95 to bring a claim. State tort claims acts also have similar notice requirements. For example, see Tex. Civ. Prac. & Rem. Code §§ 101.101 et seq. (Texas). Municipalities also will typically have ordinances requiring notice of a claim to be served within a certain period of time. For example, see Austin, Texas Code of Ordinances, Article XII, § 3 (2002).

[2]For example, Texas Code of Ordinances, Article XII, § 3 (2002) requires written notice of a claim within 45 days from the date of injury. Such a short time period has been held to be constitutional. Kelley v. City of Austin, 268 S.W.2d 773 (Tex. Civ. App. Austin 1954). For a discussion about municipal notice of claim provisions, see Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity, 59 A.L.R. 3d 93; Insufficiency of notice of claim against municipality as regards statement of place where accident occurred, 69 A.L.R. 4th 484; Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit, 55 A.L.R. 3d 930.

[3]See Bova v. County of Saratoga, 258 A.D.2d 748, 685 N.Y.S.2d 834 (3d Dep't 1999); Bacon v. Arden, 244 A.D.2d 940, 665 N.Y.S.2d 154 (4th Dep't 1997). If the defendant creates the condition, however, it may not be entitled to statutory notice. Haviland by Haviland v. Smith, 91 A.D.2d 764, 458 N.Y. S.2d 11 (3d Dep't 1982); Barrett v. City of Buffalo, 96 A.D.2d 709, 465 N.Y. S.2d 376 (4th Dep't 1983); Rouse v. State, 97 A.D.2d 962, 468 N.Y.S.2d 756 (4th Dep't 1983); Muszynski v. City of Buffalo, 29 N.Y.2d 810, 327 N.Y.S.2d 368, 277 N.E.2d 414 (1971); Sorrento v. Duff, 261 A.D.2d 919, 690 N.Y.S.2d 368 (4th Dep't 1999).

[4]Dixon v. City of Chicago, 101 Ill. App. 3d 453, 56 Ill. Dec. 950, 428 N.E.2d 542 (1st Dist. 1981) (injury sustained on curb that was state's responsibility whereas city defendant was only responsible for streets and

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reality such duty fell upon a different entity, the plaintiff's claim may be doomed from the start—and counsel may have committed professional negligence.

It is important that counsel take care to bring suit only in situations involving negligent conduct and only against those entities who breached their duty to the plaintiff. It is equally important, however, that counsel thoroughly examine the facts of his client's case to fully evaluate all potential defendants. Besides the typical governmental entity who owned, designed, constructed, or maintained the road, there are many other possible entities that owed duties to the plaintiff and whose negligence could have contributed to the plaintiff's injuries. For example, adjoining landowners,[5] independent contractors,[6] or utility companies can be possible defendants in roadside haz-

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sidewalks); Tunk v. Village of Willow Springs, 120 Ill. App. 3d 800, 76 Ill. Dec. 478, 458 N.E.2d 1132 (1st Dist. 1983) (village defendant granted summary judgment because it was not responsible for maintaining road, but state was); Avey v. Santa Clara County, 257 Cal. App. 2d 708, 65 Cal. Rptr. 181 (1st Dist. 1968) (shrubbery was state's responsibility, not county's); Burcroff v. Orleans County, 114 Misc. 2d 16, 450 N.Y.S.2d 651 (Sup 1982) (town not liable for condition of county road); Ingram v. Howard-Needles-Tammen and Bergendoff, 234 Kan. 289, 672 P.2d 1083, 43 A.L.R.4th 893 (1983) (turnpike authority and consulting engineers both responsible for defect on bridge resulting in plaintiff's death); Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119 (1st Dep't 1998) (agreement between city and state to share responsibility for roadway).

[5]Morales v. Costa, 427 So. 2d 297 (Fla. Dist. Ct. App. 3d Dist. 1983) (landowner failed to maintain tree and it obscured stop sign). Often, a cause of action against an adjoining landowner will be treated as a negligent activity case rather than a premises case. Alamo Nat. Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981) (suit for injury on public road due to demolition of building on adjoining landowner's property was treated as negligence case and not premises liability case). This will be an important point for counsel to research in their jurisdiction because the elements of simple negligence are easier to prove than the elements of a premises liability case (i.e. the plaintiff's status is irrelevant). Keetch v. Kroger Co., 845 S.W.2d 262 (Tex. 1992). For a discussion of adjoining landowner liability, see Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land, 100 A.L.R. 3d 510; Liability of private owner or occupant of land abutting highway for injuries or damage resulting from tree or limb falling onto highway, 94 A.L.R. 3d 1160; Liability of railroad or other private landowner for vegetation obscuring view at railroad crossing, 66 A.L.R. 4th 885; Liability of private landowner for vegetation obscuring view at highway or street intersection, 69 A.L.R. 4th 1092; Joinder as defendants, in tort action based on condition of sidewalk or highway, of municipal corporation and abutting property owner or occupant, 15 A.L.R. 2d 1293.

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ard cases.[7]

§ 4 Selection and use of experts

Several types of experts may be necessary in a roadside hazard case. For example:

Accident reconstructionist. This person can reconstruct the collision by collecting data at the scene, speaking to witnesses, and examining the vehicles involved. Many reconstructionists are engineers also and can speak to design, construction, and maintenance issues as well. Former law enforcement officers are also often used as reconstructionists. Because these witnesses are recreating the collision, their testimony is often helpful for causation issues such as the cause of the loss of control, what would have happened to the vehicle had a barrier been present, and how fast the plaintiff was traveling at the time he encountered the hazard.[1]

Highway engineer. This type of expert is normally a civil engineer, preferably with extensive experience designing and building the type of roadside feature at issue.[2] Many will have former experience with state departments of transportation or construction firms. Some of the best highway engineers are often very involved in practical or research projects closely tied with state or federal transportation officials and may be conflicted

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[6]See Ingram v. Howard-Needles-Tammen and Bergendoff, 234 Kan. 289, 672 P.2d 1083, 43 A.L.R.4th 893 (1983) (turnpike authority and consulting engineers were responsible for defective bridge); Karle v. Cincinnati St. Ry. Co., 69 Ohio App. 327, 24 Ohio Op. 102, 37 Ohio L. Abs. 164, 43 N.E.2d 762 (1st Dist. Hamilton County 1942) (plaintiff allowed to sue both city and private street care company for defective tracks); Lattea v. City of Akron, 9 Ohio App. 3d 118, 458 N.E.2d 868 (10th Dist. Franklin County 1982) (state and contractor responsible for plaintiff's injuries). See also Hricko, Roadside Hazards—Responsibility and Liability, FEDERATION OF INSURANCE COUNSEL QUARTERLY (Fall 1974); Personal injury liability of civil engineer for negligence in highway or bridge construction or maintenance, 43 A.L.R. 4th 911; Actions Against Road Contractors for Inadequate Warning of Construction Hazards, 72 Am. Jur. Trials 215.

[7]Obviously, depending upon the facts, there are an infinite number of potential defendants in these cases. For example, another driver or vehicle who struck a plaintiff, a driver of the vehicle with a passenger plaintiff, an owner of a vehicle who negligently entrusted it to a tortfeasor, or a manufacturer of a defective or uncrashworthy vehicle. While it is important to examine the potential liability of these defendants, such evaluation is outside the scope of this article.

[1]For a discussion on accident reconstruction, see Reconstruction of Traffic Accidents, 9 Am. Jur. Proof of Facts 3d 115.

[2]See Use of Engineers as Experts, 6 Am. Jur. Trials 555; Selecting and Preparing Expert Witnesses, 2 Am. Jur. Trials 585; Locating Scientific and Technical Experts, 2 Am. Jur. Trials 293.

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from testifying in certain matters. This expert should be intimately familiar with all the industry standards regarding the roadside hazard in question and can provide testimony about such issues as whether the defendant had a duty to correct or warn of the defect, whether the defect is unreasonably dangerous or whether a barrier would have successfully prevented the collision.

Traffic engineer. This expert is typically a person with an engineering background and experience as a traffic engineer with a governmental department or agency. This expert is useful to address issues pertaining to flow of traffic, analysis of collision data, or calculation of average daily traffic counts.

Academic engineer. This witness is a professor at a college or university with knowledge in the field of roadside design, construction, and maintenance. While this witness often will not have the practical experience as the highway engineer, this type of witness will gain credibility because he appears neutral. Additionally, this engineer's experience in the classroom can make him a good teacher for the jury. This type of witness is typically used in conjunction with the highway engineer, not in lieu of him.

Biomechanical engineer. This expert will have an engineering background and will often also have experience reconstructing collisions. This type of witness is useful for determining things such as how a vehicle would react upon impact with a barrier or how a vehicle occupant would have been thrown upon impact. Unless the witness has some background in medicine or trauma epidemiology, his opinions about probability of injury or causation of injury may be susceptible to attack.

Epidemiologist. This expert will typically have a Ph.D. in trauma epidemiology and preferably a background in accident reconstruction also. This type of witness is useful in discussing whether the plaintiff would have been just as injured had he hit a barrier or rolled the vehicle or whether, due to the nature of the collision, the plaintiff's injuries are the result of the incident in question.

Human factors expert. This expert will typically have a background in psychology and have done much work in the field of human information processing and visual perception. This type of expert is useful in presenting information about issues such as whether or when a driver should have perceived a hazard, how fast a driver should have reacted upon encountering a hazard, or whether a certain obstruction would have affected a driver's vision.[3] While highway engineers will often have a base of knowledge in this area and can testify about sight distances around curves, over hills, and at intersections, a human factors expert is preferable for more complex issues in this field.

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[3]See Using the Human Factors Expert in Civil Litigation, 40 Am. Jur. Trials 629.

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In addition to the above-mentioned experts, counsel may need different or more specialized experts depending upon the facts of the particular case. Also, in most cases, the parties will need to present treating or reviewing doctors, economists, or counselors. Because of the highly technical nature and the tremendous cost associated with prosecuting roadside hazard cases, it is very important for plaintiff's counsel to carefully select experts early in the evaluation process.

As with any case, it is critical for a party to select experts who not only have the experience and knowledge necessary to give legally admissible opinions, but who also have the charisma and integrity to deliver such opinions persuasively. While an effective presentation is important in all cases, it is especially important in technical cases like roadside hazard cases. The parties' experts may be the most critical witnesses, through which the entire theory of the case will advance.

Selecting experts who are well respected and still practicing in their field, therefore, is very important. "Hired gun" experts who are no longer involved in their field of expertise other than to testify for money will be more susceptible to attack than those who are also still contributing to their field. Just as counsel would research his opponent's experts' background, previous testimony, and biases, counsel should also research his own experts. Counsel should perform verdict searches to locate previous cases involving the expert, obtain former deposition transcripts from attorney organizations and colleagues, as well as consult with others who have used or opposed the expert before retaining or disclosing him.

Additionally, while counsel should use experts to teach them about the science behind roadside design, construction, and maintenance, counsel still must conduct his own research. Many experts do not have the time or access to the facilities to conduct specialized research. Counsel should locate a good technical library and use the expert to guide the research.

Last, while an expert may have a firm grasp on the science and may have testified numerous times, counsel should still carefully prepare his expert to testify. It is imperative that the expert and counsel be on the same page regarding the theory of liability. This is especially true regarding causation issues. Experts often accustomed to dealing in terms of mathematical certainty may have trouble opining on proximate causation. Counsel should explain to their experts that the collision need not only have one proximate cause, and that the hazard in question need only be one of the many causes that contributed

to the plaintiff's collision. Therefore, when the expert is discussing whether the hazard or defendant's negligence caused the collision, he will feel more comfortable using stronger language. An expert's testimony that the hazard "could have" caused the collision, while legally sufficient,[4] may not be tactically sufficient or persuasive. Testimony that the hazard is "the most likely cause of injury, based on a statistical probability"[5] or that the condition "did cause"[6] the collision is, obviously, more persuasive.

B. DEFENDANT'S DUTY

[As with other types of cases, there can be many sources for a defendant's duty and many interpretations of the appropriate standard of care. In the roadside hazard context, engineering standards are the most important and widely used source for defining the standard of care. Other sources also can be useful for determining whether a defendant breached its duty to the plaintiff. For example, a defendant's own policies or regulations, historical practices, and state law can provide the standard of care owed by a defendant.]

§ 5 Origin of roadside engineering standards

The American Association of State Highway Transportation Officials (AASHTO) is the most authoritative source of roadside design and maintenance standards in the United States. Since its inception in 1914, AASHTO has published numerous manuals regarding roadway and roadside design, construction, and maintenance. Early on, AASHTO's'primary concerns were signage, signaling, and pavement markings.[1]

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[4]Clifford-Jacobs Forging Co. v. Industrial Commission, 19 Ill. 2d 236, 166 N.E.2d 582 (1960) (not unduly speculative for expert to testify conditions "could have" or "might have" cause death); Greim v. Sharpe Motor Lines, 101 Ill. App. 2d 142, 242 N.E.2d 282 (3d Dist. 1968).

[5]Beloit Foundry v. Industrial Commission, 62 Ill. 2d 535, 343 N.E.2d 504 (1976).

[6]Johnson v. Ward, 6 Ill. App. 3d 1015, 286 N.E.2d 637 (1st Dist. 1972).

[1]When initially formed, the Association was called the American Association of State Highway Officials (AASHO). In 1973, AASHO added the word "Transportation" to its name and became AASHTO. For purposes of this article, the Association will only be called AASHTO. In 1927, AASHTO released its Manual of Uniform Standards For Traffic Control on Rural Highways. Just a few years later in 1930, AASHTO published the Manual of Uniform Standards For Traffic Control on Urban Streets and then, in 1935,

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While AASHTO and other organizations[2] had been publishing material regarding the geometric design of roadways since the thirties, AASHTO did not discuss roadside hazards extensively until the sixties.[3] With AASHTO's 1967 publication of Highway Design and Operational Practices Related to Highway Safety, commonly referred to as the "Yellow Book," AASHTO reflected the change in philosophy taking place

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released its Manual on Traffic Control Devices, which was the first edition of the present Manual of Uniform Traffic Control Devices (MUTCD) governing traffic signals, signs and pavement markings. The MUTCD has gone through a number of editions with the most recent being the Millennium Edition in 2000. The MUTCD is one of the, if not the, most important sources available for the standard of care regarding signage, signaling, and pavement markings and has been incorporated by reference into the Code of Federal Regulations. 23 C.F.R. pt. 655, Subpart F. For example, all states are required to bring their own standards for signing, signaling, and pavement markings into compliance with any changes made in the federal manual within two years. 23 C.F.R. § 655.603 (2002). Additionally, all states are required to systematically upgrade all substandard traffic control devices so that they comply with the MUTCD requirements. 23 C.F.R. § 1204.4 (2002).

[2]In 1950, the Highway Research Board published the Highway Capacity Manual. The Highway Research Board was established in 1920 as part of the National Academy of Sciences and has grown into the primary medium for the distribution of research findings on highway technology. The Institute of Traffic Engineers, later renamed as The Institute of Transportation Engineers, released the first edition of its Handbook of the Institute of Traffic Engineers in 1941. The second edition that was published in 1950 was renamed the Traffic Engineering Handbook. Also in 1950, AASHTO published the Policies on Geometric Highway Design, which was expanded just four years later into AASHTO's "Blue Book". AASHTO, A Policy on Geometric Design of Rural Highways (1954) (commonly referred to as the "Blue Book").

[3]In 1965, AASHTO, in its A Policy on Geometric Design of Rural Highways, commonly referred to as the "Blue Book," at page 126 wrote: "Objects on the side of the road frequently contribute to accidents. In most cases when a vehicle leaves the roadway the driver does not have the ability to fully control the vehicle. Any object in or near the path of the vehicle becomes a contributing factor in the severity of the accident. . . . Objects that cannot be removed entirely should be located in such a manner as to reduce the hazard as much as practical. . . . Objects in or near the roadway that constitute serious hazards to traffic, including installations designed for the control of traffic, should be adequately marked."

Also, at pages 127-129: "One of the most common forms of accidents is the single car leaving the traveled way. Such accident can become serious if the car is stopped suddenly. The accident can be a minor one without damage if, instead of stopping, the car has the opportunity either by the efforts of the driver or by devices of one kind or another, to slow down gradually. To this end there should be as few objects above the surface of the ground as absolutely necessary. Any objects above the ground should be as far from the traveled way as possible."

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within the industry. According to AASHTO, roadways and roadsides must not only be safe for the motorist who makes no error, but also for the motorist who, for whatever reason, leaves the roadway.[4] This standard was adopted as federal policy through Instructional Memorandum (IM) 21-11-67, which made it applicable to all federal roads with design speeds of at least 50 m.p.h.[5] and encouraged states to apply the standard to roads constructed with federal aid.[6]

The shift in policy was not only to prevent roadside hazards in newly constructed projects or roads being renovated, but also to remove roadside hazards from existing roads. In 1968, the Federal Highway Administration (FWHA) published the Handbook of Highway Safety Design and Operating Practices that concentrated on correcting existing problems on existing roadways. Just a few years later, the Highway Users Federation for Safety and Mobility released the first edition of its Maintenance and Highway Safety Handbook that focused on maintenance practices on existing roadways. That same year, the Highway Research Board published an article also encouraging the removal of roadside hazards within the clear zone.[7]

Continuing the focus on roadside maintenance and improvement of the existing roadways, Congress passed the Federal-Aid Highway Act of 1976. This legislation authorized funds for improvements to roads and roadsides not on the federal aid highway systems and provided for, among other things, the removal of roadside hazards. Congress created the Federal-Aid RRR (resurfacing, restoration and rehabilitation) Program in order to facilitate the repair and upgrading of substandard roadways and roadsides. This legislation marked a major shift

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[4]Another less known publication that came out in 1966 shortly before AASHTO's Yellow Book was the Automobile Manufacturers Association, Inc.'s The State-of-the-Art in Traffic Safety, which also discussed roadside obstacle removal or protection.

[5]AASHTO, Highway Design and Operational Practices Related to Highway Safety 6 (1974).

[6]AASHTO, Highway Design and Operational Practices Related to Highway Safety 6 (1974).

[7]"For warranting purpose, a 30-ft. zone adjacent to the traveled way is recommended as the minimum for being clear of roadside obstacles; a zone of more than 30-ft. width is desirable. If the 30-ft. zone cannot be cleared of roadside obstacles, due to practical or economic reasons, guardrail may be warranted for the roadside areas." HIGHWAY RESEARCH BOARD, Location, Selection and Maintenance of Highway Guardrails and Median Barriers, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 54 at n. 4 (1968).

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in federal policy because, up to this point, federal aid funds had always been just for new construction. Congress, the industry, and the country were becoming increasingly concerned with the deteriorating condition of the country's roadways and roadsides.[8]

In 1977, AASHTO published its Guide for Selecting, Locating, and Designing Traffic Barriers that discussed the latest information on the use of safety devices such as guardrails, crash cushions, and median barriers. Again, AASHTO stressed the removal of all roadside hazards within the clear zone when possible and suggested protecting any roadside hazards that could not be removed.[9] Consistent with the recent industry trend, AASHTO stressed that the guidelines should be applied to existing roadways as well as new construction.[10] This was also the first time AASHTO published an actual formula for calculating a road's clear zone by using the road's ADT, design speed, and shoulder slope.[11]

In 1996, AASHTO published its Roadside Design Guide that addressed exclusively the design, construction and mainte-

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[8]For example, "[t]he Federation of Insurance Counsel, through the publication of its pamphlet Booby Trapped Highways and its communications with government officials at both the state and national level and insurance company executives, has been a leader in the attempts to have these hazards (boobytraps) removed. [S]everal insurance companies and organizations have started programs aimed at correction of these hazards. Among the most recent was Nationwide Mutual Insurance Company's announcement that in the future it would refuse to pay claims from government agencies for damage to hazardous roadside fixtures unless they were replaced by safe devices." Hricko, Roadside Hazards - Responsibility and Liability, FEDERATION OF INSURANCE COUNSEL QUARTERLY 1 (Fall 1974). In 1976, the Insurance Institute for Highway Safety wrote, "Top priority should be given to roadside hazard modification on and near curves. . . ." Insurance Institute for Highway Safety, Priorities for Roadside Hazard Modification, TRAFFIC ENGINEERING, Vol. 46, No. 8, (Aug. 1976).

[9]"[A] major emphasis has been placed on the elimination of hazardous roadside conditions and on the improvement of traffic barriers to shield those hazards that cannot be eliminated." AASHTO, The Guide for Selecting, Locating and Designing Traffic Barriers 3 (1977).

