Some Legal Implications of Potholes

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ABSTRACT

This article is based on case law involving suits by highway users against various highway and street authorities. The article was prompted by damage occurring to Illinois highways during the severe winters of 1976–77, 1977–78 and 1978–79. Discussed are the views which courts in different jurisdictions have taken regarding an actionable defect, the liability of highway authorities for different types of vehicles, and the legal position of various highway and street authorities as defendants. Modern highway usage, coupled with severe recent winters, gives rise to certain types of damage claims which could not have existed in an earlier day. However, the prudence of vehicle operators is still an important factor; and recovery, even for a clear failure on the part of public road authorities to protect highway users, may be barred if there is contributory negligence on the part of the plaintiff. The article suggests that current highway usage imposes upon highway authorities a duty not only to make prompt and adequate repair but also to foresee and be knowledgeable about weather-induced damages and the effect such will have on highway users.

1. Introduction

Some years ago the writer was approached by a number of his neighbors with complaints about the conditions of a county highway. In response, the Illinois Statutes were consulted to see what duties might be imposed on local highway authorities regarding the condition of county and township roads. As a result, a petition was drafted, eagerly signed by a significant number of local residents, and duly presented to the county board of supervisors and the county superintendent of highways.

Since the petition is germane to the subject of this article and since it led the writer to some surprising discoveries about weather-related potholes, ruts, uneven surfaces and other infirmities of highways, the significant portion of the petition minus Illinois statutory references is quoted below:

"In support of this request the petitioners allege the following:

a. The road has numerous deep ruts.
b. It was washed in from the sides in places in such manner as to constitute a hazard.
c. Mud and water accumulate after rains, especially on that portion of the road where sewer pipes were laid and proper reconditioning of the road was not accomplished.
d. There is a dangerous bump on leaving route 37 which constitutes a hazard in that cars should proceed quickly from route 37 but are unable to do so without severely jolting the vehicle and its occupants.
e. The road is rough over most of its area.
f. In places the road is constricted so that two cars have difficulty passing.

"All of the above conditions have existed for more than a year. This is dangerous to life, impedes traffic and damages vehicles. If not corrected, the petitioners will institute further appropriate action.

"We the undersigned urge prompt action to correct the conditions enumerated above."

Happily, action was forthcoming and "further appropriate action" was unnecessary. While this county highway is holding up very well, some of our state and interstate highways have suffered accutely from the winter weather of the past three years. One of the results has been the development of holes, cracks and uneven surfaces. It should be realized that potholes and many other road problems typically result from a variety of factors including severe winter weather conditions (cold and moisture interactions), from wear induced by vehicles, and from road construction and maintenance practices.

Since the term "pothole" seems to have gained general acceptance, it is used in the title of this article. We will not speculate about the origin of the term. The only reference to the term found in legal literature appeared in Thomson v. Public Service Commission,1 and it is not particularly helpful since the court simply stated that water standing in a "pothole" for the greater part of the year is surface water. The term "chuckhole," however, has received judicial attention. In Elliott v. State Highway Commission2 the
court said "The term 'chuckhole' as used in the United States means a deep hole in a wagon rut. It is proper to extend the meaning to a deep hole in a vehicle rut." Assuming that any reader with a little bit of imagination can substitute "pothole" for "chuckhole," the writer will let it go at that so far as definitions are concerned.

Cases used to illustrate the duty—or absence of duty—of highway authorities necessarily involve the application of "tort" or negligence law. The fundamental concept of tort law is that we all (whether individuals, corporations or public bodies) have a duty toward our fellow man. That duty has both an active and passive aspect—active in that we should not conduct ourselves in such a way as to cause harm to another—passive in that we should not fail to perform or do those things which would prevent injury to another. Actions against highway authorities involve tort law. It must be alleged that the injury which is the basis for the complaint occurred because the highway authority failed to discharge some duty it owed the using public. Whether or not it owed this duty under the circumstances is the nub of the case—assuming that injury can be proved and that the highway authorities’ failure to act or to act in a proper manner was the cause of the injury. But the injured party must be able to prove that he was free from negligence. If he was driving recklessly or could have avoided the injury (damage), the defending highway authority may be able to interpose this as a defense. In some states this would be a complete defense; in others it would be compared as a matter of degree with the negligence of the highway authority and damages would be awarded—or possibly not awarded—depending on how the negligence of the defendant compared with the contributory negligence of the plaintiff.

