Highway Tort Liability in Michigan

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Liability for defective highway conditions have ebbed and flowed over the years. Until the 1870's persons injured on local or state roads were barred by the principle of sovereign immunity from suing any governmental entities. In the 1870's the legislature authorized suits against local units of government for injuries arising from the failure to repair local roads and bridges. No one challenged the state's sovereign immunity. However, in 1964 the legislature codified this immunity with the enactment of the Governmental Tort Liability Act. (MCL 694.1401, *et seq*.) That act did carve out three exceptions to the state's governmental immunity, one for defective highways, one for defective public buildings, and one for negligently driven governmentally-owned motor vehicles. The defective highway exception places a duty on all governmental agencies to maintain their roads in reasonable repair. The exception describes the duty as follows:

> [e]ach **governmental agency** having jurisdiction over a highway shall **maintain the highway in reasonable repair** so that it is **reasonably safe and convenient for public travel.**

1. Jurisdiction

This duty applies to any governmental agency that has jurisdiction and control of a roadway. Thus, the state has a duty to keep its trunklines in reasonable repair; counties have the same duty relative to its roads; and townships, cities and municipalities have the same duty relative to their public roads. For any road, there is only one agency that is responsible. Generally, the agency that has jurisdiction is the agency that has certified the road as its own by filing its Act 51 certification map. State trunklines remain the responsibility of the state notwithstanding contracts giving maintenance responsibility to the counties or other governmental agencies. At the intersection of two roads under separate agencies (e.g. state trunkline and county road), the higher agency (e.g. state) is ceded jurisdiction.

2. Nature and Extent of the Duty

Local units of government, under their enabling statutes, and the state and counties under Act 51, do have a duty to design and maintain safe roadways. However, the highway exception severely limits the circumstances under which a breach of that duty may give rise to a lawsuit.

The duty defined in § 1402 is limited to the duty to "repair and maintain." There is no general duty to make the roadway "safe." Nor is there a duty to improve, augment or expand the safety of the roadway when standards change. The road authority need only maintain what was originally built. Similarly, highway agencies and their engineers and technicians can be expected to follow generally accepted federal, state or AASHTO guidelines. However, failure to do so cannot be the basis for a personal injury claim against the road agency. Citizens in agencies which ignore such guidelines are left to address these situations through the selection of state and local political officials. The electorate, not the courts are left with the responsibility for punishing poor design decisions by governmental agencies. As noted below, if these design decisions are egregious, individual employees may, under limited circumstances be held personally liable.

3. Potential Plaintiffs

The exception allows anyone injured by a surface defect to recover. Pedestrians, bicyclists and any other person can sue regardless whether a motor vehicle was involved in the injury causing accident. Thus, highway agencies have a duty to repair and maintain trunkline surfaces for bicyclists and pedestrians, as well as for motor vehicles.

4. Limitation on State and County Liability

The fourth sentence of § 1402 limits state and county liability to only a portion of the highway as opposed to the entire right of way.

> [T]he **duty** . . . extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trail ways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

Thus, the state and the counties can be held liable only for those areas in the right-of-way that are "improved" and "designed" for vehicular travel. This sentence means that the state and counties can only be sued for injuries arising from defects in the "actual physical structure of the roadbed surface, paved or unpaved." A narrow, common sense view of this limitation would seem to limit defect liability to the travel lanes of the roadway even excluding shoulders.

Similarly, the fourth sentence excuses the state and counties from injuries arising from defects in sidewalks, trail ways, crosswalks, or other installations like guardrails or crash attenuators. The key question is not the location of the person injured, but the location of the injury-causing defect. Thus, a pedestrian who slips on a defect in a crosswalk cannot sue, while the same pedestrian on a sidewalk struck by a car that struck a pothole in the roadway can sue.

Ironically, the above language insulates road agencies from liability for pedestrian injuries arising from surface defects at crosswalks, but not for jaywalker injuries arising from surface defects where pedestrians were not intended to cross.

5. Individual Employee Liability

The restrictions on the liability of road agencies for road conditions are severe. These restrictions do not protect individual road agency employees from liability for these same conditions. Nevertheless, the rules applicable to individual employee liability do provide substantial protection for the employee.

MCL 691.1402(2) provides that governmental employees or agents are immune from tort liability if all the following conditions are met:

- The employee was acting within the scope of his or her authority.
- The employee was engaged in the exercise or discharge of a governmental function.
- The employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Road agency employees and agents typically are engaged in the exercise or discharge of a governmental function and within the scope of authority in designing or maintaining a highway or driving in furtherance of these duties.

The gross negligence standard requires that governmental employees must be more than negligent to be held liable. Gross Negligence means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Even if the governmental employee is grossly negligent, that may not be enough. That gross negligence must be "the" proximate cause of the injury or damage. The Supreme Court defined that to mean "the most immediate, direct and efficient cause of damage" *Robinson v Detroit* (2000). The Court also said that there can only be "one" proximate cause.

The recent case of *Long v City of Detroit* (2003) illustrates the point. In that case a city employee failed to repair a street light where an automobile accident occurred injuring a pedestrian. The pedestrian sued the city employee in charge of lighting. The Court held that the most immediate and direct cause of the accident was the errant driver's act of hitting the plaintiff, not the faulty street light. The Court noted that a properly functioning street light would only have made visibility better.

In short, to successfully recover from an employee engaged in his or her governmental duties as a road engineer, technician, or maintenance worker, the injured person must show he or she engaged in "gross negligence." Once overcoming that hurdle, he or she must also show that that conduct alone was "the" proximate cause of the injury. Where most accidents and injuries arise from automobile accidents and negligent drivers are the norm, this condition to recover is similarly difficult to overcome.

6. <u>The Drain Exception</u>

Under what is known as the drain exception to governmental immunity, road authorities can be held liable for damages caused by water backups or overflows of a storm water drainage system. Such damages may include personal injuries to motorists who are injured as a result of "standing" water on the roadway, if that water is a result of a water backup or overflow caused by a defect in a drainage system. Unlike the Highway Exception, a defect in a sewage disposal system includes design defects as well as maintenance, operation and repair defects.

A person wishing to invoke the "drain exception" to governmental immunity must prove the following four things:

1. First, that at the time the damage or injury occurred, the road authority owned, operated or directly or indirectly discharged into the portion of the system that caused the damage or injury.
2. Second, that the disposal system had either a construction, design, maintenance, operation or a repair defect.
3. Third, that the road authority knew or should have known about this defect; and
4. Fourth, this defect was 50% or more the cause of the backup and damage or injury.

Damages recoverable under the drain exception include damage to property as well as injury to person. However, the injured person must give notice of the claim to the road authority within 45 days of the damage.