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County Immunity—County Not Liable for Personal Injuries Suffered in an Accident Caused by the Removal of a Stop Sign from a Hazardous Intersection: *McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966)

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COUNTY IMMUNITY—COUNTY NOT LIABLE FOR PERSONAL INJURIES SUFFERED IN AN ACCIDENT CAUSED BY THE REMOVAL OF A STOP SIGN FROM A HAZARDOUS INTERSECTION—*McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966).

The plaintiff was a passenger in a vehicle traveling north on a graveled county road. The vehicle collided at an intersection with a car traveling east on another graveled county road, which had been designated an arterial. A stop sign which had protected the east-west road had been removed about one week prior to the accident by employees of the county, and no temporary stop signs or warning signs had been substituted. The driver of the vehicle in which plaintiff was riding was not familiar with the intersection in question. The driver of the eastbound car was familiar with the intersection, and knew that some stop signs in the area had been removed for repainting and repair; but it was not conclusively determined at the trial whether he knew that this particular stop sign had been removed. (The jury determined that the defendant driver was not negligent as to the notice of stop signs being removed in the general area of the accident. He testified that he did not know that the particular stop sign in question had been removed for repainting and repair.)

The trial court dismissed the defendant county at the close of plaintiff's evidence. The jury returned a verdict for the defendant driver of the eastbound car. On appeal the Supreme Court of Nebraska affirmed as to both defendants, holding that a county is immune from liability for personal injuries which are caused by an accident that results when the county removes a stop sign, which protects an arterial road and a hazardous intersection, for the purpose of repair and negligently fails to put a warning in its place.

HISTORY OF COUNTY IMMUNITY

The rule of county immunity arose from the English case of *Russell v. Men of Devon*.[1] This case was a tort action against one hundred men of the community who had done a public service by building a bridge. The court said it was "better that an individual should sustain an injury than that the public should suffer an injustice."[2] It was better that the public service continue than to hold it liable to an individual. Thus the rule is based on a preference to use public funds for public service rather than private indemnification. The rule was also based on necessity, that is, the

[1] 100 Eng. Rep. 359 (1788).

[2] *Id.* at 362.

county did not have enough money to carry out its functions and also to satisfy personal judgments.[3]

The doctrine of county immunity has been established in Nebraska by the case of *Wehn v. Commissioners of Gage County*,[4] which cites the *Russell* case.

COUNTIES AND MUNICIPAL CORPORATIONS DISTINGUISHED

A county is a political subdivision and a creation of state government. It differs from a municipal corporation in that it is not created by the request and consent of the residents thereof.[5] A distinction is generally recognized between the liability for negligence of a municipal corporation and that of a county.[6] In Nebraska the liability of a county for negligence is imposed by statute.[7]

At the common law a county was not obligated to keep its roads in repair so as to make them reasonably safe for travel, while a municipal corporation was, as the maintenance of roads was considered a "proprietary" rather than a "governmental" function. Much of the discussion that follows deals with cases involving municipal corporations, but the theories that deal with possible municipal liability for the negligent maintenance of stop signs are suitable for application to county liability.[8]

NEBRASKA STATUTES APPLIED

Two Nebraska statutes had to be construed in *McKinney v. County of Cass*, NEB. REV. STAT. § 39-834 (Reissue 1960),[9] and NEB.

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[3] Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[4] 5 Neb. 494, 25 Am. Rep. 497 (1887).

[5] Woods v. Colfax County, 10 Neb. 552, 7 N.W. 269 (1880).

[6] The case of Stitzel v. Hitchcock County, 139 Neb. 700, 298 N.W. 555 (1941), says that the liability of a municipal corporation depends on whether the damages arose from a governmental or a proprietary function. These two functions are the two classes of municipal power. Under the former the municipality acts as a sovereign and governs its inhabitants. Under the latter the municipality acts for its own private advantage. These functions or powers are separate and distinct. The municipality is not liable for the negligent performance of a governmental function, but can be held for the negligent performance of a discretionary or proprietary function. Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220 (1929).