2. Depth of hole

Search of the case law involving legal action based on the condition of a highway reveals a surprising number of state appellate and state supreme court cases, enough cases in fact to prompt an annotator to categorize them according to the depth of the hole or depression. His classification was based on holes less than 3 inches, 3–5 inches and 5 inches or more in depth. Then he added a fourth category: "bumps, ridges, etc." The "etc." included stones on the highway (certainly weather-related in mountain terrain), protruding bricks, differences in elevation resulting from repaving, and differences in elevation between the road and the shoulder. He mentions that in modern case law involving city streets, a 2-inch rule seems to have evolved.

The cases disclose a variety of claims, including those for personal injury, wrongful death and property damage. Also, there were a variety of plaintiffs including motorists, guests in motor vehicles, cyclists (both bicycle and motorcycle), pedestrians, wageeons and others.

Due in large part to the hangover of the tort immunity theory regarding public agencies, courts impose a heavier burden on the plaintiff in suits against such agencies than they do in suits against private individuals. Also, a typical defense is that the defect complained about is of a "minor or trivial character." Thus the plaintiff must show that it is not "minor or trivial." Obviously, this demands definition and gives the court a certain leeway in deciding which direction to move.

In a number of states—Kansas, Massachusetts, Michigan and Washington, for example, the courts have held that there is no basis for a charge of negligence when the holes are less than 5 inches deep and thus have directed verdicts for the road authority. In at least two states, New York and Oklahoma, the courts have reached a similar conclusion with regard to holes 5 inches or more deep. However, courts which are inclined to protect highway authorities by regarding 5-inch holes as "trivial" will find for the plaintiff if the hole is deep enough. In the Massachusetts case of Adams v. Town of Bollom an occupant in the rear seat of a car was injured when the car hit a "hollow" a foot deep and extending across three-fourths of the width of the macadamized surface. The court accepted testimony that the severe winter of 1933–34 had caused undulations which flattened out again when the frost left. Expert testimony from a long-employed road maintenance man was accepted. The facts showed that the township knew of the defect and Massachusetts had a statute requiring that highways be kept "reasonably safe and convenient for travelers at all seasons." In holding for the plaintiff the court said:

"An abnormal condition of the surface of the road existed and was known to the town (the road authority) . . . . The town did nothing . . . although the condition later grew worse . . . A finding was warranted that the town knew or should have known of the defective condition of the road . . . . and in the exercise of reasonable care should have anticipated that there was danger of an accident and should have taken adequate measures to prevent it."

In Calestisburg v. Davis the evidence disclosed that a series of holes from 3–8 inches deep had been caused by washing of gravel beneath the surface. These corrugations caused the plaintiff's car to bounce and leave the pavement, killing the plaintiff's spouse. The court held that the city had known about the condition of the pavement for a long period of time and that the evidence sustained a verdict for the plaintiff. A similar set of facts existed in the California case of Anderson v. San Joaquin County. Here the
evidence showed that there were a number of chuckholes, 2 to 6 inches deep, extending from the edge of the road into the traveled portion. The plaintiff lost control of his car and was killed. In holding the county liable, the court said:

"... we are satisfied that the record amply supports the ... findings ... that the highway was in a dangerous and defective condition, that appellant county was aware or should have been aware of such condition and did not correct it ..."

In DuPuis v. Town of Billerica\(^{13}\) recovery in a wrongful death action was allowed where the car struck holes 6–7 inches deep at the edge of a macadam road where it joined a 3 ft gravel shoulder. The car overturned and the driver was killed. The defense of the highway authority was that the holes were not in the "traveled way" and that its duty extended only to that portion. The court held that the macadam was not necessarily the limit of the "traveled way" and that portions not in the traveled path may be so connected as to affect the safety of users.

While depth of hole or depression is an important factor, a classification based on depth can be misleading. Other factors are involved. However, when the "pothole" is clearly more than "minor and trivial," recovery is probable.\(^{14}\)

3. For what vehicles must safe passage be afforded?

In Osterhout v. Bethlehem,\(^{15}\) a New York case somewhat mellowed by time, judgment for a plaintiff who had been thrown from his horse-drawn wagon when a wheel struck a rut alleged to be 20–22 inches deep was reversed by the Court of Appeals. A defense witness had testified that the hole was only 10 inches deep. The Appeals Court said in remanding for new trial that if evidence disclosed that the hole was only 10 inches deep there should be no recovery. Apparently, the courts were not as considerate of drivers of horse-drawn wagons as they are of today's high-speed motorists. But then the probability of injury is considerably higher in today's high-speed world.