[10]AASHTO, A Guide for Selecting, Locating, and Designing Traffic Barriers 3-4 (1977) ("Existing highways should be upgraded when feasible to eliminate hazardous conditions. . . . This guide will have applications to both new and existing roadways. . . . A survey of existing facilities should be made and substandard conditions should be identified with reference to the guide.").

[11]AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 16 (1977); see Appendix A.

nance of roadsides.[12] In this guide, AASHTO reiterates the now firmly-rooted concept of the forgiving roadside, stresses hazard removal and protection, and encourages proper maintenance of facilities.

The above-listed publications are certainly not all of the research and literature released on this topic, however, they are some of the more important resources published in this area.[13] Counsel with a roadside hazard case would be well advised to be familiar with their contents.

§ 6 Use of engineering standards as standard of care

The wording of the provision upon which the plaintiff relies greatly influences the plaintiff's success in proving his case.[1] A plaintiff will have more success when arguing that the defendant violated a standard containing mandatory language and less likely to fall to a defendant's claim of immunity.[2] If, however, the standard contains precatory language, a plaintiff

[12]AASHTO, Roadside Design Guide (1996).

[13]For some other publications on the topic of roadside design, construction and maintenance, see Federal Highway Administration, Handbook of Highway Safety Design and Operating Practices (2d ed. 1973); Federal Highway Administration, Handbook of Highway Safety Design and Operating Practices (3d ed. 1978); AASHTO, Guide for Highway Landscape and Environmental Design (1970); AASHTO, Transportation Landscape and Environmental Design (1991); Highway Users Federation for Safety and Mobility, Maintenance and Highway Safety Handbook (2d ed. 1977); Federal Highway Administration Offices of Research and Development, Identification of Hazardous Locations, Report FHWA-RD-77-83 (1977); AASHTO, Maintenance Manual (1987); AASHTO, A Policy on the Accommodation of Utilities Within Freeway Right of Way (1989); AASHTO, Guide for Protective Screening of Overpass Structures (1990); AASHTO, Informational Guide on Fencing Controlled Access Highways (1990); AASHTO, Guide for Accommodating Utilities Within Highway Right of Way (1994); AASHTO, Highway Safety Design and Operations Guide (1997); AASHTO, Strategic Highway Safety Plan (1997); AASHTO, Guide for Snow and Ice Control (1999).

[1]Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R. 3d 148.

[2]Some courts have found that because some engineering standards have been adopted by federal law or a state's highway commission, they have the effect of law and their violation constitutes negligence. Holmquist v. State, 425 N.W.2d 230 (Minn. 1988); Lonon v. Talbert, 103 N.C. App. 686, 407 S.E.2d 276 (1991); Millman v. County of Butler, 244 Neb. 125, 504 N.W.2d 820 (1993); Martin v. Missouri Highway and Transp. Dept., 981 S.W.2d 577 (Mo. Ct. App. W.D. 1998). Courts have found a violation of a standard can constitute negligence in spite of the standard's permissive language. Keller v. City of Spokane, 1996 WL 460256 (Wash. Ct. App. Div. 3 1996). In fact, some

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may have difficulty arguing that the standard should be construed as more than mere guidance, and the defendant may be able to successfully argue it is immune because the duty was discretionary.[3]

Plaintiffs may also have difficulty in determining which engineering standard is applicable. Defendants typically will argue that the applicable standard is the one in effect when the road was originally constructed or renovated years earlier. A defendant can often argue that, if subsequent events (such as upgrading or nonnegligent conduct) cannot absolve it of liability for previous negligent conduct, subsequent events (i.e., evolving technology) cannot impose liability on an originally non-negligent act. This argument is not only logically appealing, but also consistent with the established legal principles of negligence.

Moreover, many of the standards themselves state that they apply only prospectively to new construction or major renovations.[4] This, of course, is necessary because most defendants do not have the resources to upgrade all of their facilities each time a new, more stringent standard is released. The technology in the area of highway design and maintenance,

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courts have held that the engineering publications only reflect minimum standards, therefore, even if a defendant complies with a particular standard, it can still be found to be negligent. Schmidt v. Washington Contractors Group, Inc., 1998 MT 194, 290 Mont. 276, 964 P.2d 34 (1998).

[3]Some courts have held that if a particular provision employs the term "may" then there is room for engineering discretion, thereby making the defendant immune from suit. See § 16. Additionally, most of the publications discussed above include a general provision permitting variance from the standards if the engineer deems appropriate. For example, see AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 4 (1977) ("It can therefore not be overemphasized that application of these guidelines must be made in conjunction with sound evaluation of the facts and engineering judgment to effect the proper solution."). Courts have used such disclaimer to find defendants immune from suit in spite of the non-discretionary wording used in a particular provision. State Dept. of Highways and Public Transp. v. King, 808 S.W.2d 465 (Tex. 1991), reh'g of writ of error overruled, (June 5, 1991). Other courts have held that some portions of the same publication can be mandatory and other provisions discretionary. Esterbrook v. State, 124 Idaho 680, 863 P.2d 349 (1993).

[4]For example, see AASHTO, Roadside Design Guide 1-4 (1996) ("The guidelines presented in this publication are most applicable to new construction or major reconstruction projects. . . . For resurfacing, rehabilitation or restoration (RRR) projects, the primary emphasis is generally on the roadway itself to maintain the structural integrity of the pavement. It will generally be necessary to selectively incorporate roadside guidelines on RRR projects only at locations where the greatest safety benefit can be realized.").

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as indicated by the numerous standards and publications detailed above, has developed rapidly and extensively over time making it impossible for a defendant to ensure all of its facilities are in compliance with the current standards at all times.

There are a number of things a plaintiff can do to counter the defendant's arguments. One is simply to prove that the defendant violated the standard in effect at the time the road was created or renovated. Because of the relatively short time many of the design and maintenance standards have been around, and because most of the country's roadways were constructed years ago, this is often difficult for a plaintiff to prove.

Another option is for the plaintiff to show that, while the defendant may have complied with the AASHTO standard in effect at the time the road was created, it did not satisfy other widely accepted standards among designers and transportation engineers. It is important to note that the AASHTO publications reflect, rather than create, professional consensus at a particular point in time. Before most of AASHTO's publications are released, AASHTO subjects the policy to nationwide testing and study. The results of the tests and studies are usually published in other authoritative works long before they are released as AASHTO standards. Therefore, while a defendant may satisfy an AASHTO standard, it may still fall below the standards most generally accepted at the time by designers and transportation engineers.

Another alternative is for a plaintiff to prove that, while a defendant may not have violated a published industry standard, the defendant ignored widely known safety techniques for financial reasons. Because transportation departments have historically been under-funded, a plaintiff can establish a defendant's pattern of failing to employ higher safety devices that were known, affordable, and available when the facility was created.

Because many of our existing transportation facilities were built decades ago when the industry standards were few, nonexistent, unsettled or pathetically low, it may be difficult for a plaintiff to demonstrate a clear violation of an industry standard existing at the time the facility was created. In those instances, plaintiffs may be forced to argue that a defendant has a duty to inspect its facilities for unreasonably dangerous conditions, must maintain its facilities in a reasonably safe condition, and/or must upgrade its facilities to modern stan-

dards once they become dangerously outmoded. One way to show a breach in such cases is to present evidence such as prior crashes, complaints to the defendant from travelers, and internal memoranda making recommendations for improvement.

Engineering standards can be useful in making maintenance/ upgrading type arguments just as they are when making negligent design and construction arguments. Over the last 50 years, there has been an ever-increasing emphasis on safety, not only when engineers are designing and building new roads, but also when governmental and private entities are repairing, maintaining, and upgrading roadways and roadsides.[5] A defendant's duty to travelers on its roads does not end with the proper design and construction of such road. A defendant's duty continues by requiring adequate maintenance and repair,[6] as well as systematic inspection[7] and periodic upgrading,[8] in compliance with the standards in existence at the time the

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[5]AASHTO, Highway Design and Operational Practices Related to Highway Safety 1-2 (1967): "An intensive crash program to remove roadside hazards on existing streets and highways and to engineer the roadsides of new facilities with safety as a major criterion should have a paramount place in the highway program of each state. Only this way will the motorist who inadvertently leaves the traveled way have adequate protection against death or injury. Design standards more liberal than the minimums prescribed will often increase safety. Constant field checks of the operating conditions with existing and new designs are recommended for evaluation of their effectiveness and cost efficiency."

AASHTO, Highway Design and Operational Practices Related to Highway Safety 37 (1974): "A coordinated effort to provide a forgiving roadside must be made in design, construction, maintenance, and traffic control stages of project development if there is to be success in reducing the sizable number of fatal and other serious accidents which occur each year off the roadway."

AASHTO, The Guide for Selecting, Locating and Designing Traffic Barriers 3-4 (1977): "Existing highways should be upgraded when feasible to eliminate hazardous conditions. . . . This guide will have applications to both new and existing roadways. . . . A survey of existing facilities should be made and substandard conditions should be identified with reference to the guide."

[6]AASHTO, The Guide for Selecting, Locating and Designing Traffic Barriers 3-4 (1977).

[7]AASHTO, The Guide for Selecting, Locating and Designing Traffic Barriers 3-4 (1977). See also Ingram v. Howard-Needles-Tammen and Bergendoff, 234 Kan. 289, 672 P.2d 1083, 43 A.L.R.4th 893 (1983) (establishing defendant's duty to use reasonable care in conducting inspections).

[8]AASHTO, The Guide for Selecting, Locating and Designing Traffic Barriers 3-4 (1977) ("Existing highways should be upgraded when feasible to elim-

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road should have been maintained, repaired, or upgraded, not the standards applicable at the time of original construction.

§ 7 Use of other sources as standard of care

Even if the above-described engineering standards cannot be used as conclusive evidence of the standard of care, they can still be valuable evidence of industry custom. Industry custom, while possibly not conclusive on the issue of what constitutes reasonableness or ordinary care, is still highly relevant as to what measures are feasible and what others within the field deem to be minimum standards.[1]

Another potential source for the relevant standard of care in a given situation is the defendant's own rules and regulations. Most state legislatures have passed legislation directing the states' highway departments to promulgate rules and regulations concerning roadway and roadside design, construction, and maintenance.[2] Federal agencies have passed similar rules and regulations that can be used to illustrate the standard of care applicable to a given situation.[3]

A defendant's previous actions with regard to designing,

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inate hazardous conditions. . . . This guide will have applications to both new and existing roadways. . . . A survey of existing facilities should be made and substandard conditions should be identified with reference to the guide.").

[1]Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860 (1965); Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (5th Dist. 1968), judgment rev'd, 45 Ill. 2d 418, 261 N.E.2d 305, 46 A.L.R.3d 226 (1970) (overruling recognized by, Austin v. Lincoln Equipment Associates, Inc., 888 F.2d 934 (1st Cir. 1989)) (reversing on other grounds) (holding that plaintiff was not required to plead or prove his exercise of due care and that action, brought less than two years after injury but more than two years after machine left control of manufacturer, was brought within period of limitations, but that evidence on affirmative defense of assumption of risk was sufficient for submission to jury); Murphy v. Messerschmidt, 41 Ill. App. 3d 659, 355 N.E.2d 78 (5th Dist. 1976), judgment aff'd and remanded, 68 Ill. 2d 79, 11 Ill. Dec. 553, 368 N.E.2d 1299 (1977).

[2]See Violation of state or municipal law or regulation as affecting liability under Federal Tort Claims Act, 78 A.L.R. 2d 888.

[3]For example, if a collision occurs on an Army installation, counsel may find Army, Department of Defense (DoD), and local installation regulations helpful. Army Regulations require installation personnel to follow the MUTCD, AASHTO, federal and state rules regarding signage, pavement markings, road design, construction, and maintenance. See Army Regulations 420-5, 420-72, 190-5; Technical Manual 5-624 (TM). For specific federal regulations, see 23 C.F.R. pt. 625 (design standards for new construction on

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constructing or maintaining roads or roadsides can also serve as an indication of the relevant standard of care. For example, if a defendant installs a paved shoulder, it has a duty to ensure the shoulder is not only designed and constructed safely, but also that it is maintained in a reasonably safe condition, even if no standard required defendant to install the shoulder in the first place. This notion is related to the rule that a defendant must not, by its actions, increase the danger to travelers on its roadways.[4]

§ 8 Feasibility

The feasibility of corrective measures should be considered when determining the "reasonableness" of a defendant's conduct and whether it violated the standard of care. A common claim by the defense is that because of the vast number of transportation assets under its control, it could not afford to apply the remedy the plaintiff seeks throughout its infrastructure.

One of the best ways for a plaintiff to counter such an argument is to focus the fact finder on the singular defect at issue in the case. Usually, the cost of curing a particular defect is relatively small especially when compared to the governmental defendant's annual budget for transportation improvements and maintenance.[1] For example, if the roadside hazard at issue was a fixed object within the clear zone, the plaintiff should concentrate on collision data, inspection results, internal department recommendations, and industry standards regarding this specific hazard. The stronger the evidence that the specific fixed object at issue is a dangerous condition and that the defendant had reason to know about it, the more difficult it is for the defendant to successfully argue it did not correct the situation because it could not afford to do so on a system-wide basis.

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roads within federal aid highway system must conform to certain AASHTO and other standards incorporated by reference by 23 C.F.R. § 625.4); 23 C.F.R. pt. 626 (standards for pavement design); 23 C.F.R. pt. 630, Subpart J (traffic safety and control in highway safety improvement program); 23 C.F.R. pt. 635 (construction and maintenance programs); 23 C.F.R. pt. 645 (accommodation of utilities); 23 C.F.R. pt. 650 (erosion and sediment control); 23 C.F.R. pt. 924 (requiring each state to have a written highway safety improvement program).

[4]City of Chicago v. Seben, 165 Ill. 371, 46 N.E. 244 (1897).

[1]Wright, et. al., Low-Cost Countermeasures for Ameliorating Run-Off-the-Road Crashes, Transportation Research Board 926, 1-7 (1984).

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AASHTO provides relatively sophisticated methods for determining whether a specific correction or enhancement is economically feasible.[2] A plaintiff will want his expert to use AASHTO's methods to calculate the economic feasibility of correcting the specific condition in question, while the defendant will want to calculate the costs of making such correction or enhancement system-wide.

Plaintiffs can also argue that a defendant's inability to employ a certain remedial measure system-wide does not justify a defendant's refusal to correct certain dangerous conditions on a more limited scale. For example, if a tree is located within the clear zone in a vulnerable position, a defendant must reasonably evaluate the feasibility of removing that tree, as opposed to every tree located within the clear zone on all of its roads system-wide. Industry literature documents that defendants often refuse to cure one defect out of fear that it would have to then correct other defects at that location or system-wide. By arguing that such inaction is not reasonable and not a proper way to evaluate feasibility, plaintiffs can prove a violation of the standard of care.

§ 9 Unreasonably dangerous condition

A defendant is only responsible for correcting or warning of conditions if such conditions are unreasonably dangerous. Although some conditions on or next to a roadway are dangerous, they may not be unreasonably dangerous. Whether a particular condition is unreasonably dangerous will usually depend upon the specific circumstances existing in that case. For example, a fixed object inside the clear zone on a road is almost certainly a dangerous condition. Whether the fixed object is an unreasonably dangerous condition, however, will depend upon a number of factors such as what, if anything is around it, whether it is located on a curve, how close it is to the traveled way, and what is the road's design speed.

Often, the issue of whether a condition is unreasonably dangerous will be addressed through expert testimony. Many of AASHTO's guidelines expressly state that their application depends upon professional judgment.[1] Because experts can, and do, disagree as to whether a condition is unreasonably

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[2]See AASHTO, Roadside Design Guide, App. A (1996); AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 156-184 (1977).

[1]For example, see AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers 4 (1977) ("It can therefore not be overemphasized that ap-

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dangerous, the defense has an opportunity to argue that it had the discretion not to correct or warn of the condition and, therefore, is immune from liability pursuant to the discretionary function doctrine.[2]

One way a plaintiff can show that a condition is unreasonably dangerous is through prior and subsequent collision data.[3] A defendant cannot ignore this information, but has a duty to evaluate such data in determining problem areas and allocat-

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plication of these guidelines must be made in conjunction with sound evaluation of the facts and engineering judgment to effect the proper solution."). See also AASHTO, Highway Design and Operational Practices Related to Highway Safety 12-13 (1974): "[W]hile a 30-foot recovery area might be considered a desirable minimum on a high-seed arterial, this recommendation may be expressed as "the maximum clearance practicable" on a low-volume secondary road or a low-speed local road. The required recovery area for a vehicle running off the road at a given speed and departure angle is the same for a high-speed arterial as a low-volume secondary road, but the probability of the occurrence and the economic factors are not the same for the two highways. Thus the principles apply, but judgment is required in their application."

[2]See § 16.

[3]Prior collisions can be admissible to prove the existence of a dangerous condition, causation, or notice. See Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 A.L.R. 4th 472; Springer v. Jefferson County, 595 So. 2d 1381 (Ala. 1992) (notice and causation); Coyle v. Beryl's Motor Hotel, 85 Ohio L. Abs. 492, 171 N.E.2d 355 (Ct. App. 8th Dist. Cuyahoga County 1961) (notice); Sweeney v. State, 768 S.W.2d 253 (Tenn. 1989) (notice and dangerous condition); McAllen Kentucky Fried Chicken No. 1, Inc. v. Leal, 627 S.W.2d 480 (Tex. App. Corpus Christi 1981), writ refused n.r.e., (May 5, 1982) (foreseeability which is element of duty and causation); Winkelmann v. Battle Island Ranch, 650 S.W.2d 543 (Tex. App. Houston 14th Dist. 1983) (dangerous condition and, on rebuttal, causation). Subsequent collisions are admissible as to the existence of a dangerous condition and causation, but not as to defendant's knowledge. Eisenbraun v. City of New York, 2 Misc. 2d 981, 159 N.Y.S.2d 73 (Sup 1955); Veit v. State, 192 Misc. 205, 78 N.Y.S.2d 336 (Ct. Cl. 1948); Hoyt v. New York, L.E. & W.R. Co., 118 N.Y. 399, 23 N.E. 565 (1890); Henwood v. Chaney, 156 F.2d 392 (C.C.A. 8th Cir. 1946); Laitenberger v. State, 57 N.Y. S.2d 418 (Ct. Cl. 1945); Galieta v. Young Men's Christian Ass'n of City of Schenectady, 32 A.D.2d 711, 300 N.Y.S.2d 170 (3d Dep't 1969). Subsequent collisions are also admissible to attack the credibility of defense witnesses should they claim there was no prior collisions. Newcomb v. Frink, 278 A.D. 998, 105 N.Y.S.2d 704 (3d Dep't 1951), amendment denied, 278 A.D. 1028, 106 N.Y.S.2d 904 (3d Dep't 1951); Singer v. Walker, 39 A.D.2d 90, 331 N.Y. S.2d 823 (1st Dep't 1972), order aff'd, 32 N.Y.2d 786, 345 N.Y.S.2d 542, 298 N.E.2d 681 (1973); St. Louis Southwestern Ry. Co. v. Jackson, 242 Ark. 858, 416 S.W.2d 273 (1967).

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ing maintenance and upgrading funds.[4] If the specific location or the hazard in question has been the site of other collisions, it would be difficult for the defendant to argue that the condition is not unreasonably dangerous. Evidence regarding prior and subsequent collisions are more probative and likely admissible if the collisions are factually similar to the plaintiff's collision.

Typically, the plaintiff will want to try to introduce a broader range of previous collision data than the defense will want to allow. Where the plaintiff may want to introduce all collisions on an entire length of road or in a large area around the crash site for years before and/or after the incident in question, the defendant will want to shrink the parameters of such evidence as much as possible. The scope of the evidence eventually admitted will largely depend upon the purpose of the collision data. For example, when using prior or subsequent collision data to show that a particular hazard is unreasonably dangerous or that a hazard caused the collision, the facts of the other collisions must be very similar to the instant collision.[5] If, however, prior collision data is being used simply to show that the defendant had knowledge of the generally dangerous nature of the road, less similarity is required.[6] When the prior collision data is being used to just prove notice, the specific

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[4]Insurance Institute for Highway Safety, Priorities for Roadside Hazard Modification, Traffic Engineering, Vol. 46, No. 8 (Aug. 1976); Jorgensen and Assoc., Evaluation of Criteria for Safety Improvements on the Highway, p. V, report prepared for U.S. Dept. of Commerce, Bureau of Public Roads, Office of Highway Safety (1966); Messer, et. al., Texas A & M Research Foundation, Highway Geometric Design Consistency Related to Driver Expectancy, Vol. II, p. 28, published by Federal Highway Administration (1981); Rowan & Woods, Texas Transportation Institute, Safety Design and Operational Practices for Streets and Highways, 2.1-3, published by United States Department of Transportation (1980); United States Department of Transportation, Federal Highway Administration, Handbook of Highway Safety Design and Operating Practices 1 (1978); Pignataro, Traffic Engineering Theory and Practice 275-82 (1973); AASHTO, Roadside Design Guide (1996).