[7] Stitzel v. Hitchcock County, 139 Neb. 700, 298 N.W. 555 (1941).

[8] Berglund v. Spokane County, 4 Wash.2d 309, 103 P.2d 355 (1940).

[9] Defective bridge or highway; damages; when county liable; limitation. If special damage happens to any person, his team, carriage or

REV. STAT. § 39-729 (Reissue 1960).[10] The former statute waives county immunity when personal injuries occur as a result of the "insufficiency or want of repair of a highway." The latter gives the county the power to erect and maintain stop signs where "it is deemed advisable."

In the principle case the County of Cass erected a stop sign, then removed it for repainting and repair and put no other warning in its place. This latter action would seem to indicate that the county violated the direction of NEB. REV. STAT. § 39-729 (Reissue 1960), in that, by removing the stop sign and putting no warning in its place the county failed to "maintain" the stop sign. The word "maintain" is practically the same thing as "repair," which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction, and, when used in reference to railroad right of way, includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended.[11] It could be argued that the County of Cass, by removing the sign, did not "maintain" the sign for the purpose for which it was intended, that is, to protect an arterial road and warn the traveler of a dangerous intersection; although it could also be argued that "maintain" means simply to keep the sign in repair so that it is readable. NEB. REV. STAT. § 39-729 (Reissue 1960), does not impose a duty on the county to erect stop signs, but the language of the statute can be construed by the court to mean that once a stop sign has been erected there is a duty to maintain it in such a way that so long as there is a dangerous intersection there will be a warning sign to protect it.

In *Olson v. Wayne County*, the syllabus states:

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other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the persons sustaining the damage may recover in an action against the county....

10 "Flares, stop signs, traffic signals, warning signs; designing, manufacture and installation; powers of Department of Roads, county boards; costs, when paid by railroads; right of way.

In order to further promote safety, power is conferred upon the Department of Roads to devise and supervise the manufacture and erection of stop signs, red flares, traffic signals, traffic lights, or warning signs, and to erect and maintain such of them on state highways and at railroad crossings where the same intersect highways, where, in the judgment of the department, it is deemed advisable. In order to further promote safety, the power is conferred upon county boards to purchase and erect stop signs or warning signs and to erect and maintain such of them at all intersections on county highway systems, where, in the judgment of the county boards, it is deemed advisable."

11 Missouri, K. & T. Ry. Co. v. Bryan, 107 S.W. 572 (Tex. Civ. App. 1908).

12 157 Neb. 213, 59 N.W.2d 400 (1953).

> A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location.[13]

It has been stated in construing NEB. REV. STAT. § 39-834 (Reissue 1960), that,

> A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.[14]

It is also stated that, "this important word 'insufficiency,' was used in this section, may be defined as being inadequate to the need, use, or purpose of the highway."[15]

It can reasonably be said that an intersection with a road that has been designated an arterial, and has for some time been treated as an arterial by those who use it, is not "reasonably safe" for even a cautious traveler when the stop signs protecting it are abruptly taken down and alternative warning signs are not substituted. This was especially true in *McKinney*, where the stop sign in question had been protecting a "blind" intersection.

These arguments for imposing a duty on the county to maintain warning signs are supported by the fact that traffic accidents are increasing at an alarming rate. The possibility of being held liable for negligence would make the county more alert in carrying out its governmental functions.

When these two statutes are construed together a strong case can be made for holding the county liable. It would not be hard to say that: (1) such stop signs should be considered part of the highway since they are to be erected at intersections "on county highway systems," (2) the county has a duty to maintain a stop sign once it has been deemed advisable to erect it, and (3) a failure to maintain said sign is an insufficient repair of the highway for which the county is liable if personal injuries result therefrom.

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[13] *Id.* at 214, 59 N.W.2d at 402.

[14] Olson v. Wayne County 157 Neb. 213, 219, 59 N.W.2d 400, 404 (1953). *Accord*, Shields v. County of Buffalo, 161 Neb. 34, 71 N.W.2d 701 (1955); Wittwer v. County of Richardson, 153 Neb. 200, 43 N.W.2d 505 (1950); Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W.2d 559 (1945).