Around the turn of the century, bicycles apparently fared no better than horse-drawn wagons. In Rust v. Essex,\(^{16}\) a 1902 Massachusetts case, the court denied recovery to a bicyclist who hit a stone measuring approximately 19 inches by 15 inches and protruding 6 inches above the road. Evidence disclosed that it was not in the wheel track used by other vehicles and that 16 ft of roadway was free of obstructions.

That motorcycles do not (or did not) fare well on the city streets in Tennessee is exemplified by Knox-ville v. Cooper\(^{17}\) in which the court said that a city need not maintain streets in such perfect condition that motorcycles which can be operated in an upright position can be operated with the same safety as a four-wheel vehicle which is not in the same danger of being thrown off balance. Plaintiff's arguments in this case were that all users are entitled to a safe road surface and, furthermore, that the authorities knew that motorcycles habitually used the city streets. Counter arguments were that the main purpose of the streets was not to afford a highway for motorcycles and that to keep them safe for such vehicles would involve unreasonable cost. The Alabama Supreme Court took a different view in City of Florence v. Slack\(^{18}\) where the operator of a two-wheeled motor scooter was injured. The Court said that the duty of a city to keep its streets in a reasonably safe condition for use by travelers applies with respect to the use of two-wheeled as well as four-wheeled vehicles.

4. Pedestrians

Though potholes in highways are not likely to give rise to successful pedestrian actions against highway authorities, potholes or other defects in city streets may constitute a viable cause of action. Nevertheless, the courts have indicated a reluctance to hold cities liable for what are considered to be slight depressions or defects. For example, in Hamilton v. Buffalo\(^{19}\) the court held that a hole 34 inches long, 12 inches wide and 4 inches deep, which had existed in a public street for some time, was a defect so slight as not to suggest to the mind of an ordinarily careful and prudent man that it was dangerous and that therefore the city had no duty to make immediate repair.

In Montezuma v. Wilson\(^{20}\) plaintiff was injured when he stepped in a hole washed out by rain. Recovery was denied, the reason being that although the city had inspected and found the hole, it had not had enough time to make repairs. In the same vein is Hickey v. Berlin\(^{21}\) where recovery was denied because a pedestrian plaintiff failed to show how long the defect had existed. In Knoxville v. Felding\(^{22}\) recovery was allowed by the trial court which found negligence on the part of the city regarding a hole washed out in a sidewalk. The Tennessee Supreme Court reversed the finding stating that a 90-day statute of limitations on actions instituted against a city had expired before the plaintiff filed his complaint. The plaintiff had in fact filed within the 90 days, but the complaint was erroneously dated 10 days earlier than the actual date of the injury. The Supreme Court held this fatal to his case. In Tripp v. Norfolk,\(^{23}\) a Virginia case, a plaintiff pedestrian fared better. The evidence showed that a firetruck hit an 8-inch hole in the street causing a wheel to come off and strike the plaintiff while he was walking on the sidewalk. He sued the city and recovered.

In view of the difficulty which pedestrians have encountered in recovering against cities, based on claims of negligence in maintaining streets and sidewalks, it is obvious that recovery against highway authorities would be even more difficult, the primary
reason being that modern highways are not designed for pedestrian use and that even when pedestrians may legally walk along a highway they are generally required to walk along the shoulder rather than on the highway itself. Certainly, the duty to a person or to animals illegally on a highway is slight and probably consists only in not maliciously or intentionally causing injury to them.

5. Weather-induced defects other than holes

In Aldi v. S. A. Scullen Co.,\textsuperscript{24} the court held that the plaintiff should have been non-suited where the evidence showed that after he hit a stone about 4 inches in diameter, he struck a hole causing the car to turn over. There were several stones of the same size and several holes 8 or 9 inches deep. This decision makes one wonder which element most influenced the court—the stones or the holes. If the stones had not been on the highway, would the motorist have recovered because the holes were 8–9 inches deep? This will never be known.

Somewhat tangential to our inquiry but still of significance are two cases, one from Connecticut\textsuperscript{25} and one from Massachusetts,\textsuperscript{36} holding that residential owners were not entitled to recover for damage when percolating water entered their cellars as a result of defects in the city street.