[5]Eisenbraun v. City of New York, 2 Misc. 2d 981, 159 N.Y.S.2d 73 (Sup 1955); Veit v. State, 192 Misc. 205, 78 N.Y.S.2d 336 (Ct. Cl. 1948); Hoyt v. New York, L.E. & W.R. Co., 118 N.Y. 399, 23 N.E. 565 (1890); Henwood v. Chaney, 156 F.2d 392 (C.C.A. 8th Cir. 1946); Laitenberger v. State, 57 N.Y. S.2d 418 (Ct. Cl. 1945); Galieta v. Young Men's Christian Ass'n of City of Schenectady, 32 A.D.2d 711, 300 N.Y.S.2d 170 (3d Dep't 1969); Winkelmann v. Battle Island Ranch, 650 S.W.2d 543 (Tex. App. Houston 14th Dist. 1983). For a discussion on the use of collision data to prove causation, see § 11.

[6]See § 11.

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details of the collisions themselves are not relevant.[7] The only relevant factors are the number, frequency, and location of the collisions. If subsequent collision data is being used solely to attack the credibility of a defense claim of no collisions, similarity of the other collisions is not required.[8] The only question in that instant is whether the data is inconsistent with the defense claim.

The defense, on the other hand, may also introduce lack of prior collisions with that specific hazard or that area of the road in an effort to show the condition is not unreasonably dangerous. In order for such evidence to be admissible, however, the defendant must show that the defects that allegedly caused the plaintiff's collision were also present, and to the same extent, during all the earlier time periods when there were no collisions.[9] Admitting such evidence is obviously a dangerous strategy for a defendant because the defendant would essentially be proving it had constructive knowledge of the defect before the plaintiff's collision.

Both the plaintiff and the defendant should prepare to address the apparent inconsistency of their arguments regarding collision data and feasibility data.[10] When presenting collision data, the plaintiff will argue for a broad scope of admissibility, not tied to the specific location or hazard in question. When discussing economic data on the feasibility of certain remedies, however, the plaintiff will argue that evidence of the cost of implementing such remedy system-wide is irrelevant and that the only relevant cost is that which would be required to remedy the specific hazard in question at that location. Obviously, the opposite holds true for the defendant.

At first blush these arguments may seem inconsistent, therefore, counsel should be prepared to explain that the arguments address different issues and are not related. When

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[7]Henderson by Hudspeth v. Illinois Cent. Gulf R. Co., 114 Ill. App. 3d 754, 70 Ill. Dec. 595, 449 N.E.2d 942 (4th Dist. 1983).

[8]Newcomb v. Frink, 278 A.D. 998, 105 N.Y.S.2d 704 (3d Dep't 1951), amendment denied, 278 A.D. 1028, 106 N.Y.S.2d 904 (3d Dep't 1951); Singer v. Walker, 39 A.D.2d 90, 331 N.Y.S.2d 823 (1st Dep't 1972), order aff'd, 32 N.Y.2d 786, 345 N.Y.S.2d 542, 298 N.E.2d 681 (1973); St. Louis Southwestern Ry. Co. v. Jackson, 242 Ark. 858, 416 S.W.2d 273 (1967).

[9]See Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R. 5th 371; Rathbun v. Humphrey Co., 94 Ohio App. 429, 52 Ohio Op. 145, 65 Ohio L. Abs. 455, 113 N.E.2d 877 (8th Dist. Cuyahoga County 1953).

[10]For a discussion of the feasibility issue, see § 8.

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admitting collision data, the issues are whether the condition is unreasonably dangerous, whether the defendant had notice, and/or whether the condition caused the plaintiff's injuries. When admitting economic data regarding feasibility, the issue is solely whether the defendant, acting as a reasonable entity, had a duty to remedy the situation, regardless of whether it had notice of it.

§ 10 Foreseeability/notice

A defendant is only responsible for correcting or warning of unreasonably dangerous conditions about which it knew or should have known.[1] A plaintiff is not required to show foreseeability, however, if the defendant itself created the unreasonably dangerous condition. In that case, the defendant is deemed to have actual knowledge or notice of the condition.[2]

Knowledge or notice can be actual or constructive. A plaintiff can prove a defendant had actual knowledge by showing that the defendant actually knew of the dangerous condition prior to the incident in question. A plaintiff can prove constructive knowledge with evidence that the defendant should have known of the unreasonably dangerous condition had it been

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[1]Some jurisdictions require foreseeability to be determined as a threshold issue under duty and also as a component of causation. See § 11; Mellon Mortg. Co. v. Holder, 5 S.W.3d 654 (Tex. 1999), reh'g overruled, (Dec. 2, 1999) (reversing only as to a question of fact of whether the owner of a parking garage could have foreseen that motorist would be sexually assaulted in parking garage by police officer). Other jurisdictions simply treat the question of foreseeability as a causation issue.

[2]State v. McBride, 601 S.W.2d 552 (Tex. Civ. App. Waco 1980), writ refused n.r.e., (Dec. 10, 1980); Harris County v. Eaton, 573 S.W.2d 177, 179-80 (Tex. 1978); Porter v. City of Decatur, 16 Ill. App. 3d 1031, 307 N.E.2d 440 (4th Dist. 1974); Pritchard v. Sully-Miller Contracting Co., 178 Cal. App. 2d 246, 2 Cal. Rptr. 830 (2d Dist. 1960); Wood v. Santa Cruz County, 133 Cal. App. 2d 713, 284 P.2d 923 (1st Dist. 1955); Reel v. City of South Gate, 171 Cal. App. 2d 49, 340 P.2d 276 (2d Dist. 1959); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982). If a governmental defendant creates a dangerous condition, such fact can even affect the plaintiff's duty to comply with statutory notice provisions prior to filing suit. Haviland by Haviland v. Smith, 91 A.D.2d 764, 458 N.Y.S.2d 11 (3d Dep't 1982); Barrett v. City of Buffalo, 96 A.D.2d 709, 465 N.Y.S.2d 376 (4th Dep't 1983); Rouse v. State, 97 A.D.2d 962, 468 N.Y.S.2d 756 (4th Dep't 1983); Muszynski v. City of Buffalo, 29 N.Y.2d 810, 327 N.Y.S.2d 368, 277 N.E.2d 414 (1971); Sorrento v. Duff, 261 A.D.2d 919, 690 N.Y.S.2d 368 (4th Dep't 1999).

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acting with ordinary care.[3] Plaintiffs will want to show that the defect was conspicuous enough and existed long enough that the defendant, by the exercise of ordinary care, should have discovered and corrected or warned of the condition.[4] If a defendant should have known of an unreasonably dangerous condition, it can be held liable even if it did not actually know of the dangerous condition[5] and was not the entity that created the defect.[6]

Another important issue regarding notice is the determination of what the defendant knew or should have known. Some courts have found that the defendant must only have knowledge of the general nature of the hazard in question[7] and other courts have required that the defendant have actual or constructive knowledge of the specific hazard that caused plaintiff's injuries.[8]

There are a number of ways a plaintiff can prove knowledge or notice. Crash data of previous incidents involving the specific hazard in question or the same area can be valuable proof of notice.[9] A court is more likely to allow crash data into evidence if the previous incidents are closely related tot he facts in the

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[3]Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983); City of Waco v. Witt, 126 S.W.2d 1002 (Tex. Civ. App. Waco 1939).

[4]There is no firm rule as to how much time a defect must exist or how conspicuous a defect must be to prove constructive knowledge. Conspicuity and duration of the defect are interrelated in that a defect that is less conspicuous will likely need to exist longer in order to establish constructive knowledge.

[5]C.J.S., Negligence § 5(1).

[6]Coudry v. City of Titusville, 438 So. 2d 197 (Fla. Dist. Ct. App. 5th Dist. 1983).

[7]Wal-Mart Stores, Inc. v. Rangel, 966 S.W.2d 199, 202 (Tex. App. Fort Worth 1998), reh'g overruled, (May 7, 1998); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983); Duke v. Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997).

[8]Spelbring v. Pinal County, 135 Ariz. 493, 662 P.2d 458 (Ct. App. Div. 2 1983); Matts v. City of Phoenix, 137 Ariz. 116, 669 P.2d 94 (Ct. App. Div. 1 1983), case dismissed, 137 Ariz. 111, 669 P.2d 89 (1983) (citing In re Schade's Estate, 87 Ariz. 341, 351 P.2d 173 (1960); Casey v. Beaudry Motor Co., 83 Ariz. 6, 315 P.2d 662 (1957)); Norris v. City of New Orleans, 433 So. 2d 392 (La. Ct. App. 4th Cir. 1983).

[9]Prior collisions can be admissible to prove the existence of a dangerous condition, causation, or notice. Henderson by Hudspeth v. Illinois Cent. Gulf R. Co., 114 Ill. App. 3d 754, 70 Ill. Dec. 595, 449 N.E.2d 942 (4th Dist. 1983); City of Chicago v. Jarvis, 226 Ill. 614, 80 N.E. 1079 (1907); Shepard v. City of Aurora, 5 Ill. App. 2d 12, 124 N.E.2d 584 (2d Dist. 1955); Newton v. Meissner, 76 Ill. App. 3d 479, 31 Ill. Dec. 864, 394 N.E.2d 1241 (1st Dist.

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current case.[10]

A plaintiff can also demonstrate the defendant's knowledge through evidence that other travelers complained to the defendant about the specific hazard in question.[11] Plaintiffs should be aware, however, that the defendant can show lack of notice by the absence of such complaints.[12] Just as with previous crash data, the court is more likely to allow the previous complaints into evidence if the facts behind those complaints are closely related to the collision in question.

Even if there are no formal traveler complaints about the relevant part of the road or the particular hazard, evidence of the reputation of the area of the road can be introduced to show notice. A jury is more likely to find that the defendant, who is responsible for inspecting for, locating, removing and/or protecting roadside hazards, should have known of the hazard in question if that hazard is notorious and conspicuous. This evidence is based, in part, on the presumption that the defendant, as a member of the community, will know what others in

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1979); Hecht Co. v. Jacobsen, 180 F.2d 13 (D.C. Cir. 1950); P. B. Mutrie Motor Transp., Inc. v. Inter-Chemical Corp., 378 F.2d 447 (1st Cir. 1967).

[10]When using prior or subsequent collision data to show that a particular hazard is unreasonably dangerous or that a hazard caused the collision, the facts of the other collisions must be very similar to the instant collision. Galieta v. Young Men's Christian Ass'n of City of Schenectady, 32 A.D.2d 711, 300 N.Y.S.2d 170 (3d Dep't 1969); Eisenbraun v. City of New York, 2 Misc. 2d 981, 159 N.Y.S.2d 73 (Sup 1955); Veit v. State, 192 Misc. 205, 78 N.Y.S.2d 336 (Ct. Cl. 1948); Hoyt v. New York, L.E. & W.R. Co., 118 N.Y. 399, 23 N.E. 565 (1890); Henwood v. Chaney, 156 F.2d 392 (C.C.A. 8th Cir. 1946); Laitenberger v. State, 57 N.Y.S.2d 418 (Ct. Cl. 1945). If, however, prior collision data is being used simply to show that the defendant had knowledge of the generally dangerous nature of the road, less similarity is required. When the prior collision data is being used to just prove notice, the details of the collisions themselves are not relevant. Henderson by Hudspeth v. Illinois Cent. Gulf R. Co., 114 Ill. App. 3d 754, 70 Ill. Dec. 595, 449 N.E.2d 942 (4th Dist. 1983). The only relevant factor is the number, frequency, and location of the collisions. Henderson by Hudspeth v. Illinois Cent. Gulf R. Co., 114 Ill. App. 3d 754, 70 Ill. Dec. 595, 449 N.E.2d 942 (4th Dist. 1983). If subsequent collision data is being used solely to attack the credibility of a defense claim of no collisions, similarity of the other collisions is not required. The only question in that instant is whether the data is inconsistent with the defense claim.

[11]State v. Thompson, 179 Ind. App. 227, 385 N.E.2d 198 (1st Dist. 1979).

[12]Clarke v. Michals, 4 Cal. App. 3d 364, 84 Cal. Rptr. 507 (1st Dist. 1970); Gonzales v. Trinity Industries, Inc., 7 S.W.3d 303 (Tex. App. Houston 1st Dist. 1999).

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the community know.[13] It is important to note, however, that if the plaintiff is from the same community, evidence of the hazard's notoriety can also be used to show awareness of the hazard. Similarly, evidence that the hazard is open, obvious, and/or conspicuous, can also be used against plaintiff to show that he should have known of the hazard and avoided it.[14]

Work orders or internal memoranda recommending improvements or repairs also can show the defendant was aware of the dangerous condition.[15] Sometimes courts refuse the discovery of these documents under the state's open records act's exclusions or pursuant to 23 U.S.C.A. § 409. Section 409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[16]

Section 409 has been used fairly successfully by defendants in preventing the discovery and use of this type of information.[17]

Even if internal memoranda or recommendations are deemed

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[13]Chase v. City of Lowell, 151 Mass. 422, 24 N.E. 212 (1890); Chicago & A.R. Co. v. Shannon, 43 Ill. 338, 1867 WL 5039 (1867).

[14]In jurisdictions where the duty owed to plaintiffs is based upon whether the plaintiff is an invitee, licensee or trespasser, this is important. If the plaintiff is a licensee and he knew of the defect, then he may be precluded from recovery. Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R. 4th 294. Additionally, the plaintiff's knowledge can also be an important factor when determining contributory negligence. See § 23.

[15]Tuttle v. Department of State Highways, 397 Mich. 44, 243 N.W.2d 244 (1976); Travelers Ins. Co. v. Eviston, 110 Ind. App. 143, 37 N.E.2d 310 (1941); Copeland v. Louisiana Dept. of Transp. and Development, 428 So. 2d 1251 (La. Ct. App. 3d Cir. 1983), writ denied, 435 So. 2d 448 (La. 1983); Grof v. State, 126 Mich. App. 427, 337 N.W.2d 345 (1983).

[16]23 U.S.C.A. § 409 (2002).

[17]Most courts have prevented plaintiffs from accessing the requested information. See Harrison v. Burlington Northern R. Co., 965 F.2d 155 (7th Cir. 1992); Rodenbeck v. Norfolk & Western Ry. Co., 982 F. Supp. 620 (N.D. Ind. 1997); Shots v. CSX Transp., Inc., 887 F. Supp. 204 (S.D. Ind. 1995); Taylor v. St. Louis Southwestern Ry. Co., 746 F. Supp. 50 (D. Kan. 1990).

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not discoverable or admissible, the defendant's prior actions are. For example, if a defendant had previously installed a barrier, pavement markings, or warning signs, or instituted a set clear zone at a certain location, the plaintiff can show that the defendant was aware of the dangers present and thought its actions were warranted, whether or not the industry standards required such precautions. If the defendant subsequently fails to maintain those safety devices or follow its own policies and procedures regarding the clear zone, the plaintiff can point to the defendant's previous actions to show actual knowledge or notice.

Additionally, the above-mentioned engineering standards can also be used to argue that a defendant should have known of the unreasonably dangerous condition. For example, as discussed supra, throughout its guidelines over the last 40 years, AASHTO has emphasized the removal or protection of roadside hazards on new and existing roadways. In its publications, AASHTO repeatedly acknowledges that fixed objects, particularly trees, are dangerous when located within the clear zone.[18] AASHTO also prescribes regular roadside maintenance, including vegetation removal.[19] With all of these warnings from the industry experts, it becomes more difficult for a defendant to argue that it had no reason to think a tree growing in the clear zone was a dangerous condition.

Last, the industry standards can be useful in determining whether a defendant has attempted to avoid liability by deliberately remaining ignorant of dangerous conditions on its roadways. Many AASHTO standards establish inspection

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Some courts have allowed plaintiffs access to some or all of the requested information depending on the particular circumstances presented in the case. Shanklin v. Norfolk Southern Ry. Co., 173 F.3d 386, 1999 FED App. 134P (6th Cir. 1999), cert. granted, 528 U.S. 949, 120 S. Ct. 370, 145 L. Ed. 2d 289 (1999) and judgment rev'd, 529 U.S. 344, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000) (reversed on other grounds); Powers v. CSX Transp., Inc., 164 F. Supp. 2d 1299 (S.D. Ala. 2001); Department of Transportation v. Superior Court, 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2 (1st Dist. 1996); Kitts v. Norfolk and Western Ry. Co., 152 F.R.D. 78 (S.D. W. Va. 1993).

[18]AASHTO, Highway Design and Operational Practices Related to Highway Safety 7 (1974); AASHTO, Roadside Design Guide 1-3 - 1-5 (1996).

[19]For example, see AASHTO, Strategic Highway Safety Plan 46 (1997); AASHTO, Highway Safety Design and Operations Guide 113 (1997); AASHTO, Roadside Design Guide 4-14 (1996).

protocols that defendants should follow.[20] Federal regulations also impose certain inspection requirements on states in certain circumstances.[21] Therefore, if a defendant failed or refused to implement and follow an inspection program to identify roadside hazards, it may find itself charged with constructive knowledge of a dangerous condition in spite of its demonstrated ignorance.

C. CAUSATION ISSUES

To prove negligence, a plaintiff must prove that the defendant's negligent act or omission caused his damages. A plaintiff does not have to show that a particular roadside hazard was the sole cause of a collision, just that it was a proximate cause of the collision.[22] Proximate cause has been defined as "that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred."[23] Most jurisdictions follow a "substantial factor" test which states, generally, that any event that is a substantial factor in causing a result is a proximate cause of that result.[24]

Proximate cause is difficult to apply in roadside hazard cases because most collisions result from several separate, but interrelated, factors.[25] Fortunately for plaintiffs, there can be more than one proximate cause of a collision and the plaintiff may

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[20]See, for example, AASHTO, Highway Safety Design and Operations Guide 109-18 (1997); AASHTO, Highway Design and Operational Practices Related to Highway Safety 78-81 (1974).

[21]See 23 U.S.C.A. § 152 (2002).

[22]Restatement (Third) of Torts: Liability For Physical Harm § 27 (Tentative Draft No. 2 2002).

[23]Coyne v. Pittsburgh Rys. Co., 393 Pa. 326, 141 A.2d 830 (1958).

[24]To be a proximate cause, however, the roadside defect must be a "substantial factor" in causing the collision and cannot be simply a minor or collateral force in the causal chain. The proximate cause determination essentially boils down to a policy decision as to what extent a defendant should be held liable for its acts or omissions. "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some idea of justice or policy." Prosser and Keeton on the Law of Torts (5th ed.) § 264.

[25]AASHTO, A Policy on Geometric Design of Rural Highways 122 (1965) ("It is seldom that an accident results from a single cause. There are usually several influences affecting the situation at any given time. These influences

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recover on any proximate cause.[26] Therefore, if a roadside hazard begins a causal chain leading to a foreseeable collision, it will be a proximate cause of the collision, even if there were other substantial forces working to cause the collision.

§ 11 Foreseeability/notice

For an event to be the proximate cause of a result, the result must have been reasonably foreseeable.[1] In other words, a defendant is liable only if its negligent act or omission caused a result that he knew or should have known could happen.[2] If, however, a defendant did not foresee and should not have foreseen that someone could be injured by an unreasonably dangerous condition, then its failure to correct or warn of the condition was not a proximate cause of the plaintiff's damages.

The law does not require the exact manner in which the plaintiff was injured nor the exact injury suffered by the plaintiff to be foreseeable.[3] Plaintiff merely must show that it was reasonably foreseeable that defendant's act or omission

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can be separated into three groups: the human element, the vehicle element, and the highway element.").

[26]There may be more than one proximate cause of a collision. Recovery is not limited to one proximate cause. Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977) (overruling recognized by, Degregory v. Smith, 1997 WL 33344014 (Mich. Ct. App. 1997)) (overruling on other grounds); Dean v. Com., Dept. of Transp., 718 A.2d 374 (Pa. Commw. Ct. 1998), appeal granted, (Mar. 5, 1999) and order vacated, 561 Pa. 503, 751 A.2d 1130 (2000) (order vacated on other grounds). All persons whose negligence contributed to a plaintiff's injuries are liable and the negligence of one of them does not excuse the negligence of another. Missouri Pac. R. Co. v. American Statesman, 552 S.W.2d 99 (Tex. 1977); see also Millette v. Radosta, 84 Ill. App. 3d 5, 39 Ill. Dec. 232, 404 N.E.2d 823 (1st Dist. 1980); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964); Buehler v. Whalen, 70 Ill. 2d 51, 15 Ill. Dec. 852, 374 N.E.2d 460, 96 A.L.R.3d 252 (1977).