[15] Olson v. Wayne County, 157 Neb. 213, 219, 59 N.W.2d 400, 404 (1953).

THE LAW OF JURISDICTIONS OTHER THAN NEBRASKA

Generally it was held at the common law that the maintenance and repair of the streets so as to keep them reasonably safe for travel is a corporate duty for which a municipal corporation was liable for negligence.[16] A county on the other hand was under no such common law duty,[17] but NEB. REV. STAT. § 39-834 (Reissue 1960), has placed a similar duty on counties. This leads to the distinction that has been made between the physical condition of the roadway, and its use by the public. It is said that the keeping of the street safe for travel relates to the physical condition of the street and is a proprietary function for which there is liability, while the use of that street by the public and the making and enforcing of traffic regulations and warnings is a governmental function for which there is no liability.[18] There are many cases that have held the government liable where the traffic control actually became a physical obstruction in the roadway which resulted in injury, as where a car actually hits a stop sign which is in the middle of the road.[19] In those cases the liability was based on the fact that there was a physical defect in the street rendering it unsafe for travel.[20]

The issue then arises as to whether a stop sign is part of the street, that is a physical appurtenance thereto. If the stop sign becomes a physical appurtenance to the street then it becomes part of the physical condition of the street for which there is a duty to keep in reasonable repair. This theory has not been universally accepted, in fact the majority of jurisdictions do not recognize it and simply hold the government not liable on the basis that the regulation of traffic is a governmental function.

On the other hand there have been a number of recent cases that have adopted the theory.[21] Michigan has enacted a statute[22] that is very similar to NEB. REV. STAT. § 39-834 (Reissue 1960).

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16 18 E. McQuillan, MUNICIPAL CORPORATIONS, § 53.41 (3d ed. rev. 1963)

17 40 C.J.S. *Highways* § 250 (1944).

18 Auslander v. City of St. Louis, 332 Mo. 145, 56 S.W.2d 778 (1933); Kirk v. City of Muskogee, 183 Okla. 536, 83 P.2d 594 (1938).

19 Auslander v. City of St. Louis, 332 Mo. 145, 56 S.W.2d 778 (1933); Kirk v. City of Muskogee, 183 Okla. 536, 83P.2d 594 (1938).

20 Kirk v. City of Muskogee, 183 Okla. 536, 83P.2d 594 (1938).

21 *See, e.g.*, Wagshal v. District of Columbia, 216 A.2d 172 (D.C. 1966).

22 MICH. STAT. ANN. § 9.591 (1958). This section has since been repealed and replaced by MICH. STAT. ANN. §§ 3.996(101)-(115) (1965), which sets out a statutory scheme allowing recovery from a governmental agency for failure to keep in repair the "improved portion of the highway designed for vehicular travel." This new provision seems to limit liability to defects in the road surface itself.

The case of *O'Hare v. City of Detroit*[23] has a factual situation very similar to that of the principle case,[24] and also construes the Michigan statute. *O'Hare* states,

> It seems obvious to us that once a municipality has decided to exercise the discretion vested in it to declare one street a through street and erect a stop sign facing the subordinate street, and the stop sign becomes an important part of the physical appurtenance of the street.[25]

The results in *O'Hare* and *McKinney* are directly opposed to each other. In each case the plaintiff was a passenger whose driver was traveling on a stop street on which the stop sign was not in place. Yet, the Michigan court felt that once a stop sign was erected, it became a physical appurtenance of the street, as opposed to the Nebraska court which felt that the statutory liability extended no farther than the traveled surface of the roadbed. The reasoning which led to the *O'Hare* result was based on safety and the fitness of the street for travel. The reasoning leading to the *McKinney* result seems to be a desire not to change the common law rule of non-liability, and to strictly construe NEB. REV. STAT. § 39-834 (Reissue 1960). The *O'Hare* case was cited to the Nebraska court on appeal, but the court was unwilling to adopt its reasoning.