More significant is the holding of the court in Knowles v. State,\textsuperscript{27} a 1964 New York Appellate Court decision. The plaintiff’s car skidded on a frost-coated bridge and struck the side. Facts showed that the accident occurred early in the morning on a day in October and that the frost was of brief duration. The basis of the plaintiff’s claim was that the state should have sanded the bridge and erected a warning sign. The Court of Claims awarded the plaintiff damages; the Supreme Court, Appellate Division, reversed and dismissed the plaintiff’s claim. Its reasoning was that the state could not have anticipated frost and have been ready to sand the bridge on the particular day involved and that “the state could not reasonably be required to warn of this natural though recurring condition on this bridge and perhaps on most bridges.” While one might agree with the result reached by the Appeals Court, he could very well challenge the Court’s statement that highway authorities have no duty to warn about the frost condition on bridges. While it can be argued that this is a common hazard about which motorists themselves should be knowledgeable, it can also be argued that all motorists do not realize the hazard and that other motorists will be injured by their lack of knowledge. Therefore, the highway authorities have some duty, not just to the ignorant but to the knowledgeable as well, to warn. That this latter view has gained some acceptance is supported by the fact that many highway authorities do post frost or ice warnings at bridges.

6. The common-law duty to repair

One prominent work of law states that “one traveling on a highway is entitled to assume that his way is reasonably safe, and although a person is required to use reasonable care for his own safety, he is neither required nor expected to search for obstructions and dangers.”\textsuperscript{28} In support of this general view is City of Birmingham v. Carle\textsuperscript{29} in which the court said “The general rule is that the public ways for their entire length and width should be reasonably safe for uses consistent with the reason for their establishment and existence.” And in Commonwealth v. Young,\textsuperscript{30} a 1962 Kentucky case, the Court of Appeals affirmed a judgment for the plaintiff. He was injured when the blacktop on which he was driving caved in causing his car to go down an embankment and turn over. Evidence showed that a highway employee had discovered a washout under the road two months before the accident and had warned the maintenance supervisor. In affirming, the Court said “We assume that no court has ever held that those in control of roads are insurers of the safety of the traveling public, but . . . those charged with the maintenance of highways are under a duty to safeguard the traveling public while the highway is being repaired. And anyone making repairs is under a duty to observe proper precautions by the erection of suitable barriers or warning devices.”

In Leiva v. King Co.,\textsuperscript{31} a Washington Supreme Court case, the Court held for the plaintiff where evidence showed that the highway authorities had ineffectively filled a series of holes with gravel and oil. Testimony indicated that highway authorities knew that this was not an effective way to repair the road. A series of such holes from which the repair material had been forced out by passing traffic and which appeared smooth because they were filled with rain, caused the plaintiff’s truck to leave the road. The Court said “Under the circumstances the area complained of constituted a trap to strangers on the road.”

Though the governmental immunity theory has been reduced in effectiveness by statute and court decisions, nevertheless, it still plays a role. This is the theory developed at common law that the state could not be sued without its consent and that other governmental agencies should not have to respond in tort damages. But in applying the theory, even in its purest form, the courts recognize a distinction between governmental and proprietary functions and between discretionary and ministerial responsibilities. Cities, for example, are regarded as private corporations and thus liable in tort for the condition of their streets and sidewalks. Whereas counties are quasi corporations and not liable in tort in the absence of statute. But cities, too, enjoyed common-law immunity in the performance of “governmental” functions as opposed to “proprietary” functions. Police and fire
protection were clearly governmental functions. Garbage collection was regarded as a proprietary endeavor. Streets and sidewalks seemed to fall between these two, their categorization depending on the particular jurisdiction. Toll road commissions have been held liable on the theory that they exercise proprietary functions and therefore enjoy no governmental immunity.

Holdings relating to the nature and hence the liability of highway districts vary. In Strickfaden v. Greencreek Highway Dist., the court held that such districts are quasi-municipal and can be sued for failure to maintain highways, while in Lamar v. Bolivar Special Road Dist. the court reached an opposite result.