[1]The issue of foreseeability as a part of proximate cause has been discussed by courts since the famous case of Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). There are two components of proximate cause: (1) cause in fact and (2) foreseeability. Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472 (Tex. 1995); Travis v. City of Mesquite, 830 S.W.2d 94 (Tex. 1992).

[2]As stated above under the discussion about duty, a defendant who knows or should have known of a dangerous condition has a duty to correct or warn of the condition. Knowledge can be actual or constructive. The same applies to foreseeability with respect to causation.

[3]Duke v. Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983); State v. Thompson, 179 Ind. App. 227, 385 N.E.2d 198 (1st Dist. 1979); Thorsen v.

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could result in injuries to another. What results are "reasonably foreseeable" is ordinarily a question of fact for the jury, and only in rare instances will the court direct a finding.[4]

As discussed above, there are a number of ways a plaintiff can prove notice or knowledge. The methods detailed above to show knowledge apply with regard to establishing causation just as they did when proving the defendant had a duty. Prior or subsequent accident data, internal memoranda, repair/maintenance requests, industry standards, and complaints from other travelers all tend to show that the defendant was aware its acts or omissions could result in harm to another.

§ 12 Intervening causes

As discussed above, in the roadside hazard context, there are often numerous forces that work together to result in a collision. Even if the defendant's act or omission is only one of a number of forces leading up to the collision, it can still be a proximate cause. If, however, there exists a new and independent force that breaks the causal chain between a defendant's negligent act and the collision, then this new force becomes a

City of Chicago, 74 Ill. App. 3d 98, 30 Ill. Dec. 61, 392 N.E.2d 716 (1st Dist. 1979); Neering v. Illinois Cent. R. Co., 383 Ill. 366, 50 N.E.2d 497 (1943); Illinois Cent. R. Co. v. Oswald, 338 Ill. 270, 170 N.E. 247 (1930); Hartnett v. Boston Store of Chicago, 265 Ill. 331, 106 N.E. 837 (1914).

[4] Chicago, I. & L. R. Co. v. Carter, 149 Ind. App. 649, 274 N.E.2d 537 (Div. 2 1971); Wroblewski v. Grand Trunk Western Ry. Co., 150 Ind. App. 327, 276 N.E.2d 567 (Div. 1 1971). The proximate cause determination essentially boils down to a policy decision. "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some idea of justice or policy." Prosser and Keeton on the Law of Torts (5th ed.) § 264. Many cases have interpreted what is "reasonably foreseeable" broadly. See e.g., Bak v. Burlington Northern, Inc., 93 Ill. App. 3d 269, 48 Ill. Dec. 746, 417 N.E.2d 148 (2d Dist. 1981) (holding that plaintiff's death from overdose of painkillers was reasonably foreseeable result from slip and fall at train station); Millman v. U.S. Mortgage & Title Guaranty Co. of New Jersey, 121 N.J.L. 28, 1 A.2d 265 (N.J. Sup. Ct. 1938) (finding that plaintiff's injuries from becoming dizzy and falling through window was reasonably foreseeable result from her original concussion due to defendant's negligence); City of Port Arthur v. Wallace, 141 Tex. 201, 171 S.W.2d 480 (1943) (ruling that eye removal from splinter in the eye was reasonably foreseeable result from original eye injury due to defendant's negligence 15 months earlier); Eli Witt Cigar & Tobacco Co. v. Matatics, 55 So. 2d 549 (Fla. 1951) (holding that plaintiff's injuries from becoming dizzy and falling from ladder was reasonably foreseeable result from original concussion due to defendant's negligence three weeks earlier).

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proximate cause and the defendant's act, albeit negligent, cannot be the cause of the plaintiff's damages.[1] The two most common intervening causes in roadside hazard cases are the third party driver and acts of God, as discussed below.

Whether an intervening force is significant enough to constitute a superseding cause depends upon whether the intervening force was so extraordinary that it was not reasonably foreseeable.[2] If the intervening force was reasonably foreseeable, then the original negligent act that started the causal chain leading to the collision was the proximate cause of plaintiff's damages.[3] If, on the other hand, the intervening force was sufficiently extraordinary and not reasonably foreseeable, then the defendant's negligence was not a proximate cause of the plaintiff's injuries.[4] The issue of intervening cause is also a question of fact ordinarily left to the jury when they make their proximate cause determination.[5]

§ 13 —Third party driver

When the facts support such a claim, defendants often argue that a third party driver was an intervening cause that

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[1]Pullman's Palace Car Co. v. Laack, 143 Ill. 242, 32 N.E. 285 (1892).

[2]Bleman v. Gold, 431 Pa. 348, 246 A.2d 376 (1968).

[3]Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 388 N.E.2d 541 (1st Dist. 1979) ("Where harmful consequences are brought about by intervening independent forces the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces and the original wrongful act is treated as a proximate cause."); Wintersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 197 N.E. 578 (1935); Sycamore Preserve Works v. Chicago & N.W. Ry. Co., 366 Ill. 11, 7 N.E.2d 740, 111 A.L.R. 1133 (1937); Greene v. City of Chicago, 73 Ill. 2d 100, 22 Ill. Dec. 507, 382 N.E.2d 1205 (1978).

[4]Pugh v. Akron-Chicago Transp. Co., 64 Ohio App. 479, 18 Ohio Op. 211, 32 Ohio L. Abs. 159, 28 N.E.2d 1015 (3d Dist. Allen County 1940), judgment aff'd, 137 Ohio St. 164, 17 Ohio Op. 511, 28 N.E.2d 501 (1940); Clauss v. Fields, 29 Ohio App. 2d 93, 58 Ohio Op. 2d 120, 278 N.E.2d 677 (2d Dist. Montgomery County 1971); City of Houston v. Hagman, 347 S.W.2d 355 (Tex. Civ. App. Houston 1961), writ refused n.r.e., (July 26, 1961); Clark v. Waggoner, 452 S.W.2d 437 (Tex. 1970); Jezek v. City of Midland, 605 S.W.2d 544 (Tex. 1980).

[5]Stevens v. Jefferson, 436 So. 2d 33 (Fla. 1983); Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 192 Cal. Rptr. 857, 665 P.2d 947 (1983) (reversing summary judgment for defendant because question of whether it was foreseeable for drunk driver to leave road and strike plaintiff in phone booth next to road is a fact question that should have been given to the jury).

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prevented its negligence from causing plaintiff's collision.[1] One way a plaintiff may counter such an argument is simply by showing that the third party driver was not negligent. Essentially, the plaintiff would argue that the third party driver's actions were ordinarily prudent under the circumstances existing at the time. Most jurisdictions allow the jury to consider the fact that a driver was surprised or confronted by an unforeseen hazard on or near the road when determining whether the driver reacted reasonably.[2] If the third party driver reacted reasonably under the circumstances, plaintiff would argue that the driver cannot, therefore, be said to be an intervening cause shielding defendant from liability.

Another way a plaintiff can counter a defendant's intervening cause claim is to use the relevant jurisdiction's rules of procedure to preclude the defendant from arguing the fault of persons who are not parties.[3] Many jurisdictions do not allow a party to argue the contributory negligence of a person or entity that is not a current or settled party. While this may preclude a defendant from receiving a jury question on the contributory negligence of a nonparty, the defendant may still argue that the nonparty was the sole cause of the plaintiff's collision.

Last, a plaintiff may counter a defendant's attempt to blame a third party by arguing that the third party's conduct, while negligent, merely constitutes another proximate cause of the plaintiff's injuries, rather than a superseding cause. In other words, the third party driver's actions and judgment were negligent, but that was a foreseeable result and, therefore, not an intervening cause.[4] Poor driving is a fact of life and roadsides must be designed, constructed and maintained in a

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[1] Minckler v. State, 89 A.D.2d 676, 454 N.Y.S.2d 27 (3d Dep't 1982), order rev'd, 59 N.Y.2d 302, 464 N.Y.S.2d 707, 451 N.E.2d 454 (1983) (negligence of driver of plaintiff's car was superseding cause relieving state from any negligence in maintaining the road shoulder).

[2] See § 22.

[3] For example, many states will not submit a question to the jury asking about whether a person is at fault unless that person is or was a party or settling person. See V.T.C.A., Civil Practice & Remedies Code § 33.003 (2002) (Texas). In such an instance, the defendant could still argue the nonparty other driver was the sole cause, but not that they were contributorily negligent.

[4] See Lemings By and Through Lemings v. Collinsville School Dist. No. Ten, 118 Ill. App. 3d 363, 73 Ill. Dec. 890, 454 N.E.2d 1139 (5th Dist. 1983) (school district's negligent placement of dumpster blocking view of pedestrians and drivers not excused when negligent driver hit child); Springer v. Jefferson County, 595 So. 2d 1381 (Ala. 1992) (second driver's

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negligence was not an intervening cause when he hit plaintiff who was rendering aid to another vehicle that had left the road due to negligently designed curve); Wilborg v. Denzell, 359 Mass. 279, 268 N.E.2d 855 (1971); Curreri v. City and County of San Francisco, 262 Cal. App. 2d 603, 69 Cal. Rptr. 20 (1st Dist. 1968) (dangerous road condition allowed to exist by city was concurrent cause with second driver's negligence of plaintiff's injuries); Grainy v. Campbell, 493 Pa. 88, 425 A.2d 379 (1981) (contractor and gas company's liability for negligently closing sidewalk and forcing pedestrians to walk in street was not relieved by negligent driver who struck boy scout pedestrian); Thorsen v. City of Chicago, 74 Ill. App. 3d 98, 30 Ill. Dec. 61, 392 N.E.2d 716 (1st Dist. 1979) (drunk driver who hit pedestrian was concurring cause of injuries with city's negligent repair of sidewalks forcing pedestrians to walk in street); Everett v. Louisiana Dept. of Transp. and Development, 424 So. 2d 336 (La. Ct. App. 1st Cir. 1982) (even though driver of plaintiff's vehicle was drunk, it did not relieve state for liability for eight inch edge drop on shoulder); Clark v. Aetna Cas. & Sur. Co., 427 So. 2d 907 (La. Ct. App. 3d Cir. 1983), writ denied, 433 So. 2d 1048 (La. 1983) and writ denied, 433 So. 2d 1048 (La. 1983) (third party driver's actions of causing other drivers to lose control and strike vehicle in which plaintiff was passenger did not relieve state of responsibility for defective shoulder); Murphy v. Louisiana Dept. of Transp. and Development, 424 So. 2d 344 (La. Ct. App. 1st Cir. 1982) (truck driver's actions forcing plaintiff's vehicle off road did not exonerate state for failure to properly design road and maintain shoulder); Penzell v. State, 120 Misc. 2d 600, 466 N.Y.S.2d 562 (Ct. Cl. 1983) (negligent motorcyclist concurrent cause of plaintiff passenger's injuries when lost control from improper edge drop maintained by defendant); Pritchard v. City of Portland, 310 Or. 235, 796 P.2d 1184 (1990) (landowner's negligence in failing to trim vegetation obstructing sign did not relieve city of its responsibility to do the same); Royce v. Smith, 68 Ohio St. 2d 106, 22 Ohio Op. 3d 332, 429 N.E.2d 134 (1981) (owners of land adjacent to road were not relieved of their responsibility of trimming vegetation because city also had responsibility); Arnesano v. State ex rel. Dept. of Transp., 113 Nev. 815, 942 P.2d 139 (1997) (driver who rear-ended plaintiff was not intervening cause relieving defendant of responsibility for failing to install barrier); Chapman v. Checker Taxi Co., Inc., 43 Ill. App. 3d 699, 2 Ill. Dec. 134, 357 N.E.2d 111 (1st Dist. 1976) (taxi cab driver's actions were not intervening cause relieving defendant of responsibility for negligently designing and maintaining median barrier); Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (3d Dep't 1976) (truck that negligently struck plaintiff was concurrent cause with defendant's negligence in installing and maintaining guardrail); Walsh v. City of Pittsburgh, 379 Pa. 229, 108 A.2d 769 (1954) (second driver's negligence in striking and removing barricade around construction site did not exonerate contractor who negligently used improper materials to guard site); Thompson v. City of Philadelphia, 320 Pa. Super. 124, 466 A.2d 1349 (1983), order rev'd, 507 Pa. 592, 493 A.2d 669 (1985) (truck driver's negligence was not intervening cause when he drove through negligently constructed and maintained guardrail and struck plaintiff); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (2d Dist. 1950) (negligent driver's actions of hitting defectively maintained pole causing it to strike plaintiff was not an intervening cause).

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manner that recognizes that fact. Whether the third party's negligent driving was caused by himself or from a road condition the defendant created, the driver's negligence was foreseeable and, therefore, not an intervening cause absolving the defendant from liability for its own negligence.[5] Using this argument, the defendant's and the third party driver's negligence would be concurrent causes. Therefore, both would be actionable, and neither would serve as an excuse for the conduct of the other. The defendant and the third party may be liable, jointly and severally.[6]

§ 14 —Act of God

Another type of intervening cause argument defendants occasionally employ is that an act of God, not another's negligence, caused the plaintiff's injuries.[1] Essentially, the argument is that the weather conditions were so severe or unusual that they were not foreseeable and, therefore, an intervening cause. The defendant has a duty to design, construct, and maintain the roadside in a reasonably safe condition, considering such factors as the road's geographic location and the typical weather conditions experienced in that area.[2] The defendant is not, however, the guarantor of all travelers' safety, nor

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[5]It almost goes without saying that the more outrageous the third party's driving actions, the less likely the plaintiff will be able to successfully assert this argument. Drivers who have merely fallen asleep, driven slightly too fast, or made poor decisions in response to confusing signing or signaling are more likely not to serve as an intervening cause. Drivers who are reckless or grossly negligent are more likely to be found an intervening cause.

[6]Since the mid-1980's, many jurisdictions have abolished or severely limited joint and several liability. Whitehead v. Food Max of Mississippi, Inc., 163 F.3d 265, 281, 42 Fed. R. Serv. 3d 1001 (5th Cir. 1998).

[1]See TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE 3.5 (2002) ("If an occurrence is caused solely by an 'act of God,' it is not caused by the negligence of any person. An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care."). This defense argument can also be the basis of a claim of immunity. See § 17. This argument is closely related to, and included within, the "unavoidable accident" or inevitable injury argument presented below. See § 15.

[2]Mills v. City of Springfield, 75 Ohio L. Abs. 150, 142 N.E.2d 859 (Ct. App. 2d Dist. Clark County 1956) (municipality's duty to remove snow and ice was not intervening cause relieving adjoining landowner's negligence in failing to do the same). See also Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway, 61 A.L.R. 2d 425; Liability, in motor vehicle-related cases,

can it create an environment free from the dangers inherent with severe weather.

In countering this and the other intervening cause arguments, a plaintiff can rely on the same evidence he produced regarding defendant's notice. As discussed above, evidence such as historical crash data, previous complaints by travelers and upgrade recommendations is useful to show (1) a condition was unreasonably dangerous,[3] (2) the defendant knew or should have known of its dangerous character and existence,[4] and (3) the defendant should have known the condition could lead to plaintiff's collision and injuries.[5] This same information is also valuable when a plaintiff is arguing that a third party driver's actions or a weather-created hazard were foreseeable events and, therefore, not intervening causes exonerating the defendant of its negligence.[6]

§ 15 Inevitable injury

Defendants in roadside hazard cases often argue that plaintiff's injuries were inevitable. A defendant is only liable for the plaintiff's injuries if the defendant's act or omission caused the injuries. If, however, the plaintiff would have been injured just as severely had the defendant acted reasonably, then the defendant's negligence would not be the cause of the plaintiff's injuries and the defendant would not be liable.[1]

Frequently in roadside hazard cases, the facts involve a ve-

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of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 A.L.R. 3d 11; Pearson, Public Authority's Failure to Remove or Guard Against Ice or Snow on Surface of Highway or Street, 20 Am. Jur. Proof of Facts 2d 299.

[3]See § 9.

[4]See § 10.

[5]See § 11.

[6]Heffler v. State, 96 A.D.2d 926, 466 N.Y.S.2d 370 (2d Dep't 1983) (because of prior collision data showing dangerousness of particular intersection, drunk driver's actions of striking plaintiff's vehicle were foreseeable and not intervening cause).

[1]This Defense argument is very similar to the "unavoidable accident" claim. Many states have a jury instruction for this defense. For example, TEX. PATTERN JURY CHARGES, GENERAL NEGLIGENCE 3.4 (2000) ("An occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it."). Such instruction should only be given when there is some evidence that an incident occurred without fault on the part of either party. Texas & P. Ry. Co. v. Edwards, 36 S.W.2d 477 (Tex. Comm'n App. 1931). Many state's jury questions regarding negligence are phrased "Did the negligence, if any, of those named below

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hicle leaving the roadway for some reason and striking a dangerous condition that the defendant created or negligently allowed to exist. The plaintiff may claim that the roadside hazard should have been removed or protected by a barrier of some sort. The defendant may respond that even had it properly removed or protected the hazard, the plaintiff would have suffered injuries just as, if not more, severe than he did in reality because the vehicle would have rolled or fatally struck a barrier.

This defense argument is sometimes difficult a plaintiff to counter partly because he is put in the unenviable position of proving a negative—i.e., he would not have been injured as badly had his vehicle rolled down a slope or struck a barrier instead of striking the roadside hazard. This is usually an area where expert testimony is required.[2] Accident reconstructionists can attempt to predict what a vehicle would have done had it not encountered a roadside hazard. While a collision site can be surveyed and the data plugged into a computer simulation program, much of this technology is ill-fitted for predicting how a vehicle will react once it is on the unlevel and unimproved area off of the roadway. Determining whether a vehicle will catch a rim on a small rock or tree root and overturn is often little more than mere speculation.

How a vehicle will react and the forces it will absorb upon impact with a barrier is slightly more predictable. While the impact may be more predictable, it may also be more severe. Recognizing that a barrier can often be a more dangerous alternative than the roadside hazard itself, AASHTO's policy

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proximately cause the occurrence in question?" TEX. PATTERN JURY CHARGES, GENERAL NEGLIGENCE 4.1 (2000) (emphasis provided). Because the question allows the jury to find no negligence on anyone, the rationale supporting the presentation of an additional "unavoidable accident" instruction is questionable. Lemos v. Montez, 680 S.W.2d 798 (Tex. 1984). "[M]any courts have emphasized that the instruction should be reserved for exceptional situations where called for by the unique facts of a particular case, and some have more generally disapproved the unavoidable accident instruction for use in negligence cases altogether." Prosser and Keeton on the Law of Torts (5th ed.) §§ 29, 163, 164. For a discussion on the defense of "unavoidable accident" and propriety of such instructions, See Instructions on unavoidable accident, or the like, in motor vehicle cases, 65 A.L.R. 2d 12; Instructions on "unavoidable accident," "mere accident," or the like, in motor vehicle cases—modern cases, 21 A.L.R. 5th 82.

[2]See § 4.

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encourages removal of the hazard before installing a barrier.[3] Even though the technology regarding barriers has consistently improved over time, AASHTO's policy has stayed the same.[4] Highway design experts can attempt to predict whether a particular barrier effectively would restrain the vehicle, and accident reconstructionists can calculate the amount of force and/or the extent and type of damage the vehicle probably would have sustained.

Another reason an inevitable injury argument is difficult to counter is that vehicle occupants are affected by trauma differently. While a particular impact or type of collision may cause injury to 60 percent of the population, it may or may not cause injury to the plaintiff. Just as discussed above, much of the proof in this area boils down to expert speculation. Biomechanical engineers can attempt to predict the path of the occupants in- or outside of the vehicle and how much force the occupants would have suffered in an impact with the inside of the vehicle or an object outside the vehicle. An epidemiologist can translate that amount of force into predictions regarding the likelihood of injury to those occupants.

§ 16 Insufficient opportunity to correct or warn

As discussed above, how long a dangerous condition existed is an important factor in determining whether the defendant can be charged with constructive knowledge of that condition.[1] This is also an important factor with respect to causation. For example, even if the defendant knew or should have known of the defect, the defendant is only liable if there would have been enough time for the defendant to have corrected or warned of the defect.[2] If there is not enough time between when the defendant knew or should have known of a defect and the plaintiff's collision for the defendant to correct or warn of the condition, then the defendant's failure did not cause the plaintiff's collision.

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[3]AASHTO, Guide for Selecting, Locating, and Designing Traffic Barriers (1977).