One oft-cited case accepts the physical appurtenance theory and finds the governmental unit liable without a statute.[26] The case reasons that once traffic control devices are erected they become a mechanical appurtenance of the street, and states that a mechanical structure can exercise no discretion as a policeman is able to do. Since no discretion is involved, the "discretionary function" distinction is removed and liability can be found. This case bases its reasoning, as does *O'Hare*, on the theory that traffic control devices have a pronounced effect on the safety of the streets.[27]

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[23] 362 Mich. 19, 106 N.W.2d 538 (1960).

[24] The plaintiff, a passenger, was traveling on what was ordinarily a stop street, but the stop sign had been knocked down the day before by a truck. Plaintiff's driver entered the unprotected intersection and was struck by a bus. The plaintiff sustained personal injuries and brought suit against the city. The city claimed governmental immunity, but the Michigan Supreme Court reversed the trial court and found for the plaintiff.

[25] 362 Mich. 19, 22, 106 N.W.2d 538, 540 (1960).

[26] Johnston v. City of East Moline, 338 Ill. App. 220, 87 N.E.2d 22 (1949).

[27] The factual situation in Johnston is more adapted for a determination of governmental liability than are those of O'Hare and McKinney. In Johnston a damaged signal light had been removed at an intersection, while the other signals remained in operation. The plaintiff was invited into the intersection by a green light while the other

The safety of the traveler depends on the warnings that he will receive apprising him of the fact that a dangerous condition lurks ahead.

> Under the law, traffic approaching an arterial from an intersecting street must yield the right of way, regardless of the general rule. This exception to the law giving the driver on the right preference becomes an absolute menace unless drivers approaching an arterial are warned of the fact.... Plaintiff here was not familiar with the physical situation, and, in the absence of the usual warnings and stop signs, had no notice of the fact that he was approaching an intersecting arterial highway where he was required to yield the right of way to traffic approaching from either direction.[28]

There is little doubt that the average traveler relies on warning signs to protect himself from dangerous situations in the course of his travel,[29] thus it seems that for a highway to be reasonably safe for its travelers, warning signs must be maintained where they are necessary. If this reasoning would be followed, the governmental unit would be liable under the factual situation found in the principle case.

A discussion of the negligent failure to maintain a stop sign would not be complete without mentioning the possibility of recovery on the basis of nuisance, that is, when a stop sign is removed, it is no longer serving the purpose for which it was erected. Therefore drivers are lured into the unprotected intersection. Generally it is held that there is no actionable nuisance created when the government fails to properly maintain a traffic control device.[30] Such decisions say that this maintenance of traffic controls is a governmental function, so there is no liability,[31] or that the government is under no duty to maintain such controls, therefore a nuisance cannot be created for failure to do so.[32]

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driver involved entered the intersection because the control which would have signalled him to stop had been removed. The government in Johnston created a trap which made it more likely for an accident to occur. In O'Hare and McKinney the plaintiff's driver entered the intersection relying on the absence of a dangerous condition on the basis that no warning was afforded them, as opposed to Johnston where the plaintiff relied on the invitation of a green light to enter the intersection. This does not mean that the result in O'Hare is wrong, but it is distinguishable in that O'Hare reasoned that a driver should be warned of his approach to a designated arterial.

28 Lyle v. Fiorito, 187 Wash. 537, 544, 60 P.2d 709. 713 (1936).

29 Keep in mind that the law requires a driver to maintain a proper lookout when driving.

30 Annot., 161 A.L.R. 1404 (1946).

31 Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E.2d 357 (1945).

32 Kirk v. City of Muskogee, 183 Okla. 536, 83 P.2d 594 (1938).

LEGISLATIVE PROPOSAL

The doctrine of county immunity is a court-made rule and therefore it is within the proper authority of the court to overrule the doctrine.[33]

In 1966 the Nebraska Supreme Court overruled the charitable immunity doctrine in the case of *Myers v. Drozda*.[34] The case is significant because it shows an emphasis on compensation to injured plaintiffs, and it establishes a Nebraska precedent for overruling outmoded rules.