That highway personnel may be sued for their own negligence is well established as evidenced by the adoption of tort claims acts covering employees at all levels of government. These acts permit suit but come to the rescue of the employee, provided he has not deprived himself of the benefit of the law by committing a criminal act. But tort claims acts still recognize the distinction between "discretionary" and "ministerial" acts. Stated simply this means that a government employee may be sued for bad performance but not for making a bad decision. This distinction is pointed out in an Illinois Appellate Court case, Lusietto v. Kingan. In that case the deceased struck a hole in State Highway 89. The car left the road and overturned killing the occupant. Testimony varied as to the size of the hole. The jury believed it was the cause of the accident and found for the plaintiff in a wrongful death action. Plaintiff's recovery was against the highway maintenance supervisor. The Appellate Court reversed on the theory that decisions about the repair of holes in the highway are discretionary rather than ministerial. The Court said "With regard to holes in the highway, the defendant must exercise discretion and judgment as to which holes to fill and which holes not to fill and of the holes to be filled, which holes are to be filled first." One cannot help but believe that with such a definition of discretionary function, highway supervisory personnel would seldom be held liable.

That there is a duty on the part of highway authorities to discover and repair defects is not questioned. But in determining whether or not there is liability, the foreseeability of the defect (much freezing and thawing weather or persistent severe cold, for example), the extent of the damage (is it a local situation or is there general damage which will take many weeks or even months to repair), and the time elapsing between notice to the highway authorities and repair become important. Other factors to be considered are the past history of deterioration and the effect which highway authorities should expect weather to have on the condition of the road. Effects of various weather conditions on highways have been established (Dempsey and Thompson, 1979). In a law review article entitled "State Tort Liability for Road Maintenance: The Standard of Care," the writer suggests still another factor—the volume of highway usage. She expresses the view that the duty to discover defects, give warning and repair are greater on heavily traveled than on lesser traveled roads.

7. The statutory duty to repair

A variety of state statutes exist making it the duty of road authorities to keep highways in repair thus opening a route for liability where it might not have existed at common law. Illinois, for example, has the following statutes which in one way or another recognize the right of a highway user to recover for injury or damage:

The right to sue county superintendents of highways is recognized, but a one-year statute of limitations is provided.

There is a provision giving a right of action against a contractor during the course of highway repair or maintenance.

The department of administrative services is obliged to maintain without cost to state highway employees liability insurance protecting them in an amount of $100,000 unless each employee is included under a self-insurance plan.

Highway commissioners are authorized to contract for insurance against the liability of highway employees. This law states expressly that expenditure of road funds to purchase such insurance contracts constitutes a road purpose.

Applying a statute which imposed liability on the state highway commissioner for failure to repair and which provided further that sufficient notice of a defect existed when an employee in charge of maintenance had 5 days notice, the court in Collins v. Kansas State Highway Commission allowed recovery when the plaintiff struck a chuckhole 6-8 inches deep, 1.5-2 ft wide, and 2-3 ft long near the center of the highway. It was a gravel road and plaintiff's car overturned. Evidence disclosed that there had been repeated attempts to repair but all had failed because the repair material had been churned out of the holes by traffic. Furthermore, evidence disclosed that highway authorities knew for at least 5 days before the accident that the defect existed. There was a strong dissent by one justice who stated that the statute was not meant to apply to depressions or holes in sandy or gravel highways because it is common knowledge to all users that holes and depressions exist in such highways and that the cost of keeping them repaired is prohibitive.

The dissent prompts two queries: Are highway users charged with common knowledge that many potholes may exist following extremely unfavorable weather and that therefore they in effect assume some
of the risk of using the highways? And to what extent does lack of funds (a condition which frequently prevails with road authorities, particularly township authorities) constitute a defense to inaction?

In another proceeding under the Kansas statute, recovery was denied, the court holding that a depression 4 ft wide and 1 inch deep extending across the width of the highway was not the kind of defect contemplated by the statute and that it was not a defect as a matter of law.\(^{42}\)

Writing in the Texas bar journal\(^{43}\) G. Brockett Irwin expresses the current state of the law in most jurisdictions when he says that in Texas "... at common law and by statute contractors and the Texas highway department have a joint duty to provide for the safety of the traveling public."

8. Mandamus as a remedy

One work of law states that "Mandamus is an appropriate remedy to enforce the performance of mandatory duties with reference to the construction and improvement of streets and highways, but it will not issue to control discretionary powers vested in street and highway authorities or to compel action beyond their powers."\(^{44}\)

In an 1885 California case, *Barnett v. Contra Costa Co.*\(^{45}\), the court said that a statute making it the duty of the county to keep its roads in repair does not make it liable for injury but does establish a basis for a mandamus action compelling the road authorities to make repairs.