[4]AASHTO, Roadside Design Guide (1996).

[1]See § 10.

[2]Kelson v. Buckley, 429 So. 2d 477 (La. Ct. App. 5th Cir. 1983), writ denied, 434 So. 2d 1090 (La. 1983) and writ denied, 434 So. 2d 1097 (La. 1983).

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D. SOVEREIGN IMMUNITY

§ 17 Sovereign immunity in roadside hazard cases

Because defendants in roadside hazard cases are often governmental entities, plaintiffs are frequently confronted with a sovereign immunity defense. Under common law, governmental entities enjoyed full sovereign immunity.[1] While most states and the federal government have passed legislation limiting sovereign immunity,[2] it is still a potent weapon sheltering defendants from liability. The defense usually bears the burden of establishing immunity.[3]

Many states have also established separate boards or courts to hear tort claims against governmental entities.[4] Also, in many jurisdictions, Plaintiffs bringing tort actions against a governmental entity do not have a right to a jury.[5] Last, many jurisdictions have placed limitations on damages available in

[1]State v. Snyder, 66 Tex. 687, 18 S.W. 106 (1886); Hosner v. De Young, 1 Tex. 764, 1847 WL 3503 (1847); Buchanan v. State, 89 S.W.2d 239 (Tex. Civ. App. Amarillo 1935), writ refused.

[2]It is not the intent of this article to set forth a comprehensive explanation of each state's respective laws regarding sovereign immunity. Counsel with roadside hazard cases will want to familiarize themselves with their jurisdiction's laws regarding sovereign immunity. For expanded discussion on this topic, see Restatement (Second) of Torts, § 895B (2002); Van Alstyne, Governmental Tort Liability: A Decade of Change, U. ILL. L.F. 919 (1966). The Federal Tort Claims Act (FTCA) governs sovereign immunity as applied to the United States and is set forth at 28 U.S.C.A. §§ 1346(b), 2671 et seq. For further details regarding the United States' liability under the FTCA in premises defect situations, see Liability of United States Under Federal Tort Claims Act (28 U.S.C.A. ss 1346(b), 2671-2680) for Death or Injury Sustained by Visitor to Area Administered by National Park Service, 177 A.L.R. Fed. 261; Federal Tort Claims Act: Liability of United States for injury or death resulting from condition of premises, 91 A.L.R. Fed. 16.

[3]Johnson v. State, 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968); King v. City of Seattle, 84 Wash. 2d 239, 525 P.2d 228 (1974); Stevenson v. State Dept. of Transp., 290 Or. 3, 619 P.2d 247 (1980); Jackson v. City of Kansas City, 235 Kan. 278, 680 P.2d 877 (1984).

[4]For example, see Ala. Code. §§ 41-9-61 to 73 (2002) (Alabama); N.C. Gen. Stat. § 143-291 (2002) (North Carolina); S.D. Codified Laws §§ 21-32-1 to 14 (2002) (South Dakota); Tenn. Code Ann. §§ 9-8-101 et seq., 9-8-307 (2002) (Tennessee); W. Va. Code §§ 14-2-1 to 9 (2002); Wis. Stat. § 16.007 (2002) (Wisconsin).

[5]Galloway v. U.S., 319 U.S. 372, 388-89 n.17, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); 28 U.S.C.A. § 2402 (2002) ("Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried

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tort claims against the state.[6] Of course, counsel bringing roadside hazard cases against governmental defendants should consider who the fact finder will be and whether damage caps are applicable when determining whether and how to pursue the case.[7]

§ 18 Discretionary function exception

The Federal Tort Claims Act (FTCA) and most states' claims acts retain immunity for acts done by governmental employees[1] pursuant to a "discretionary function."[2] Generally, if a defendant's alleged act or omission was simply the result of the

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by the court with a jury."); see also Va. Code Ann. §§ 8.01-195.1 et seq. (Virginia).

[6]For example, see Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (2002) (Texas). See also Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit, 43 A.L.R. 4th 19; Recovery of exemplary or punitive damages from municipal corporation, 1 A.L.R. 4th 448.

[7]Some cases may benefit from the higher level of expertise found in a claims board or claims court that hears a jurisdiction's tort claims. On the other hand, other cases may benefit from a jury of the plaintiff's peers.

[1]For a discussion of the issues surrounding whether an employee is acting within the course and scope of his duties under the FTCA, see Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment' for purpose of determining government liability under 28 USC sec. 1346(b), 6 A.L.R. Fed. 373.

[2]See 28 U.S.C.A. § 2680(a) (2002). Section 2680(a) reads in relevant part: "The provision of this chapter and section 1346(b) of this title shall not apply to:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.

The text of the section excepts two categories of claims from the limited waiver of sovereign immunity within the FTCA: (1) claims based upon acts or omissions by government employees exercising due care in the execution of a statute or regulation, whether or not such statute or regulation is valid, and (2) claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty even though the discretion may have been abused. In the context of roadside hazard cases, the defense will typically argue that the plaintiff's claim falls within category (2).

Whether an act or omission constitutes a discretionary function under section 2680(a) is a matter to be decided under the FTCA rather than under

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defendant exercising its discretion, as opposed to performing an act required by some regulation or statute, then the defendant would be shielded from liability.

To determine whether the discretionary function exception to the limited waiver of immunity applies, courts typically employ a two-step analysis.[3] The first step is to determine whether the act or omission was discretionary. What constitutes a "discretionary function" has been the source of much conflict and resulted in volumes of case decisions.[4] In answering this first question, courts will determine whether the defendant was exercising judgment or choice or whether a statute, regulation, or policy specifically prescribe a course of

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the state's law. U.S. v. Muniz, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963).

[3]U.S. v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). In this case, the United States Supreme Court made a relatively significant change in the way it analyzed the applicability of the discretionary function doctrine, therefore, counsel should be aware of the questionable precedential value of cases dating before *Gaubert*.

[4]"[D]ecades of litigation have yet to yield a clear demarcation between actionable torts and immune discretion. . . ." Federal Deposit Ins. Corp. v. Irwin, 916 F.2d 1051 (5th Cir. 1990). The federal cases initially interpreting the meaning of section 2680(a) resorted to a "proprietary" versus "governmental" analysis frequently applied in municipal law. If the act was proprietary, it was not afforded protection. This analysis was followed until the United States Supreme Court rejected it in Indian Towing Co. v. U.S., 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955). The courts then started using a "planning" versus "operational" distinction in determining whether an alleged act of negligence was "discretionary." This analysis stated that if the decision was one of policy level planning, as opposed to operational level decision making, then immunity applied. Driscoll v. U.S., 525 F.2d 136, 37 A.L.R. Fed. 530 (9th Cir. 1975). Since 1991, however, following the United States Supreme Court's opinion in U.S. v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), many courts have rejected the "planning-operational" distinction. For a discussion about the discretionary function exception to the FTCA, see Liability of United States for Failure to Warn of Danger or Hazard not Directly Created by Act or Omission of Federal Government and not in National Parks as Affected by "Discretionary Function or Duty" Exception to Federal Tort Claims Act, 169 A.L.R. Fed. 421; Liability of United States for Failure to Warn of Danger or Hazard Resulting from Governmental Act or Omission as Affected by "Discretionary Function or Duty" Exception to Federal Tort Claims Act (28 U.S.C.A. s2680(a)), 170 A.L.R. Fed. 365; Claims based on construction and maintenance of public property as within provision of 28 U.S.C.A. sec. 2680(a) excepting from Federal Tort Claims Act claims involving "discretionary function or duty", 37 A.L.R. Fed. 537; Seamon, Causation and the Discretionary Function Exception to the Federal Tort Claims Act, 30 U.C. Davis L. Rev. 691 (1997).

conduct.[5] If a law, rule, or regulation forced the defendant to act or not act, there is no immunity.[6]

If, however, the defendant was exercising judgment or choice when it committed the alleged negligent act, then the court will proceed to the second step of the analysis. In this second step, the court determines whether the choice or judgment was "grounded in considerations of public policy."[7] In ascertaining whether the defendant's decision invoked policy considerations, courts should not look to (1) the subjective intent of the defendant's employee, (2) the status or level of the employee who made the decision, or (3) whether the employee actually weighed policy considerations when making the decision.[8] Instead, the court should focus on the nature of the act or omission and whether it is susceptible to policy analysis.[9]

A number of courts have come to differing conclusions about whether sovereign immunity is an affirmative defense or jurisdictional.[10] If the court finds it is an affirmative defense, the defendant would need to plead sovereign immunity or it could be waived. If sovereign immunity is jurisdictional, it would be nonwaivable. The plaintiff has the burden of proving

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[5]Obviously, if the word "discretionary" was interpreted broadly, the discretionary function exception would swallow the general waiver of immunity contained within the FTCA. It can be said that every volitional act made by a government employee involves some decision. In fact, even the "decision" to not act would be exercising a choice. The courts, however, have applied a more limited reading of "discretionary," protecting only those choices or judgments that are grounded in public policy.

[6]Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

[7]U.S. v. Gaubert, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

[8]U.S. v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). Even after *Gaubert*, however, the distinction between operational and planning level decisions can still be a factor in the determination of whether an act or omission deserves protection by the discretionary function exception. Coumou v. U.S., 114 F.3d 64 (5th Cir. 1997).

[9]U.S. v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

[10]Some courts have held that the exceptions to the FTCA mentioned in 28 U.S.C.A. § 2680 are jurisdictional and cannot be waived. U.S. v. Taylor, 236 F.2d 649, 74 A.L.R.2d 860 (6th Cir. 1956), cert. dismissed, 355 U.S. 801, 78 S. Ct. 6, 2 L. Ed. 2d 19 (1957); Lyons v. U.S., 158 F. Supp. 436 (D. Me. 1958). Other courts have held that the exceptions to the Act must be pleaded and are treated as affirmative defenses, capable of being waived. Boyce v. U.S., 93 F. Supp. 866 (S.D. Iowa 1950); Builders Corp. of America v. U.S., 259 F.2d 766 (9th Cir. 1958); Stewart v. U.S., 199 F.2d 517 (7th Cir. 1952); Smith v. U.S., 155 F. Supp. 605 (E.D. Va. 1957).

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subject matter jurisdiction,[11] but the defendant has the burden of proving that the discretionary function exception applies to the particular case.[12]

The best way a plaintiff can counter a claim that the defendant's negligent act was a discretionary function is to find a statute, regulation, or policy that imposes a mandatory duty on defendant.[13] If the text of a rule is unequivocal and requires the defendant to act or not act, then the defendant does not have discretion and, hence, is not immune.

In those instances where plaintiff does not have a mandatory regulation or law prescribing defendant's conduct, then the plaintiff should argue that the defendant's choice did not involve any public policy considerations.[14] For example, a maintenance crewperson who is supposed to trim vegetation from the roadside so that motorists are able to identify roadside hazards is simply doing what he is told and not making public policy determinations about whether what he is doing is economically feasible. When that crewperson fails to trim an area for months contrary to his superiors' direction, thereby creating a dangerous condition, it is not likely a court would find he did so in an effort to improve the state's fiscal position.

The plaintiff could also argue that the defendant never bothered to learn the facts in order to make a decision, did not make a decision, and therefore, could not have exercised

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[11]Valdez v. U.S., 56 F.3d 1177 (9th Cir. 1995).

[12]See Autery v. U.S., 992 F.2d 1523 (11th Cir. 1993).

[13]For example, see Franks v. Lopez, 69 Ohio St. 3d 345, 632 N.E.2d 502 (1994); ARA Leisure Services v. U.S., 831 F.2d 193 (9th Cir. 1987) (specific standards required park service maintain road and prevent dangerous erosion); Seyler v. U.S., 832 F.2d 120 (9th Cir. 1987) (case could be maintained where defendant failed to provide speed limit signs in spite of specific regulations requiring so). Also, often an agency's regulations require it to follow AASHTO or other industry standards, which may, in turn, not be mandatory. Army Regulations 190-5, 420-5, 420-72; Technical Manual (TM) 5-624. In those instances, a plaintiff may argue that the agency's unequivocal regulation takes away the defendant's choice, even though the industry standard may leave room for judgment.

[14]The specific language of the industry standards are important not only with reference to whether a plaintiff can avoid a claim of immunity, but also when the plaintiff is trying to use the standards to create a duty on defendant's behalf. See § 6. Because most of the industry standards use fairly permissive language, it is often difficult for a plaintiff to find industry standards (other than parts of the MUTCD) that impose mandatory requirements.

"discretion."[15] This is a difficult argument as the United States Supreme Court's decision in *United States v. Gaubert*, which held that courts should not consider whether the defendant's employee actually considered public policy when deciding to act or not act.[16] Plaintiffs will have better success if they argue that the defendant was negligent when it violated industry guidelines and regulations by failing to institute some sort of program or procedure to (1) detect and repair roadside hazards,[17] (2) hire, train, and monitor employees,[18] and (3) warn travelers of defects it decides to leave and not remove or protect.[19] While instituting these programs may seem like the public policy decisions deserving immunity, many times, the regulations pertaining to the implementation of safety programs are worded more forcefully than the regulations regarding the actual design, construction or maintenance activities themselves. While the defendant may have the discretion to leave a roadside hazard in place and unprotected, it may not

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[15]Dinger v. Hornbeck Offshore Services, Inc., 968 F. Supp. 1185 (S.D. Tex. 1997) (employee who was unaware of regulations governing his responsibilities could not exercise discretion in disregarding said regulations); Foster v. South Carolina Dept. of Highways and Public Transp., 306 S.C. 519, 413 S.E.2d 31 (1992) (state exercised no discretion, had no plan of inspection or criteria for prioritizing projects, and did not consciously weigh factors concerning safety, therefore, no discretion and no immunity); U.S. v. Gavagan, 280 F.2d 319 (5th Cir. 1960) (government employees' decision not to evaluate and pass on vital information during a ship rescue was not within discretionary function exception).

[16]U.S. v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

[17]Foster v. South Carolina Dept. of Highways and Public Transp., 306 S.C. 519, 413 S.E.2d 31 (1992) (state exercised no discretion, had no plan of inspection or criteria for prioritizing projects, and did not consciously weigh factors concerning safety, therefore, no discretion and no immunity); cf. McDuffie v. Roscoe, 679 So. 2d 641 (Ala. 1996) (ranking of road sites requiring repair called for discretion and, therefore, was entitled to immunity).

[18]U.S. v. Lawter, 219 F.2d 559 (5th Cir. 1955) (government's decision to allow untrained employee to operate rescue equipment was not discretionary function).

[19]Prescott v. U.S., 724 F. Supp. 792 (D. Nev. 1989), order aff'd, 959 F.2d 793 (9th Cir. 1992), opinion amended and superseded, 973 F.2d 696 (9th Cir. 1992) (affirming "the district court's order denying summary judgment because the government failed to adduce any evidence that the specific acts of negligence flowed directly from the policy choices of on-site officials who had been explicitly entrusted with the responsibility of weighing competing policy considerations" and determining that there "remains a genuine issue of material fact whether "the [applicable government officials] had the degree of discretion . . ."); Schoff v. City of Somersworth, 137 N.H. 583, 630 A.2d 783 (1993).

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have discretion to deliberately remain ignorant of the condition of its roadsides.

To counter a defendant's discretionary function claim, a plaintiff may argue that the defendant violated its own nondiscretionary duty to act. As discussed above, a defendant can create duties for itself by how it acts.[20] For example, if a defendant paved a road shoulder, it then has the duty to maintain that shoulder even if it did not have a duty to install the paved shoulder in the first place. In other words, when the defendant exercises its discretion and decides to create a facility, it then deprives itself of the ability to decide not to maintain such facility.[21]

§ 19 Weather created hazard exception

Many states' limited waivers of sovereign immunity contain a specific exception for dangerous conditions attributable to

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[20]See § 7; Wysinger v. U.S., 784 F.2d 1252 (5th Cir. 1986) ("Once the government has made a decision to act, the government is responsible for acts negligently carried out even though discretionary decisions are constantly made as to how those acts are carried out."); Poynter v. U.S., 55 F. Supp. 2d 558 (W.D. La. 1999) (while postal employees had discretion as to how they would provide reasonably safe environment for plaintiff, they did "not have the discretion to disregard that duty and act without reasonable care.").

[21]Indian Towing Co. v. U.S., 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (Coast Guard had no duty to undertake lighthouse service, however, "once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain the light was kept in good working order."); See also Arkansas River Co. v. U.S., 840 F. Supp. 1103 (N.D. Miss. 1993) (decision to construct lock and dam was government's discretion, however, once it did, it was under the duty to properly maintain and operate the facility); Whitney S.S. Co. v. U.S., 747 F.2d 69 (2d Cir. 1984) (when Coast Guard decides to provide navigational devices, it then takes on the responsibility of maintaining those devices in a reasonable condition); Sheridan Transp. Co. v. U.S., 834 F.2d 467 (5th Cir. 1987) ("Once Coast Guard voluntarily assumed the duty to mark [by positioning a buoy], it also assumed the obligation to use due care in doing so."); Pierce v. U.S., 142 F. Supp. 721 (E.D. Tenn. 1955), judgment aff'd, 235 F.2d 466 (6th Cir. 1956) (while decision to construct and reactivate electrical power substation was discretionary, government's duty to maintain it and warn others of dangers was nondiscretionary); Hernandez v. U.S., 112 F. Supp. 369 (D. Haw. 1953) (government did not have to erect road block, but once it did, it had the duty to ensure the road block was reasonably safe); Bulloch v. U S, 133 F. Supp. 885 (D. Utah 1955); McNamara v. U. S., 199 F. Supp. 879 (D. D.C. 1961) (designing a building may be a discretionary function, however, once built, duty to maintain it in a reasonably safe condition is not discretionary).

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weather.[1] This can play an important role in cases where the plaintiff alleges defective roadside design, construction, or maintenance caused by improper drainage or falling objects.[2] A plaintiff can attempt to avoid this exception by arguing that the weather was not the hazard nor the cause of the plaintiff's collision, but was merely one foreseeable contributing factor for which the defendant should have planned and taken precautions.[3]

§ 20 Recreational use statutes

A defendant in a roadside hazard case may also claim protection under the relevant state's "recreational use" statute. Most states have statutes that lower the duty owed to others by a defendant who holds his land out for recreational purposes.[1] Typically, the statutes will provide that such defendant will only be liable if it has been grossly negligent or has acted

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[1]See, for example, N.J. Stat. Ann. § 59:4-7 (2002) (New Jersey).

[2]See, for example, Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454 (2d Dist. 1997) (state was immune from suit for negligent design of roadway that caused flooding on the road); Scholl v. County of Boone, 250 Neb. 283, 549 N.W.2d 144 (1996) (county not negligent in the design of culvert that washed out after rain). For a discussion on defendants' liability for weather related conditions, see Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway, 61 A.L.R. 2d 425; Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 A.L.R. 3d 11; Public Authority's Failure to Remove or Guard Against Ice or Snow on Surface of Highway or Street, 21 Am. Jur. Proof of Facts 2d 299.

[3]See Woollen v. State, 256 Neb. 865, 593 N.W.2d 729 (1999) (puddling of water in ruts in road causing plaintiff to hydroplane was cause of negligent maintenance of road rather than weather); Holt v. State ex rel. Oklahoma Dept. of Transp., 1996 OK CIV APP 101, 927 P.2d 57 (Okla. Ct. App. Div. 1 1996) (ice on road over dam caused by mist from water passing through flood gates was not weather condition within exception); Woods v. Town of Marion, 245 Va. 44, 425 S.E.2d 487 (1993) (ice on road was caused by activities of city, not natural accumulation, therefore, city was liable).

[1]It is not the purpose of this article to set forth a detailed and exhaustive description of the various recreational use statutes in existence across the county. Counsel who are prosecuting or defending a roadside hazard case would be well advised to familiarize themselves with their jurisdiction's recreational use statute. For a discussion on this issue, see: Liability of United States Under Federal Tort Claims Act (28 U.S.C.A. ss 1346(b), 2671-2680) for Death or Injury Sustained by Visitor to Area Administered by National Park Service, 177 A.L.R. Fed. 261; Effect of statute limiting landowner's liability for personal injury to recreational user, 47 A.L.R. 4th 262.

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intentionally, in bad faith, or with malice.[2] If a court finds the statute applies in a particular case, it can have a devastating effect on the plaintiff's case.