It is true in the principle case that the legislature has acted to remove part of the court-made rule of county immunity. This should not stop the court from removing governmental immunity from tort liability where the legislature has not specifically done so.[35] The Nebraska court has deemed it advisable to remove one area of tort liability from immunity; so it would seem plausible that it should remove another area of immunity, that is, in the area of county immunity for the insufficient maintenance of warning signs and traffic controls.

The court in *McKinney* said, "The duty of the county will not be extended by construction beyond the words and fair implication of the statutory liability."[36] The Nebraska Supreme Court did not see fit to extend the statute to include stop signs within the fair

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[33] Government immunity has been judicially abolished in whole or in part in:
California—Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
Colorado—Colorado Racing Com'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957).
Florida—Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
Illinois—Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).
Minnesota—Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W.2d 795 (1962).
Michigan—Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).
New Jersey—McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960).
Wisconsin—Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
But see Urow v. District of Columbia, 316 F.2d 351 (1963), *citing* 28 U.S.C. § 1346 (1962), 28 U.S.C. §§ 2671-80 (1965); Act July 14, 1960, 74 Stat. 519.

[34] 180 Neb. 183, 141 N.W.2d 852 (1966).

[35] Muscopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[36] McKinney v. County of Cass, 180 Neb. 685, 689, 144 N.W.2d 416, 420 (1966).

implication of the statute. The result reached coincides with the greater weight of authority which holds that a stop sign is not part of the road and that there is only a duty to keep the surface of the road free of physical defects.

Since the Nebraska court has chosen not to extend the concept of governmental tort liability to the negligent removal of stop signs, the burden falls upon the legislature. New York is an example of a state where outright destruction of immunity was accomplished by statute.[37] But perhaps a more reasonable approach was taken by California.[38] There a public entity is to be found liable for injury caused by a "dangerous condition of its property." The dangerous condition must be caused by a negligent act of the government's agent, or one that continues after the government has received notice of the condition and has had a reasonable time to remedy it. A later enactment provides that there is to be no governmental liability for an injury resulting from a plan or design which had been approved by a reasonable legislative body, or that which would have been approved by a reasonable legislative body if no such plan was actually adopted.[39] The question of reasonableness is to be determined by the court.

The California courts have yet to rule on a situation similar to *McKinney*, but they have held that a dangerous condition for which there is liability is created by the faulty arrangement of traffic lights.[40] It would be logical to assume that an application of the California enactments to the *McKinney* facts would result in county liability. It would be reasonable to argue that: (1) A dangerous condition is created by the acts of the county since it is reasonable for travelers to rely on signs to warn them of their approach to hazardous intersections and arterial roads; and (2) The removal of stop signs for repair without providing adequate warnings would not be contemplated by legislative plan and is not conduct reasonable in itself.

CONCLUSION

The doctrine of governmental immunity dates back many years. There is a definite trend to partially or completely abrogate the doctrine because the reasons for the rule are outdated. There is no longer any necessity for the individual plaintiff to bear the loss

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[37] N.Y. Ct. Cl. Act § 8 (McKinney 1963). *See also* Richardson v. State, 28 Misc.2d 607, 218 N.Y.S.2d 922 (1961).

[38] Cal. Gov't. Code § 830(a) and Cal. Gov't. Code § 835 (West 1966).

[39] Cal. Gov't. Code § 830.6 (West 1966).

[40] Teall v. City of Cudahy, 60 Cal.2d 431, 386 P.2d 493, 34 Cal. Rptr. 869 (1963).

since the government can spread the loss among the taxpayers and insurance is readily available. Our plaintiff-oriented society also prefers compensating an injured person as opposed to using the funds for public service.

The argument for placing a duty on the government to erect and maintain stop signs at hazardous intersections is more forceful because of the alarming increase in automobile accidents. Drivers rely on warning signs, and if they are not maintained in places where a dangerous condition exists then the responsible governmental body should be liable for any resulting damage or injury.

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