Examples of the use of mandamus appear in *Carey Salt Co. et al. v. City of Hutchinson*,\(^{46}\) an early Kansas case. There the court held that an owner of real estate abutting upon a city street may institute mandamus to compel the paving of the street in accordance with an agreement previously reached with the city. In *Brophy v. Schindler*,\(^{47}\) a Michigan case, the problem involved rebuilding a washed-out bridge on the line between two townships. The townships could not agree on which should rebuild the bridge. In the meantime, the children from several families had to take a long route to school. Finally, the parents commenced a mandamus action to compel one or other of the townships to rebuild the bridge. The court held that a mandamus action against both townships was appropriate and that the court could determine which township should rebuild the bridge. In *Hamer et al. v. Village of Deerfield*,\(^{48}\) a recent Illinois Appellate Court case, the Court held that "If... corporate authorities have abused their discretion in refusing to replace or repair sidewalks in compliance with their duty, the issuance of a writ of mandamus may be proper." This was a taxpayer's suit by property owners.

In some jurisdictions the courts have held that for one to maintain a mandamus action against a public officer or public body, he must be able to show a peculiar interest separate from that of the general public. This is not the better view, and the trend is toward permitting suit without showing special damage.

An alternative to mandamus, at least initially, is a law which provides that landowners or taxpayers may petition the next higher authority to compel maintenance and repair. For example, the Illinois Highway Code provides that if a highway commissioner fails or refuses to maintain or repair any road in his district within 10 days after he is given a notice in writing signed by three landowners of the district, these landowners may petition the county superintendent of highways, following which a hearing is held. If the superintendent agrees with the petitioners the commissioner can be required to do the job.\(^{49}\) Though this section does not say anything about mandamus, it is possible that such an action could be maintained if the county superintendent refuses to take action and the complainants can make a strong case showing the need for repair or maintenance.

For the record it should be stated that in recent years there has been a substantial erosion of the "governmental immunity" theory, that is, the theory that public bodies cannot be sued for negligence unless there is specific statutory authority. In this same vein, some of the cases involving mandamus would no longer be binding in view of the liberalizing move to use mandatory injunctions and "all-purpose writs." Hence, cases cited from some jurisdictions, while representing the law at the time, may no longer be the rule. Generalizations which must necessarily be made in an article of this kind should not be relied on as determinative law when a concrete situation presents itself.

9. Faulty highway design and defects in construction

What is the liability of highway authorities when the plan of the highway results in dangerous features or when the method and materials used in construction are conducive to the development of defects such as potholes? In many jurisdictions courts have held that there is no liability for defects resulting from mere errors in judgment. Hence, making a case against a public entity for defective designing or planning is much more difficult than making a case based on failure to maintain or repair. However, as with most common-law rules there are exceptions. As early as 1867 a Connecticut court held that a plan executed or an improvement operated with negligence making the road dangerous could be the basis for a suit by an injured party.\(^{50}\)

Many courts distinguish between a defective plan and defective execution of the plan, permitting an action for the latter but not for the former. Thus, in
Dayton v. Taylor, an Ohio case where a man crossing in the middle of the street stepped in a catch basin and was injured, the court said “A municipality cannot be called to account by the courts respecting its errors of judgment in the plan of a public improvement.” But the court opined that if a defect arises, the city may be liable. In Frisk v. Des Moines the court went further and said that if the plan is dangerous and construction follows the plan, there can be liability. And in Hickey v. Berlin, though the court held for the defendant, it opined that if the washout had been due to a defect in the culvert (too small) there could have been liability.

These cases suggest that a cause of action might arise against the highway authorities or the contractor or both if it can be shown that defective design and roadbed preparation led to the creation of potholes, particularly when evidence could be produced to show that roads in the same area which were properly designed and constructed did not develop potholes.

10. The factual determinants of liability

No matter what the rule of law may state, if the plaintiff cannot muster the facts to make a case he will lose. Judging from reported cases the following factors are important, and any one of them could be decisive:

- Depth of hole
- Size of hole
- Location of hole
- Shape of the depression
- Number and arrangement of holes
- Length of time holes have existed without repair (and since severe weather ended)
- Whether or not highway authorities have discovered holes
- The nature of an attempted repair job
- Time of day—holes are more difficult to see and judge at night
- Visibility of depression—if the hole is filled with water, its depth cannot be gaged by a motorist either by night or day
- Presence or absence of contributory negligence on the part of the motorist—was he driving too fast for the condition of the highway? Had he been drinking? Was he asleep? Had he been distracted by something?
- Condition of motorist’s car—were the brakes bad? Did it have a faulty steering mechanism? Were the tires slick?