The statute is typically held to be an affirmative defense that must be pleaded, otherwise it is waived.[3] If the court rules that the statute applies, then plaintiff will be forced to show the defendant acted recklessly, grossly negligent, in bad faith or with malice in order to establish liability. Therefore, a plaintiff who anticipates his facts may fall within the state's recreational use statute should include in his complaint or petition allega-

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[2]For example, Texas Civil Practice and Remedies Code § 75.002 (Texas) provides, in relevant part, that:

(a) An owner, lessee occupant of agricultural land:
  (1) does not owe a duty of care to a trespasser on the land; and
  (2) is not liable for any injury to a trespasser on the land, except for willful or wanton acts or gross negligence by the owner, lessee or other occupant of agricultural land.

(b) If an owner, lessee or occupant of agricultural land gives permission to another or invites another to enter the premises for recreation, the owner, lessee or occupant, by giving the permission, does not:
  (1) assure that the premises are safe for that purpose;
  (2) owe to the person to whom permission is granted or to whom the invitation is extended a greater degree of care than is owed to a trespasser on the premises; or
  (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted or to whom the invitation is extended.

(c) If an owner, lessee or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee or occupant, by giving the permission, does not:
  (1) assure that the premises are safe for that purpose;
  (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
  (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

(d) Subsections (a), (b), and (c) shall not limit the liability of an owner, lessee or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith.

Tex. Civ. Prac. & Rem. Code § 75.002 (2002) (Texas).

[3]Effect of statute limiting landowner's liability for personal injury to recreational user, 47 A.L.R. 4th 262.

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tions for gross negligence[4] and/or nuisance,[5] which would still establish liability should the statute apply.

Depending upon the exact language used in the recreational use statute, plaintiffs have a number of arguments to avoid the statute's effects. For example, the statutes vary as to who they protect, from "landowners" to "lessees" to just "occupiers" of the land. Plaintiffs can argue that the defendant does not fit within the definition provided in the statute for who is protected.[6] If the defendant is a governmental entity, the plaintiff could argue that the recreational use statute was

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[4]Often, the statute's effect is to require the plaintiff to prove gross negligence, malice or willful conduct. Walker v. Daniels, 200 Ga. App. 150, 407 S.E.2d 70, 69 Ed. Law Rep. 602 (1991) (owner of land who holds it open for recreational purposes is only liable for willful and malicious conduct); Casas v. U.S., 19 F. Supp. 2d 1104 (C.D. Cal. 1998) (state's statute limited liability to certain circumstances, one being for willful or malicious failure to guard or warn against dangerous condition).

[5]See § 19.

[6]Most courts have found that state and local governmental units fall within the definition of "owner" for purposes of the recreational use statute. City of Houston v. Morua, 982 S.W.2d 126 (Tex. App. Houston 1st Dist. 1998), reh'g overruled, (Sept. 24, 1998) (recreational use statute applied to city and acted simply to limit liability, not abolish it); Tex. Civ. Prac. & Rem. Code §§ 75.003(e) and 101.058 (Texas). Some courts, however, have declined to extend the statute's protection to certain governmental defendants. Bradshaw v. State Through Dept. of Wildlife and Fisheries, 616 So. 2d 799 (La. Ct. App. 2d Cir. 1993), writ denied, 620 So. 2d 841 (La. 1993); Hovet v. City of Bagley, 325 N.W.2d 813 (Minn. 1982).

Courts also have consistently held that the federal government is entitled to receive the protection of the relevant state's recreational use statute. The Federal Tort Claims Act (FTCA) provides that the United States will be held liable for its negligent acts or omissions "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b) (2002); see also 28 U.S.C.A. § 2674 (2002). Therefore, in a FTCA claim, if the state in which the plaintiff was injured has a recreational use statute, it will likely apply to the United States. Schneider v. U.S.A., Acadia Nat. Park, 760 F.2d 366 (1st Cir. 1985) (defendant awarded summary judgment because claim was barred by Maine's recreational use statute); Guttridge v. U.S., 927 F.2d 730 (2d Cir. 1991); Casas v. U.S., 19 F. Supp. 2d 1104 (C.D. Cal. 1998); City of Houston v. Morua, 982 S.W.2d 126 (Tex. App. Houston 1st Dist. 1998), reh'g overruled, (Sept. 24, 1998) (recreational use statute applied to city and acted simply to limit liability, not abolish it).

A minority of courts have found the recreational use statute inapplicable when applied to a governmental defendant. See Hahn v. Com., 18 Pa. D. & C.3d 260, 1980 WL 537 (C.P. 1980) (state was not an "owner" as defined in the statute); Hovet v. City of Bagley, 325 N.W.2d 813 (Minn. 1982) (the term "owner" under the statute did not extend to cities).

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meant to encourage private landowners to open their land for public recreational use. It was not intended to further protect the government from liability for injuries sustained from recreational activities on the government's property.

Even if the defendant fits the class of landowners the statute intended to protect, the plaintiff may still argue that the property the defendant owned, leased, or possessed is not the type of property covered by the statute.[7] For example, a plaintiff in a roadside hazard case may argue that the statute does not apply where the plaintiff's vehicle left the roadway (which is arguably land within the statute) and encountered a roadside hazard on an area of land not held open to the public for recreational purposes (outside the statute).

Plaintiffs can assert that their activity does not meet the description of "recreational activity" as defined in the statute. Although most statutes will define "recreational activity" by listing a number of activities that fall within the statute,[8] many

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[7]See Bledsoe v. Goodfarb, 170 Ariz. 256, 823 P.2d 1264 (1991) (canal road was not "premises" under statute); Michalovic v. Genesee-Monroe Racing Ass'n, Inc., 79 A.D.2d 82, 436 N.Y.S.2d 468 (4th Dep't 1981) (parking lot not "premises" under statute). Sometimes, if the plaintiff can successfully argue that the property is held for commercial uses rather than recreational uses, the plaintiff can avoid the application of the statute. Danaher v. Partridge Creek Country Club, 116 Mich. App. 305, 323 N.W.2d 376 (1982) (statute did not apply to property used as a commercial enterprise); Jones v. Gillen, 504 So. 2d 575 (La. Ct. App. 5th Cir. 1987), writ denied, 508 So. 2d 86 (La. 1987) (campground held out for commercial enterprise was not type of land intended to fall under the statute).

[8]For example, Texas Civil Practice and Remedies Code, § 75.001(3) states:

"Recreation" means an activity such as:

(A) hunting;
(B) fishing;
(C) swimming;
(D) boating;
(E) camping;
(F) picnicking;
(G) hiking;
(H) pleasure driving;
(I) nature study, including bird-watching;
(J) cave exploration;
(K) waterskiing and other water sports; or
(L) any other activity associated with enjoying nature or the outdoors.

Texas Civil Practice and Remedies Code, § 75.001(3) (Texas).

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other statutes include a catch-all item on its list of activities falling within the statute.[9] When the statute includes a catch-all item in its definition of "recreational activity," courts are more likely to find that the plaintiff's conduct fell within the scope of the statute.[10]

Last, the plaintiff can argue that even if the statute applies, it only abolishes the premises liability negligence claim, and that any negligent activity claim survives.[11] For example, while the dangerous condition on the roadside may fall within the statute, the negligent activity of creating the condition is not affected by the statute. Along those same lines, the plaintiff can argue that any nuisance claim also survives application of the statute.[12] Courts' reactions to these arguments have been inconsistent. Therefore, counsel should check the case law in their jurisdiction to determine whether such an argument would be successful.

§ 21 Nuisance exception

Most state courts recognize a nuisance exception to sovereign

[9]Texas Civil Practice and Remedies Code, § 75.001(3) (Texas).

[10]See Kelly v. Ladywood Apartments, 622 N.E.2d 1044 (Ind. Ct. App. 4th Dist. 1993) (sledding down hill fit statute's "any other purposes" provision); Blair v. U.S., 433 F. Supp. 217 (D. Nev. 1977) (swimming was deemed to be "other recreational purpose" under statute).

[11]See Scott v. Wright, 486 N.W.2d 40 (Iowa 1992) (negligent operation of tractor pulling hayrack injuring plaintiff was activity falling outside of statute); Del Costello v. Hudson Railway Co. Inc., 274 A.D.2d 19, 711 N.Y.S.2d 77 (3d Dep't 2000) (plaintiff's injury due to operation of train as opposed to maintenance of track, therefore, statute did not apply). Other courts have held that defendant's activity was also covered under the statute. See Johnson v. Sunshine Min. Co., Inc., 106 Idaho 866, 684 P.2d 268 (1984) (holding that statute applied to active as well as passive negligence).

[12]Some cases have held that application of the statute does not affect the viability of a nuisance cause of action. See Ochampaugh v. City of Seattle, 91 Wash. 2d 514, 588 P.2d 1351 (1979) (state's statute disclaimed any intention to alter the nuisance law); Smith v. Crown-Zellerbach, Inc., 638 F.2d 883 (5th Cir. 1981) (Louisiana statute did not abolish the attractive nuisance doctrine). On the other hand, some courts have found that the statute precludes the nuisance claim as well as the negligence cause of action. See Coursey v. Westvaco Corp., 790 S.W.2d 229 (Ky. 1990) (statute precluded attractive nuisance doctrine); Stanley v. Tilcon Maine, Inc., 541 A.2d 951 (Me. 1988) (claim based on attractive nuisance was barred by the statute). For a discussion on nuisance claims, see Attractive Nuisance Cases, 80 Am. Jur. Trials 535; What constitutes special injury that entitles private party to maintain action based on public nuisance—modern cases, 71 A.L.R. 4th 13.

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immunity.[1] These states recognize that a government has no more right than a private person or entity to create or maintain a nuisance, and when it does, it should be subject to the same liability. Other courts have declined to apply this nuisance exception in the context of personal injury claims.[2] Also, even in jurisdictions recognizing the exception, courts may essentially gut its effect by employing very restrictive definitions as to what constitutes a nuisance and under what circumstances a governmental defendant will be subject to liability for the nuisance.[3] Last, a plaintiff can sometimes make a claim of nuisance per se based upon a statute establishing duties on the defendant to maintain certain places free of nuisances.[4] Because of the inconsistent way courts have treated this claim, it is important for counsel to evaluate the relevant jurisdiction's decisions when determining whether and how to pursue a nuisance claim as part of their roadside hazard case.

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[1]For a helpful summary of the various jurisdictions' position on the issue, see Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to personal injury or death as result of a nuisance, 56 A.L.R. 2d 1415.

[2]See, for example, Davis v. Provo City Corp., 1 Utah 2d 244, 265 P.2d 415 (1953) (overruled in part by, Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981)) ("If we were to accept the nuisance exception, the public would be called upon to defend every personal injury negligence action and the law of nuisance would be further confused by attempts to force a coverage of the individual case.").

[3]Some courts focus on the underlying negligence that resulted in the nuisance in justifying its holding that the nuisance exception does not apply. See Kilbourn v. City of Seattle, 43 Wash. 2d 373, 261 P.2d 407 (1953) (drawing the distinction between creating and maintaining a nuisance and simple negligence). Other courts will focus on the type of nuisance complained of. If it was created or maintained by the defendant while performing a governmental function, as opposed to a proprietary function, then the nuisance exception will not apply. See Robb v. City of Milwaukee, 241 Wis. 432, 6 N.W.2d 222 (1942) (holding city liable for plaintiff's injuries from baseball that was hit out of city maintained park because maintaining park was proprietary function rather than governmental function). Last, courts also have focused on whether the defendant affirmatively created the nuisance, as opposed to failed to abate it, to determine whether the exception is applicable. This is merely an application of the rule that if a defendant creates a dangerous condition, it will be subject to liability for injuries resulting from it. See Bacon v. Town of Rocky Hill, 126 Conn. 402, 11 A.2d 399 (1940) (finding city liable under nuisance theory when it created dangerous condition on highway).

[4]See Hall v. Town of Keota, 248 Iowa 131, 79 N.W.2d 784 (1956) (recognizing that the city had a duty, both in common law and pursuant to a statute, to maintain its streets free from nuisances).

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E. COMPARATIVE/CONTRIBUTORY NEGLIGENCE

§ 22 General principles

Another common threat to a plaintiff's roadside hazard case is the defense of comparative or contributory negligence. Neither negligence nor contributory negligence can be inferred from the mere fact that there was a collision.[1] If a plaintiff is found to have acted "unreasonably," he may be completely barred from recovery or his damages may be reduced by an amount proportionate to his fault. While "ordinary care" is the standard applied to the plaintiff as well as the defendant, when evaluated in the context of a plaintiff driver, there is normally very little objective indicia of the standard of care. When judging a defendant, we compare its acts and omissions to industry standards, its own regulations, industry customs, and its previous actions.[2] When judging a plaintiff driver, we can only compare his actions to a "reasonable man under same or similar conditions."[3] Typically, the defendant bears the burden of proving contributory negligence; however, some jurisdictions require the plaintiff to prove his freedom from contributory negligence in certain situations.[4]

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[1]Kenyon v. State, 21 A.D.2d 851, 250 N.Y.S.2d 1007 (4th Dep't 1964).

[2]See §§ 6, 7.

[3]TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE 2.1 (2000) ("'Ordinary care' means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.").

Most jurisdictions also have a "sudden emergency" or "sudden peril" rule that expands on the general definition of ordinary care when applied to a situation where a party is confronted with an unexpected situation. See TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE 3.3 (2000): "If a person is confronted by an "emergency" arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person or ordinary prudence would have acted under the same or similar circumstances."

For a discussion of the doctrine of sudden emergency, see Automobiles: Sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead, 75 A.L.R. 3d 327; Modern status of sudden emergency doctrine, 10 A.L.R. 5th 680; Instructions on sudden emergency in motor vehicle cases, 80 A.L.R. 2d 5; Existence of "Sudden Emergency", 8 Am. Jur. Proof of Facts 3d 399.

[4]See Am. Jur. 2d, Evidence §§ 135, 136; Harford v. State, 19 Misc. 2d 7, 191 N.Y.S.2d 742 (Ct. Cl. 1959), judgment aff'd, 17 A.D.2d 680, 230 N.Y.S.2d 284 (3d Dep't 1962).

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§ 23 Reaction time

A large percentage of roadside hazard cases involve a driver perceiving and then reacting to a hazard either on or off of the roadway. One way to determine whether that driver reacted with "ordinary care under the circumstances" is to compare his reaction time to those times reflected in the scientific literature.

The study of reaction times has found that when a person is confronted with an event, he goes through a four stage process: perceiving the event, intellectually thinking about the event, emotionally responding to the event, and then taking volitional action in response.[1] Depending upon the circumstances present at the time the driver confronts an event, the time it takes a driver to proceed through these stages and react to a stimulus can vary dramatically. For example, reaction times for a non-emergency, simple situation in daylight can be a little as .5 seconds.[2] On the other hand, reaction times for emergency, complex situations at night can be a long as 4.5 seconds.[3]

One of the ways a plaintiff can counter an allegation of comparative or contributory negligence is to argue that there was insufficient opportunity for him to react to the event to avoid the collision. The plaintiff will want to argue that, when comparing his actions to the average reaction time found in scientific literature, a longer reaction time is appropriate. The plaintiff should point out that many of the studies determine average reaction times from simple tests performed by pre-warned test subjects in a safe laboratory setting. A person's ability to react to stimuli can become significantly slowed or paralyzed when confronted with a complex and/or stressful situation.[4] Obviously, the plaintiff will be able to justify a longer reaction time if the event is complex, confusing, and stress-

[1]Matson, Smith & Hurd, TRAFFIC ENGINEERING 20.

[2]AASHTO, A Policy on Geometric Design of Urban Highways and Arterial Streets 277 (1973).

[3]AASHTO, A Policy on Geometric Design of Urban Highways and Arterial Streets 277 (1973).

[4]As explained in a publication by the Division of Human Psychology Institute for Medical Research, Medical Research Council, London, England: "As a result of exposure (to sudden startle) a driver may continue in a state of apprehension and/or uncertainly for a minute—or even longer—following the actual incident that initiated the danger. Incorrect decision making may therefore continue for some time after unexpected incident, and any accident or error in driving occurring during that period may be occasioned by the continuing effects of startle, rather than as a direct result of the incident itself."

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ful and visibility is poor.

If the plaintiff successfully argues for a longer reaction time, it can have a dramatic effect on the defendant's claim of comparative or contributory negligence. If, for example, the literature supports an average reaction time under the circumstances of four seconds, that would mean that a plaintiff, traveling 60 m.p.h., would have had to see the dangerous condition approximately 352 feet away, at night, to avoid the collision.[5] Considering the fact that normal headlights on dim only illuminate approximately 300 feet under normal nighttime conditions, this would have made it impossible for the plaintiff to perceive the hazard and execute evasive maneuvers in time to avoid the collision.

§ 24 Defendant's negligence as affecting plaintiff's reaction time

Another method the plaintiff can use to lengthen the reaction time applicable in his case is to focus on the defendant's negligence. This technique dovetails nicely with the plaintiff's case in chief. For example, a plaintiff may have encountered a defective road condition that caused him to leave the road and strike a roadside hazard within the clear zone that should have been removed or protected. The plaintiff can argue that the defective road condition surprised him, lengthened his reaction time, and prevented him from avoiding the roadside hazard. In this way, the plaintiff can take the defense's attempt to focus the jury on the plaintiff's conduct and reverse it so that the jury is focusing again on the defendant's acts or omissions that surprised the plaintiff.

§ 25 Ordinary care viewed prospectively

The plaintiff's or defendant's conduct is measured according to the circumstances that existed at the time he acted or chose not to act. This is important for the defendant because its decision to forgo a certain safety precaution will be measured against the industry standards and custom existing at the

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Hunt, Preliminary Investigation into a Psychological Assessment of Driving Stress, p. 36 (1968). The literature has established that reaction times increase when the driver encounters a stressful situation, as similarly recognized by the doctrine of "sudden emergency" or "sudden peril."

[5]To convert miles per hour (m.p.h.) to feet per second (f.p.s.), multiply the vehicle's speed in MPH by 1.47. For example, a vehicle traveling 60 m.p.h. will cover 88 f.p.s.

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time.[1] This concept is also important for the plaintiff when countering a contributory negligence allegation. A plaintiff confronted with an emergency situation and instantaneously presented with a number of alternative courses of action cannot later be blamed for choosing a less-safe course unless such choice was unreasonable under the circumstances.[2] Most jurisdictions have a "sudden emergency" or "sudden peril" rule that simply expands on the general definition of ordinary care and holds that a person, when confronted with an unexpected and sudden situation, must only act as a reasonable person would have acted under those same emergency conditions.[3] Even if in hindsight one can see that the plaintiff's course of action was not the most prudent available, he is not contributorily negligent unless it was unreasonable for him to pick that course under the emergency circumstances in which he found himself.

To avoid an argument that he took the wrong course of action, a plaintiff may be tempted to argue that no matter what course of action he chose, he would have been injured just as severely. This can be an effective argument to counter a defense assertion of contributory negligence, however, the plaintiff should be aware that it can be turned against him. For example, a defendant may build on the plaintiff's argument and attempt to show that, not only were plaintiff's driving actions immaterial, but the hazard itself was also immaterial to the outcome in this collision. In other words, plaintiff's fate was sealed before he encountered the hazard and the collision

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[1] See § 6.

[2] Connolly v. Melroy, 63 Ill. App. 3d 850, 20 Ill. Dec. 654, 380 N.E.2d 863 (1st Dist. 1978); Allen v. Dhuse, 104 Ill. App. 3d 806, 60 Ill. Dec. 559, 433 N.E.2d 356 (2d Dist. 1982); Reuter v. Kocan, 113 Ill. App. 3d 903, 68 Ill. Dec. 711, 446 N.E.2d 882 (2d Dist. 1983).

[3] See TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE 3.3 (2000): "If a person is confronted by an "emergency" arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person or ordinary prudence would have acted under the same or similar circumstances."

For a discussion of the doctrine of sudden emergency, see Automobiles: Sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead, 75 A.L.R. 3d 327; Modern status of sudden emergency doctrine, 10 A.L.R. 5th 680; Instructions on sudden emergency in motor vehicle cases, 80 A.L.R. 2d 5; Existence of "Sudden Emergency", 8 Am. Jur. Proof of Facts 3d 399.

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was simply an "unavoidable accident."[4]

§ 26 Plaintiff's knowledge of condition before collision

A plaintiff's knowledge of the dangerous condition or familiarity with the road can be an important factor in assessing contributory negligence.[1] A jury is more likely to find a plaintiff contributorily negligent if the plaintiff is familiar with the road and the dangerous condition itself.

The defense will often argue that a plaintiff's familiarity with the road somehow makes it more likely that he was contributorily negligent when he reacted to a situation and crashed. A party's conduct is judged against a "reasonable person" who possess the same knowledge, training, and experience as the party. Therefore, the argument goes, because the plaintiff was familiar with the road, he should have been able to prevent the collision.

Depending upon the facts of the case, a plaintiff may counter this defense argument by simply turning it on its head. For example, if the plaintiff had traveled the road earlier that day without incident, but then later, while traveling on the road again, suddenly encountered a hazard, he would potentially be

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[4]See § 13.

[1]In states where a plaintiff's status determines a defendant's duty, the plaintiff's knowledge is important not only in judging comparative negligence, but also in determining whether the plaintiff can even make the elements of his negligence cause of action. For example, if a plaintiff is deemed to be a licensee rather than an invitee, on the defendant's property, then the plaintiff cannot recover if he knows of the unreasonably dangerous condition. State Dept. of Highways & Public Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992), reh'g of cause overruled, (Dec. 22, 1992) and reh'g dismissed, (Jan. 27, 1993); See also TEX. PATTERN JURY CHARGES, PREMISES LIABILITY 66.4 (2000).

With respect to the condition of the premises, [Defendant] was negligent if—

a. the condition posed an unreasonable risk of harm, and
b. [Defendant] had actual knowledge of the danger, and
c. [Plaintiff] did not have actual knowledge of the danger, and
d. [Defendant] failed to exercise ordinary care to protect [Plaintiff] from danger, by both failing to adequately warn [Plaintiff] of the condition and failing to make that condition reasonably safe.

For a discussion of rules determining a defendant's duty based upon a plaintiff's status, See Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R. 4th 294.

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even more surprised than someone who was unfamiliar with the road paying close attention to where he was going.[2]

Another counter to this defense argument is to assert that it is plaintiff's knowledge of the specific hazard in question, rather than his familiarity with the road in general, that is relevant.[3] Plaintiff can argue that his previous travels on the road when the hazard did not exist are not relevant to the question of whether he was contributorily negligent. Similarly, if he has never left the roadway before, there would be no reason for him to possess particular knowledge of the various roadside hazards and their specific location or dangerousness. The fact that the plaintiff may be familiar with a roadway in general does not equip him with special skills to avoid hazards located off of the road, especially if he is attempting to do so after he has lost control of his vehicle.

Counsel should be conscious of the potential for seemingly inconsistent positions regarding the specific nature of plaintiff's or defendant's knowledge. For example, when discussing the defendant's notice or knowledge of the dangerous condition, plaintiff will want to argue that the defendant only need be aware of the general danger associated with the type of hazard at issue. Plaintiff will argue against any assertion that the defendant had to be aware, actually or constructively, of the specific hazard that caused the plaintiff's injuries.[4] On the other hand, when determining whether the plaintiff knew of the dangerous condition, plaintiff will want to argue that only his knowledge of the specific hazard in question is relevant and not his familiarity with the road or that type of hazard in general.

One explanation as to why these arguments are not inconsistent is that a party's actions are measured against a reasonable person possessing the same knowledge, training, and ex-

[2]State v. McBride, 601 S.W.2d 552 (Tex. Civ. App. Waco 1980), writ refused n.r.e., (Dec. 10, 1980).

[3]See State v. McBride, 601 S.W.2d 552 (Tex. Civ. App. Waco 1980), writ refused n.r.e., (Dec. 10, 1980) (driver was familiar with road, but had never encountered the particular hazard at issue before); Claytor v. Durham, 273 Pa. Super. 571, 417 A.2d 1196 (1980); St. Germain v. City of Fall River, 177 Mass. 550, 59 N.E. 447 (1901) (plaintiff was familiar with road, however, his travels would not have given him knowledge of the existence of a particular fire hydrant or its exact location).

[4]See §§ 10, 11.

perience as the party.[5] Therefore, a defendant traffic engineer does not have the duty to act as a reasonable person, but as a reasonable traffic engineer. Of course, a reasonable traffic engineer responsible for the safe design, construction, and maintenance of the roadside possesses the specialized knowledge and the opportunity to notice dangerous conditions and foresee their potential to cause injury. A typical motorist, on the other hand, does not have the necessary knowledge to recognize many hazardous conditions existing on the roadside. Moreover, a motorist's vantage point and fleeting opportunity for viewing would likely prevent him from even seeing many hazards or understanding their dangerous character. The law should, therefore, require less specific evidence of notice to hold responsible those who are trained to foresee such dangerous conditions.

§ 27 Character evidence

Once the defense asserts the affirmative defense of contributory negligence, plaintiff may be allowed to introduce habit evidence in rebuttal. For example, if the defense is alleging that the plaintiff was driving at an excessive speed for the conditions, the plaintiff may be allowed to introduce evidence that the plaintiff always obeys the speed limit and drives at speeds that are safe and prudent under the circumstances.[1]

[5] Restatement (Second) of Torts, § 289 (1965) ("The actor is required not only to have the attention, perception, and memory of a reasonable man, but also to exercise the power of intelligent correlation of the sense impressions with previous knowledge, belief, and experience which a reasonable man would exercise, in order to recognize the danger.").

[1] For a discussion on the admissibility of habit character evidence, see Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 A.L.R. Fed. 703; Admissibility of evidence of habit, customary behavior, or reputation as to care of motor vehicle driver or occupant, on question of his care at time of occurrence giving rise to his injury or death, 29 A.L.R. 3d 791; Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 A.L.R. 3d 1293; Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury, 59 A.L.R. 2d 1379; Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 A.L.R. 2d 9; Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R. 2d 103.

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§ 28 Passenger negligence

Normally, a passenger is not at risk of being found contributorily negligent in a collision. A passenger does not have a duty to keep a lookout for the driver or supervise the driver's actions.[1] Because most passengers have little or no control over the driver's acts or omissions, the driver's negligence, if any, is not usually imputed to the passenger.[2] If somehow the passenger takes control of the vehicle, either physically or by controlling the driver, then he can be found contributorily negligent.[3]

Even where the driver is intoxicated, the passenger does not have a duty to stop the driver or warn him of the danger of driving, unless the passenger also owns the vehicle.[4] A jury issue can be created, however, if the driver is intoxicated and the passenger knew or should have known, not only that the driver had been drinking, but also that the driver was intoxicated.[5]

Sometimes the defense will attempt to argue that the passenger and the driver were involved in a joint venture at the time of the collision and, therefore, the driver's negligence can be imputed to the passenger.[6] There are likely very few situations where this argument would be successful.

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[1]O'Brien v. Janelle, 321 Mass. 316, 73 N.E.2d 460 (1947).

[2]Blazo v. Neveau, 382 Mich. 415, 170 N.W.2d 62 (1969); Kowalski v. Mohsenin, 38 A.D.2d 274, 329 N.Y.S.2d 37 (2d Dep't 1972); Vonderheide v. Comerford, 113 Ohio App. 284, 17 Ohio Op. 2d 272, 177 N.E.2d 793 (1st Dist. Hamilton County 1961); Fuller v. Flanagan, 468 S.W.2d 171 (Tex. Civ. App. Fort Worth 1971), writ refused n.r.e., (Oct. 6, 1971).

[3]Escamilla v. Garcia, 653 S.W.2d 58 (Tex. App. San Antonio 1983), writ refused n.r.e., (Sept. 14, 1983).

[4]Fugate v. Galvin, 84 Ill. App. 3d 573, 40 Ill. Dec. 318, 406 N.E.2d 19 (1st Dist. 1980); Vanderah v. Olah, 387 Mich. 643, 199 N.W.2d 449 (1972); Balla v. Sladek, 381 Pa. 85, 112 A.2d 156 (1955).

[5]Hunter v. Carter, 476 S.W.2d 41 (Tex. Civ. App. Houston 14th Dist. 1972), writ refused n.r.e., (Apr. 26, 1972).

[6]Flager v. Associated Truck Lines, Inc., 52 Mich. App. 280, 216 N.W.2d 922 (1974) (two girls riding scooter, one operating throttle and one operating brake, were operating joint enterprise); cf. Andes v. Lauer, 80 Ill. App. 3d 411, 35 Ill. Dec. 701, 399 N.E.2d 990 (3d Dist. 1980); Boyd v. McKeever, 384 Mich. 501, 185 N.W.2d 344 (1971); Haley v. C.I.R., 203 F.2d 815 (5th Cir. 1953); Pusateri v. Stanton, 5 Adams L.J. 30 (Pa. C.P. 1963); Little v. Littlefield, 311 F.2d 885 (5th Cir. 1962), opinion amended on denial of reh'g, 313 F.2d 959 (5th Cir. 1963) (amending opinion on the basis that "the language in our opinion to the effect that 'the jury verdict must, therefore, be reinstated,' should not have been included."); Government Emp. Ins. Co. v.

II. DAMAGES

§ 29 Elements of damages; checklist

Damages Recoverable By or on Behalf of Injured Person

☐ Necessary and reasonable medical and dental expenses.[1]
- — Actual past expenses for physician, hospital, nursing, and laboratory fees, medicines, prosthetic devices, and the like[2]
- — Anticipated future expenses[3]

☐ Loss of earnings[4]
- — Actual loss of wages or salary in the past[5]
- — Loss of existing vocational skill
- — Loss of wages in the future[6]

Edelman, 524 S.W.2d 546 (Tex. Civ. App. Beaumont 1975), writ refused n.r.e.

[1]See Recovery, and measure and element of damages, in action against dentist for breach of contract to achieve particular result or cure, 11 A.L.R. 4th 748; Establishing an Adequate Foundation for Proof of Medical Expenses, 23 Am. Jur. Proof of Facts 3d 243.

[2]See Cost of future cosmetic plastic surgery as element of damages, 88 A.L.R. 3d 117.

[3]See Requisite proof to permit recovery for future medical expenses as item of damages in personal injury action, 69 A.L.R. 2d 1261; Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability or possibility, 75 A.L.R. 3d 9; Sufficiency of evidence to prove future medical expenses as result of injury to head or brain, 89 A.L.R. 3d 87.

[4]See Proof of Lost Earning Capacity, Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259.

[5]See Proof of Lost Earning Capacity, Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259; Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value of earnings decedent would have made after death, 76 A.L.R. 3d 125; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 A.L.R. 4th 134; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor, 46 A.L.R. 4th 220.

[6]See Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259; Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R. 3d 88; Discount Rate for Future Damages, 8 Am. Jur. Proof of Facts 2d 1; Effect of anticipated inflation on damages for future losses—modern cases, 21 A.L.R. 4th 21; Forensic Economics—General Overview; Death of Person in Labor Force, 13 Am. Jur. Proof of Facts 2d 45; Forensic Economics-Death of Person

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- — Loss of capacity to earn increased wages in the future
- — Loss of profits or net income by person engaged in business; past and future[7]

☐ Ancillary expenses, past and future
- — Cost of hiring substitute or assistant[8]
- — Cost of hiring home care attendants for cooking, cleaning and the like[9]
- — Cost of occupational therapy or training
- — Funeral and burial expenses[10]
- — Cost of making home or vehicle handicap accessible

☐ Physical pain and suffering
- — Pain and suffering from physical injuries[11]
- — Pain and suffering from prolonged immobilization for treatment of injury[12]

Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations, 50 A.L.R. 4th 787; Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 A.L.R. 2d 259; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons, 48 A.L.R. 4th 229; Effect of anticipated inflation on damages for future losses—modern cases, 21 A.L.R. 4th 21.

[7]See Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death, 45 A.L.R. 3d 345.

[8]See Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259; Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury, 37 A.L.R. 2d 364.

[9]See Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259.

[10]See Common-law recovery of funeral expenses from tortfeasor by husband, wife, or other relative of deceased, 3 A.L.R. 2d 932; What are necessary funeral expenses within coverage of medical payment and funeral expense provision of insurance policy, 87 A.L.R. 3d 497.

[11]See Pain and Suffering, 23 Am. Jur. Proof of Facts 2d 1; Thresholds of Pain, 8 Am. Jur. Proof of Facts 3d 91; Admissibility, in civil case, of expert evidence as to existence or nonexistence, or severity, of pain, 11 A.L.R. 3d 1249; Per diem or similar mathematical basis for fixing damages for pain and suffering, 3 A.L.R. 4th 940; Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain, 90 A.L.R. 2d 1071; Showing Pain and Suffering, 5 Am. Jur. Trials 921.

[12]See Complications Due to Immobilization, 39 Am. Jur. Proof of Facts 2d 545.

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— Pain and suffering in the future[13]
— Subjective pain and suffering not readily apparent to layperson[14]

☐ Mental anguish
— Pre-impact fright
— Mental anguish caused by physical disfigurement, anxiety, depression, and other mental suffering or illness[15]
— Anxiety as to future disease or condition[16]
— Physical injuries or manifestations of mental anguish[17]
— — Harm from loss of sleep
— — Sexual dysfunction[18]
— — Anosmia (loss of sense of smell)[19]
— — Past and future loss of enjoyment of life[20]

Damages Recoverable By Dependents or Heirs of Injured Person

☐ Economic
— Funeral and burial expenses[21]
— Loss of prospective inheritance[22]

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[13]See Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R. 3d 10.

[14]See Amputation Damages-Phantom Pain and Stump Pain, 9 Am. Jur. Proof of Facts 3d 207.

[15]See Generalized Anxiety Disorders, 27 Am. Jur. Proof of Facts 3d 1; Major Depressive Disorder, 26 Am. Jur. Proof of Facts 3d 1.

[16]See Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R. 4th 13.

[17]See Determining the Medical and Emotional Bases for Damages, 23 Am. Jur. Trials 479.

[18]See Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 A.L.R. 4th 183.

[19]See Anosmia, 27 Am. Jur. Proof of Facts 2d 361.

[20]See Recovery of Damages for Loss of Enjoyment of Life, 24 Am. Jur. Proof of Facts 171; Loss of enjoyment of life as a distinct element or factor in awarding damages for bodily injury, 34 A.L.R. 4th 293.

[21]See Common-law recovery of funeral expenses from tortfeasor by husband, wife, or other relative of deceased, 3 A.L.R. 2d 932; What are necessary funeral expenses within coverage of medical payment and funeral expense provision of insurance policy, 87 A.L.R. 3d 497.

[22]See Proof of Damages in Wrongful Death Damages or Survival Action, 22 Am. Jur. Proof of Facts 3d 251.

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— Loss of financial support[23]
— Loss of household services of spouse[24]
— Loss of minor's services[25]

☐ Noneconomic
— Loss of consortium[26]
— Loss of parental advice and guidance[27]
— Loss of companionship[28]

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[23]See Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259; Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R. 3d 88; Discount Rate for Future Damages, 8 Am. Jur. Proof of Facts 2d 1; Effect of anticipated inflation on damages for future losses—modern cases, 21 A.L.R. 4th 21; Forensic Economics—General Overview; Death of Person in Labor Force, 13 Am. Jur. Proof of Facts 2d 45; Forensic Economics-Death of Person Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations, 50 A.L.R. 4th 787; Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 A.L.R. 2d 259; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons, 48 A.L.R. 4th 229; Effect of anticipated inflation on damages for future losses—modern cases, 21 A.L.R. 4th 21.

[24]See Damages for Loss of Housewife's Services, 13 Am. Jur. Proof of Facts 193; Forensic Economics-Death of Person Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311; Proof of Lost Earning Capacity, 29 Am. Jur. Proof of Facts 3d 259; Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker, 47 A.L.R. 4th 100; Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action, 77 A.L.R. 3d 1175; Forensic Economics-Death of Person Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311.

[25]See Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 A.L.R. 4th 1076; Damages for Wrongful Death of, or Injury to, Child, 20 Am. Jur. Trials 513.

[26]See Wife's Damages for Loss of Consortium, 10 Am. Jur. Proof of Facts 3d 97; Loss of Consortium in Parent-Child Relationship, 27 Am. Jur. Proof of Facts 2d 393; Am. Jur. 2d, Husband and Wife § 455; Loss of Consortium in Parent-Child Relationship, 27 Am. Jur. Proof of Facts 2d 393; Parent's right to recover for loss of consortium in connection with injury to child, 54 A.L.R. 4th 112.

[27]See Am. Jur. 2d, Death § 134; Child's right of action for loss of support, training, parental attention, or the like, against a third person negligently injuring parent, 11 A.L.R. 4th 549; Loss of Consortium in Parent-Child Relationship, 27 Am. Jur. Proof of Facts 2d 393.

[28]See Am. Jur. 2d, Death § 135.

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— Mental anguish and grief[29]
— Mental anguish from witnessing injury/death as bystander[30]

Additional Elements of Damages

☐ Damage to or destruction of vehicle and property[31]
— Cost of repair
— Dimunition in value
— Loss of use[32]
— Towing and storage
— Contents of vehicle or trailer

☐ Pre-judgment interest[33]

☐ Court costs

☐ Attorney's fees

☐ Punitive or exemplary damages[34]

NOTE: Because defendants in roadside hazard cases are often governmental entities, there are often statutory caps on the type or amount of damages recoverable.[35] Plaintiff's counsel should consult their jurisdiction's tort claims act when evaluating whether to take a prospective case.

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[29]See Am. Jur. 2d, Death § 126; Recovery of damages for grief or mental anguish resulting from death of child—modern cases, 45 A.L.R. 4th 234.

[30]See Bystander Recovery for Negligently Inflicted Mental Distress, 35 Am. Jur. Proof of Facts 2d 1; Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or Refinements Thereof, 96 A.L.R. 5th 107; Relationship Between Victim and Plaintiff—Witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Is Not Member of Victim's Immediate Family, 98 A.L.R. 5th 609; Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another, 99 A.L.R. 5th 301.

[31]See Damages for Injury to Personal Property-Motor Vehicle, 18 Am. Jur. Proof of Facts 3d 239.

[32]See Recovery of loss of use of motor vehicle damaged or destroyed, 18 A.L.R. 3d 497.

[33]See Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in tort actions, 40 A.L.R. 4th 147; Recovery of prejudgment interest on wrongful death damages, 96 A.L.R. 2d 1104.

[34]See Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 A.L.R. 5th 195.

[35]See § 3.

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III. ELEMENTS OF PROOF

§ 30 Defendant's liability for failure to properly design, construct, or maintain roadside: Checklist

Counsel should work to obtain evidence of the following facts and circumstances, among others, to show that a defendant or defendants are liable for injury or damage as a result of a roadside hazard:

☐ Identification of potential defendants
— control of roadside
— ownership of roadside
— responsibility for maintenance of roadside
— exclusive or concurrent control, ownership or responsibility
— control, ownership or responsibility existing at time of alleged breach
— agreement or contract assigning control, ownership or responsibility
— other actors that caused plaintiff to encounter roadside hazard

☐ Jurisdiction over defendants
— state court
— federal court
— statutory claims tribunal or board
— involvement, if any, of foreign nation or citizens

☐ Controlling laws
— Federal Tort Claims Act (FTCA)
— state's tort claims act
— damage caps
— sovereign immunity

☐ Defendant's duty
— plaintiff's status: invitee, licensee, trespasser
— plaintiff's knowledge of hazard
— plaintiff's familiarity with roadside
— industry standards
— common law for premises liability
— common law for negligent activity
— common law for nuisance
— statutes
— internal agency or department regulations
— sovereign immunity

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- — discretionary function
- — recreational use statute
- — duty to properly design
- — duty to properly construct
- — duty to properly maintain
- — duty to properly inspect for and identify hazards
- — duty to properly warn
- — duty to properly correct condition; barriers, removal

☐ Unreasonably dangerous condition
- — previous collisions
- — subsequent collisions
- — industry standards
- — internal defense memoranda recommending improvements/repairs
- — reputation of road
- — defendant's own actions at other locations
- — defendant's previous actions at this location
- — hazard
  - — — location of hazard
  - — — type of hazard
  - — — condition of hazard
  - — — type of road; freeway, arterial, residential, rural, collector
  - — — road's average daily traffic
  - — — slope of roadside
  - — — vulnerability of hazard

☐ Defendant knew or should have known of danger
- — previous collisions (not subsequent collisions)
- — industry standards
- — internal defense memoranda recommending improvements/repairs
- — reputation of road
- — defendant's own actions at other locations
- — defendant's previous actions at this location
- — efforts, if any, of defendant to identify roadside hazard
  - — — frequency of inspection
  - — — date of last inspection prior to collision
  - — — extensiveness of inspection
  - — — qualifications of persons conduction inspection
  - — — maintenance measure taken or foregone
- — duration of existence of hazard

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- — conspicuity of hazard
- — notoriety of hazard

☐ Hazard or defendant's act/omission caused plaintiff's collision/injuries
- — collision/injuries foreseeable result of hazard or defendant's negligence
  - — — previous collisions
  - — — subsequent collisions
  - — — industry standards
  - — — internal defense memoranda recommending improvements/repairs
  - — — reputation of road
  - — — defendant's own actions at other locations
  - — — defendant's previous actions at this location
- — no intervening cause
- — third party driver's actions concurrent cause, not intervening cause
- — no act of God
- — hazard existed for sufficient amount of time for defendant to correct/warn
- — plaintiff or driver of plaintiff's car not sole cause

☐ No affirmative defenses
- — no comparative/contributory negligence
  - — — no violation of statutes
  - — — existence of sudden emergency
  - — — defendant's negligence created sudden emergency
  - — — insufficient time to react
  - — — no passenger negligence
  - — — no negligent entrustment
- — no unavoidable accident

§ 31 Proof of various roadside hazards: Cases, regulations, and standards

The following is a list of some of the more typical types of roadside hazards motorists encounter. Each hazard category is followed by a short list of references that discuss the particular hazard. The industry standards mentioned earlier in the article are not repeated here. This is not meant to be an exhaustive listing of the resources available, but rather, merely a starting point for counsel's research in his or her relevant jurisdiction.