While this list may appear fairly completé, it is only suggestive. With imagination one could add other factors, any one of which could turn the case for or against the defendant.

11. The elements of damage

For what may a highway user be compensated when a claim is based on damage caused by potholes? The following are a few possibilities, some of which the courts have recognized, some which, to the author’s knowledge, they have not:

- Personal injury to driver, passengers, or third parties
- Damage to vehicles—this might include not only damage due to an accident but damage resulting from jolts and vibration
- Loss of time—particularly to the trucking industry
- Strain on the driver
- Damage to certain types of loads—eggs or watermelons, for example
- Danger of shifting loads—lumber, steel beams or baled hay
- Damage to other highway users by lost vehicle parts or partial load losses.

A number of factors point to an enlargement of the elements of damage which a court might consider. Some of these are as follows:

- Heavier traffic
- Higher speeds
- Changes in the nature of traffic—more trucks and mobile homes
- The move toward greater consumer protection
- The move both by legislatures and courts to liberalize the rules regarding standing to sue public bodies
- More frequent severe winter weather conditions.

12. Conclusion

It has not been the purpose of this article to cause undue concern on the part of highway authorities or to suggest that injured parties should immediately resort to the law. One purpose of using decided cases, and taking from them what the courts appear to have said, is to create a greater awareness on the part of highway officials that there are legal implications arising from their duty to plan, construct, repair and warn. A further purpose has been to show that weather may materially affect this duty and that both foreseeability of weather problems and prompt action to alleviate them can be important elements in forestalling possible lawsuits.

With respect to highway users, the purpose has been to show that they do have some important legal rights not only to recover damages but to compel action, these rights being tempered by certain legal protections which the courts still accord public bodies and by the prudence of the highway user in operating his vehicle.
REFERENCE


COURT RECORDS

3. 1 ALR 3d 496.
14. In the following cases the plaintiff recovered for personal injury:

Pendlebury v. Bristol, 118 Conn. 285, 172 A. 216 (1934) (A hole 3''x4'' deep and 2' square.)
Meier v. Cushing, 246 IA. 441, 68 NW2d 74 (1955) (An elliptical hole 5''x7'' and 6'' deep.)
Shafer v. State Highway Commission, 169 Kan. 264, 219 P2d 448 (1950) (A chuck hole 30'' across and 3 1/2''-4'' deep in an 18''x20'' depression.)
Lang v. Ingham County, 277 Mich. 345, 269 NW 197 (1936) (A depression 2'' to 12'' deep.)
Matte v. State, 14 Misc. 2d 438, 179 NYS 2d 115 (1958) (A water-filled hole 3''x2'' and 5'' to 7'' deep.)


28. 39 Am. Jur. 2d, Highways, Streets, and Bridges, par. 337.
31. Leiva v. King County, 38 Wash. 2d 850, 233 P2d 532 (1956).
34. Lamar v. Bolivar Special Road District, 201 SW 890 (Mo. 1918).
42. Snyder v. Kansas State Highway Commission, 139 Kan. 150, 30 P2d 102 (1934).
43. Safety Responsibility to the Traveling Public, G. Brockett Irwin, 35 Texas Bar Jnl. 525, 530 (June 1972).
44. 55 CJS Mandamus Sec. 177.
45. Barnett v. Contra Costa County, 67 Cal. 77, 7 P 177 (1885).

Other cases exemplifying the use of mandamus are Plainfield Consolidated School Dist. v. Cook, 173 Ga. 447, 160 SE 617 (1931) (Taxpayers suit to compel construction of a school) and People v. Gallatin County, 294 Ill. 579, 128 NE 645 (1920) (Citizens suit to compel County Board to provide and keep in repair a suitable court house and jail.)
49. Ill. Rev. Stat. Ch. 121, Sec. 6-401.
51. Dayton v. Taylor, 62 Ohio St. 11, 56 NE 480 (1900).
52. Frisk v. Des Moines, 196 IA. 606, 193 NW 570 (1923).
53. Note 21 Supra.