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- Visual obstructions[1]
- Slopes and embankments[2]
- Utility poles[3]
- Fixed objects other than utility poles[4]
- Guardrails and barriers[5]

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[1]For purposes of this article, an obstruction is something that exists off of the roadway that affects a traveler's view while attempting to drive within the right of way. This article is focused on roadside hazards. Therefore, it will not address obstructions that exist on the roadway or within the right of way. See Liability of private landowner for vegetation obscuring view at highway or street intersection, 69 A.L.R. 4th 1092; Liability of railroad or other private landowner for vegetation obscuring view at railroad crossing, 66 A.L.R. 4th 885; Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection, 22 A.L.R. 4th 624; Governmental Liability for Failure to Maintain Trees Near Public Way, 41 Am. Jur. Proof of Facts 3d 109.

[2]See Schoff v. City of Somersworth, 137 N.H. 583, 630 A.2d 783 (1993) (city had a duty to install signs warning of an embankment at the end of a dead end and to periodically inspect said signs, therefore, it was not immune).

[3]See The Influence of Utilities on Roadside Safety, A Proposed State-of-the-Art Report by the Utilities Committee of the Transportation Research Board, Federal Highway Administration (draft January 1, 2002); Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 A.L.R. 4th 602; Liability of electric power, telephone, or telegraph company for personal injury or death from fall of pole, 97 A.L.R. 2d 664; Injury to traveler from collision with privately owned pole standing within boundaries of highway, 3 A.L.R. 2d 6; American National Standard Electric Safety Code, § 21,211 (1973 ed.) ("all electric supply communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable.").

23 C.F.R. Part 645 (accommodation of utilities).

[4]Liability, in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway, 19 A.L.R. 4th 532; Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land, 100 A.L.R. 3d 510; Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip, 98 A.L.R. 3d 439; Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R. 3d 778; Liability of private owner or occupant of land abutting highway for injuries or damage resulting from tree or limb falling onto highway, 94 A.L.R. 3d 1160; Injury to traveler from collision with privately owned pole standing within boundaries of highway, 3 A.L.R. 2d 6.

[5]See Highway Defects-Liability for Failure to Install Median Barrier, 50 Am. Jur. Proof of Facts 2d 63; Highway Defects - Barrier or Guardrail, 17

- Shoulders[6]
- Falling objects[7]
- Inadequate or absence of warning signs[8]

IV. PLEADINGS AND DISCOVERY

[The pleadings and discovery included below are provided merely as a general guideline for counsel. They are drafted broadly to encompass the general roadside hazard case and are not tailored to any one specific type of case. The excerpts included are just those questions or allegations relating to roadside hazard cases and are not complete versions of discovery. Counsel are advised to use the following examples as a starting point only and to build upon them according to what is necessary for the specific case and allowed in the relevant jurisdiction.]

Am. Jur. Proof of Facts 413; Governmental tort liability as to highway median barriers, 58 A.L.R. 4th 559.

[6]See Ivey, et. al., Transportation Research Board, National Research Council, A State-of-the-Art Report: The Influence of Roadway Surface Discontinuities on Safety, Chapter 4, (1984) (reflecting results from testing done on various edge drops); Highway Defects-Road Shoulder, 16 Am. Jur. Proof of Facts 2d 1; Liability, in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway, 19 A.L.R. 4th 532.

[7]See Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R. 3d 778; Liability of private owner or occupant of land abutting highway for injuries or damage resulting from tree or limb falling onto highway, 94 A.L.R. 3d 1160.

[8]This article will not address pavement markings or signing not pertaining to roadside features. This article will discuss only signing and other warnings as they pertain to roadside conditions. It is important to note, however, that pavement markings and signing regarding roadway features can play an important role in roadside hazard cases. After all, the primary function of pavement markings and signing is to minimize driver surprise and confusion, thereby, reducing the likelihood that a vehicle will leave the roadway and encounter a roadside hazard.

See Establishing Liability of a State or Local Highway Administration, Where Injury Results From the Failure to Place or Maintain Adequate Highway Signs, 31 Am. Jur. Proof of Facts 3d 351; Highways: governmental duty to provide curve warnings or markings, 57 A.L.R. 4th 342; Defective Design or Setting of Traffic Control Signal, 6 Am. Jur. Proof of Facts 2d 683.

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§ 32 Sample petition or complaint alleging negligence for failing to reduce or eliminate a roadside hazard, or warn of same

[CAPTION OF CASE]

COME NOW, Plaintiffs, Spouse, Individually and as Administrator of the Estate of Deceased and as Next Friend of Child Boy and Child Girl, Minors to bring this lawsuit against Defendant State Department of Transportation for the wrongful death of Deceased.

[DESCRIPTION OF THE PARTIES]

[EXPLANATION OF JURISDICTION AND VENUE]

[CONDITIONS PRECEDENT & PREREQUISITES FOR STATE TORT CLAIMS ACT]

[RESPONDEAT SUPERIOR OR THEORY OF AGENCY]

[FACTS]

NEGLIGENCE

Plaintiffs allege that Defendant was negligence in at least one of the following ways:

1. Improperly designing/constructing/maintaining the road's shoulders such that:
   a. they became soft and slippery when subjected to automobile traffic;
   b. because of their composition, they provided inadequate contrast in color and texture from the traveled right-of-way;
   c. they became irregular and rough creating a washboarding effect for travelers;
   d. they were uneven and significantly lower than the traveled right-of-way;
   e. they were of irregular width, and at certain points, significantly narrowed without warning;
   f. they did not allow for the proper drainage from the roadway, creating pooling and flooding on the shoulders and roadway;
   g. they were not free from obstacles, obstructions, and fixed objects.
2. Improperly designing/constructing/maintaining the

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area adjacent to the roadway, such that:

a. there were insufficiently deep ditches to allow for proper drainage creating pooling and flooding on the roadway;
b. trees, brush, and other vegetation obstructed travelers' view of road signs;
c. trees, brush, and other vegetation obstructed travelers' view at intersections;
d. trees, brush, and other vegetation obstructed travelers' view around curves, significantly limiting sight distance;
e. trees/culverts/headwalls/utility poles/fixed objects were improperly allowed to remain unprotected on the roadside preventing a clear recovery area for errant vehicles;
f. the slope of the road side is improperly severe too close to the roadway;
g. unsafe drainage devices and covers were installed/allowed to remain unprotected on the road side;
h. building, construction, and repair equipment and materials were improperly stored/allowed to remain unprotected on the road side;
i. barriers were not properly installed/maintained/replaced/upgraded to protect travelers from road side hazards.

3. Improperly failing to institute/implement/follow policies or procedures for:
   a. inspecting the road sides for obstructions, fixed objects, or other dangerous conditions;
   b. removing or protecting obstructions, fixed objects, or other dangerous conditions on the road side to provide a clear recovery area;
   c. installing, inspecting, repairing, replacing, upgrading and maintaining drainage devices on the road side;
   d. inspecting the shoulders and road sides for areas in need of maintenance;
   e. installing, inspecting, repairing, replacing, upgrading and maintaining barriers and other safety devices on the road side;
   f. collecting, maintaining, and evaluating collision data for its roads to identify high collision areas;
   g. maintaining the shoulders of the road in a travers-

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able and safe condition;

h. maintaining the road sides so that they drain properly;
i. maintaining, trimming, mowing, or removing vegetation on the road sides so that road signs are not obscured/roads side hazards are observable/sight distances are not adversely affected;
j. maintaining the road sides free from obstacles, obstructions and fixed objects;
k. installing, inspecting, repairing, replacing, upgrading and maintaining road signs and other warning devices on the road side.

4. Improperly designing/constructing/maintaining barriers such that:
   a. the barrier was located in an unsafe, inappropriate or ineffective position;
   b. the barrier could not effectively stop or redirect a vehicle;
   c. the barrier's condition prevented it from effectively stopping or redirecting vehicles;
   d. the barrier's design was unsafe, inappropriate or ineffective at that location and for that purpose.
5. Improperly failing to warn of unreasonably dangerous conditions by:
   a. failing to install a road sign warning travelers of unreasonably dangerous conditions;
   b. failing to maintain road signs in a reasonable condition such that they can be read by travelers;
   c. failing to promptly and reasonably repair and/or replace damaged, destroyed or stolen road signs;
   d. failing to properly install road signs at locations where they will effectively warn travelers of unreasonably dangerous conditions.
6. Improperly failing to hire, train, supervise employees/agents/representatives to [insert appropriate negligence allegations from above].
7. Improperly failing to terminate incompetent, reckless, and negligent employees/agents/representatives who [insert appropriate negligence allegations from above].

Each of the above acts or omissions, taken together or separately, constituted negligence and were a proximate cause of the Decedent's death and Plaintiffs' damages.

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[OTHER CAUSES OF ACTION AS APPROPRIATE SUCH AS NUISANCE, NEGLIGENCE PER SE].

[DAMAGES]

[PRAYER]

§ 33 Sample request for production of documents to state department of transportation

[CAPTION]

[INSTRUCTIONS]

[DEFINITIONS]

REQUESTS FOR PRODUCTION

1. The entire set of full scale plans, including, but not limited to, drawings, specifications, or other engineering documents used in the original design and/or construction of the road in question.
2. The entire set of full scale plans, including, but not limited to, drawings, specifications, or other engineering documents used in all renovations, restorations, or resurfacing of any area of the road in question within five miles in either direction of the location of the incident in question.
3. All diaries of Defendant's supervisors, inspectors, or employees for or relating to the original design and construction of the road in question.
4. All diaries of Defendant's supervisors, inspectors, or employees for or relating to all renovations, restorations, or resurfacing of any area of the road in question within five miles in either direction of the incident in question.
5. All documents, plans, surveys, memoranda, or drawings relating to [signs or other traffic control devices/drainage devices/barriers/etc.] recommended or planned for, whether or not installed, on the road in question within one mile in either direction of the incident in question.
6. All documents, records, correspondence, memoranda regarding all engineering studies made to determine the [traffic control device/drainage device/barrier/etc.] requirements for the road in question within one mile in either direction of the incident in question.
7. All documents, reports, surveys, recommendations,

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audits, or assessments relating to inspections of any area of the road in question within five miles in either direction of the incident in question during the period of ten years before the incident in question to present. This includes inspections conducted by the Defendant as well as those performed by any other entity, public or private.

8. All correspondence, letters, complaints, memoranda, telephone messages, and e-mail messages between the public and Defendant regarding [the defects] in question during the period of five years before the incident in question to present.
9. All documents, records, reports, spreadsheets, evaluations, or compilations created, kept, or maintained on motor vehicle collisions on the road or roadside in question within five miles in either direction of the incident in question during the period of five years before the incident in question to present.
10. All documents, records, reports, spreadsheets, evaluations, or compilations created, kept, or maintained which reflect the average daily traffic (ADT) count for traffic on the road in question at the location of the incident in question during the period of five years before the incident in question to present.
11. Full scale reprints of any aerial photographs of the road in question at the location of the incident in question.
12. Any and all policies, regulations, internal memoranda, letters, documents, pamphlets, manuals, handbooks, and videotapes pertaining to Defendant's procedures and practices regarding maintenance of [type of defects in question].
13. Any and all policies, regulations, internal memoranda, letters, documents, pamphlets, manuals, handbooks, and videotapes pertaining to Defendant's procedures and practices regarding inspection of [type of defects in question].
14. Any and all policies, regulations, internal memoranda, letters, documents, pamphlets, manuals, handbooks, and videotapes pertaining to Defendant's procedures and practices regarding upgrading of [type of defects in question].
15. Any and all policies, regulations, internal memoranda, letters, documents, pamphlets, manuals, handbooks,

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and videotapes pertaining to Defendant's procedures and practices regarding installing of [type of defects or protective device in question].

16. Any records, documents, receipts, or memoranda indicating any and all sources of funding for the initial design and construction of the road in question.
17. Any records, documents, receipts, or memoranda indicating any and all sources of funding for all renovations, restorations or resurfacing of any area of the road in question within five miles in either direction of the location of the incident in question.
18. Any records, documents, receipts, or memoranda indicating any and all sources of funding for all maintenance projects on any area of the road in question within five miles in either direction of the location of the incident in question.
19. All contracts, payroll records, agreements, or memoranda between Defendant and any other entity, private or public, for the initial design and construction of the road in question.
20. All contracts, payroll records, agreements, or memoranda between Defendant and any other entity, private or public, for any renovation, restoration, or resurfacing of the road in question within five miles in either direction of the location of the incident in question.
21. All contracts, payroll records, agreements, or memoranda between Defendant and any other entity, private or public, for any maintenance or repair projects on the road or roadside in question within five miles in either direction of the location of the incident in question.
22. Minutes, notes, attendance records, or other recordations of safety meetings held by, for, or at the request of, Defendant by the Defendant or any other entity during the period of five years before the incident in question to present.
23. All documents, manuals, handbooks, policy statements, or pamphlets describing the duties of any of Defendant's employees charged with responsibility for the safety of the traveling public.
24. All documents, manuals, handbooks, policy statements, or pamphlets regarding the safety of the traveling public.

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25. All documents, memoranda, reports, or correspondence indicating the functional classification of the road in question at the location of the incident in question.
26. The entire personnel files of all individuals working for Defendant or any firm or contractor employed by Defendant in a supervisor, inspector, engineer, design engineer, traffic engineer, or highway engineer position for the original design and construction of the road in question at the location of the incident in question.
27. The entire personnel files of all individuals working for Defendant or any firm or contractor employed by Defendant in a supervisor, inspector, engineer, design engineer, traffic engineer, or highway engineer position for any renovation, restoration or resurfacing of any area of the road in question within one mile in either direction of the location of the incident in question.
28. The personnel files of all persons in charge of highway construction and maintenance in the district containing the location of the incident in question for the period of twenty years before the incident in question to present.
29. The personnel files of all sub-district supervisory personnel involved in the highway construction and maintenance in the district containing the location of the incident in question for the period of twenty years before the incident in question to present.
30. The log of the Project Engineer involved in the original design and construction of the road in question at the location in question.
31. The log of the Project Engineer involved in any renovation, restoration or resurfacing of any area of the road in question within one mile of the location of the incident in question.
32. Any "as built" survey of the road in question that includes any portion of the area within one mile in either direction of the location of the incident in question.
33. All documents, titles, surveys, abstracts, plats, purchase agreements, deeds, easements or grants for land that includes the area of the road in question at the location of the incident in question from the time

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the land was originally acquired by Defendant until present.

§ 34 Sample interrogatories to state department of transportation

[CAPTION]

[INSTRUCTIONS]

[DEFINITIONS]

INTERROGATORIES

1. Who designed the road [culvert, barrier, etc.] in question at the location of the incident in question? Please identify all persons who planned or designed the road [culvert, barrier, etc.] in question with their name, address, telephone number, position, duties on the project, employer at the time, and current employer.
2. Who built or constructed the road [culvert, barrier, etc.] in question at the location of the incident in question? Please state:
   a. what exactly has been done,
   b. when it was done,
   c. the name, address, telephone number, position and duties of every person who worked in a supervisory or inspector capacity for Defendant in connection with the project(s),
   d. the name, address, telephone number, position and duties of every person who worked as a contractor, subcontractor, independent contractor, partnership or sole proprietorship who worked in connection with the project(s).
3. Has the road in question been resurfaced, repaired, or restored in any way at the location of the incident in question since the time of the incident in question? If so, please state:
   a. what exactly has been done,
   b. when it was done,
   c. the name, address, telephone number, position and duties of every person who worked in a supervisory or inspector capacity for Defendant in connection with the project(s),
   d. the name, address, telephone number, position and

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duties of every person who worked as a contractor, subcontractor, independent contractor, partnership or sole proprietorship who worked in connection with the project(s).

4. At the time of the incident in question, what was the functional classification of the road in question at the location of the incident in question?
   a. freeway?
   b. expressway?
   c. arterial highway?
   d. collector highway?
   e. local road?
   f. If none of the above, please indicate the functional classification.
5. If at the time of the incident in question, the road in question at the location of the incident in question was an expressway, did freeway design standards apply to it?
6. At the time of the incident in question, was the road in question a rural or urban road at the location of the incident in question?
7. What was the state-wide accident rate for locations of similar classification to the road in question at the location of the incident in question at the time of the incident in question for five years before and including the year of the incident in question to present? Please also indicate the source of this response.
8. What criteria did Defendant use in identifying hazardous roadway locations during the period of five years before and including the year of the incident in question to present?
9. What criteria did Defendant use in identifying roadway locations that needed safety improvements during the period of five years before and including the year of the incident in question to present?
10. How much must the accident rate, injury rate, and/or fatality rate on a section of road exceed the state average for similar classifications each year for the section of road to be considered "hazardous" or "dangerous" during the period of five years before and including the year of the incident in question to present?
11. What criteria did Defendant use to determine the priority to be given roadway locations requiring safety

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improvements during the period of five years before and including the year of the incident in question to present?

12. How much did Defendant spend each year on roadway safety improvements in the state during the period of five years before and including the year of the incident in question to present?
13. Please indicate whether the money Defendant spent each year on roadway safety improvements in the state during the period of five years before and including the year of the incident in question to present came from state government funds, Federal government funds, or both.
14. How much money did the Federal government make available each year to Defendant for roadway safety improvements during the period of five years before and including the year of the incident in question to present?
15. Were Federal funds used in the initial design of the road in question? If so, please state the date, amount and reason for such expenditure.
16. Were Federal funds used in the initial construction of the road in question? If so, please state the date, amount and reason for such expenditure.
17. Were Federal funds used in any subsequent improvements to, changes in, or additional construction of the road in question at the location in question? If so, please state the date, amount and reason for such expenditure.
18. What is the Average Daily Traffic (ADT) of the road in question at the location in question each year during the period of five years before and including the year of the incident in question to present? Please identify the source of this response as well as who conducted the traffic counts used, where exactly on the road the counts were made, and when (days and time of day) they were performed.
19. Prior to the incident in question, was there ever a warning sign or other warning device on either the ________ bound or ________ bound side of the road in question indicating ________. If so, please state what exact type of sign or device was there and what period of time it existed.
20. At the time of the incident in question, was there a

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warning sign or other warning device on either the ________ bound or ________ bound side of the road in question indicating ________. If so, please state what exact type of sign or device was there and what period of time it existed.

21. Prior to the incident in question, was there ever a barrier of any type on either the ________ bound or ________ bound side of the road in question protecting travelers from ________. If so, please state what exact type of barrier that was there and what period of time it existed.
22. At the time of the incident in question, was there a warning sign or other warning device on either the ________ bound or ________ bound side of the road in question protecting travelers from ________. If so, please state what exact type of barrier that was there and what period of time it existed.
23. Prior to the incident in question, when was the last time that the road [shoulder, culvert, etc.] in question at the location in question was inspected in any way? Please state who performed such inspection, where, why it was inspected, and what exactly was done?
24. Prior to the incident in question, when was the last time that any maintenance was performed to the road [shoulder, culvert, etc.] in question at the location in question? Please state who performed such maintenance, where, why, and what exactly was done?
25. Has any claim for damages been made against the Defendant, other than Plaintiffs' claim, for injuries received on the road in question at the location of the incident in question from 10 years before the incident in question to present? If so, please state the name and address of the claimant, date of injury, and describe the claim and any amount paid or awarded.
26. Has anyone, other than the Deceased, been injured or killed on the road in question at the location of the incident in question, whether or not from the same defect or instrumentality, from 10 years before the incident in question to present? If so, please state the name and address of the injured or deceased person, date of injury or death, and describe the incident in detail.
27. Has Defendant made any changes, renovations, alterations, upgrades, repairs, or restorations of the road in question at the location of the incident in ques-

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tion since the incident in question? If so, please describe in detail what exactly was done, when, why, and by whom.