

Combating Roadside Hazards:

New Book Develops Legal Strategies

Four Washington attorneys, in a landmark book being published this month, have developed a wide range of strategies for citizens and organizations to harness federal, state and local laws in order to eliminate roadside hazards.

The 592-page book is the result of an exhaustive, two-year study by James F. Fitzpatrick, Michael N. Sohn, Thomas E. Silfen, and Robert H. Wood, who are with the firm of Arnold & Porter in Washington, D.C. The study was originated and sponsored by the Insurance Institute for Highway Safety.

Entitled, *The Law and Roadside Hazards*, the book is being published by the Michie Company.

The new book establishes a series of legal frameworks for forcing removal of roadside hazards that already exist along the nations' highways. (Last month, the Center for Auto Safety released a study that exposed inadequate planning by federal and state officials that allows roadside hazards to be built in the first place. See *Status Report*, Vol. 9, No. 23, Dec. 26, 1974.)

The book points out the "surprising lag in the development of the law in response to the roadside hazard," even though "of the 56,000 highway deaths in 1972, about one-third reportedly occurred when the vehicle collided with a fixed object on or along the road, rolled over (possibly because of steep roadside slopes or dropoffs), or otherwise came to grief after leaving the pavement."

Factors that may have contributed to the law's indifference, it says, include "the preoccupation of state and federal governments with new road construction," and "the tendency of private litigants to be concerned essentially with compensation for injuries, rather than eliminating the agent of injuries."

The Law and Roadside Hazards focuses on the responsibility and liability of:

- Highway engineers and consultants accountable for designing roadside hazards.
- Road contractors accountable for faulty construction and failure to eliminate hazards.
- Utility companies accountable for dangerously placed light and utility poles and for concrete and other non-breakaway pole supports.
- Federal, state and local agencies and officials accountable for dangerous guard rails, culverts, signs, embankments, trees, shoulders, and bridge supports, and for poor judgement in failing to correct known roadside hazards.

According to the book, "Highway authorities, to avoid assertions of liability, should provide motorists with an unobstructed recovery zone in which they can bring their vehicles to a safe stop Obstacles or devices capable of causing collisions resulting in injury or death should not be placed so close to a highway that a driver cannot stop before hitting them If a government maintains dangerous obstacles or devices on or near the highway, even if they are devices such as guardrails, the courts will hold the government liable for the injuries suffered in collisions with them."

The book cites various cases that, it says, demonstrate the "growing judicial recognition that the duty of those responsible for the design and maintenance of highways extends beyond the prevention of crashes. Rather, . . . these cases focus on the need to reduce losses when accidents occur."

In the book, the authors point out that the distinction between accident causation and injury causation is well known to the courts in the context of product liability.

They contend that principles that pushed vehicle manufacturers to correct vehicle defects causing crash losses can be applied to highway roadside design defects.

"There are sound reasons," says the book, "for arguing that, if a manufacturer may be liable for designing a car in such a way that it exacerbates the injuries suffered by its passengers in a collision, even though the design did not cause the collision, then highway authorities ought to be liable for designing a highway environment with fixed roadside obstacles, which also exacerbate injuries."

The Law and Roadside Hazards concentrates on two principal lines of legal action, based on federal statutory law and state common law.

FEDERAL

The book points out that the federal government itself has provided much of the potential leverage for the elimination of roadside hazards, through a series of directives issued under the authority of federal highway legislation.

According to the authors, if the Federal Highway Administration does not follow these statutory requirements and its own regulations, then the courts on behalf of interested private motorists could be asked to enforce them. The book cites successful suits brought by environmentalists to stop or change highway construction that threatened aesthetic aspects of an area. Now, according to the book, these legal precedents can be applied to stop or alter highway construction that does not protect lives.

According to the authors, the following legal action could be taken based on federal statutes:

- Road construction aided by federal funds could be halted if during the public hearings conducted prior to construction as required by the Federal-aid Highway Act, the state did not explicitly consider the need to have clear roadsides.
- Under the same act, no federally aided highway project may be approved unless the plans, specifications and estimate are "conducive to safety." This section could be employed to stop a project that should not have been approved because a clear roadside was not promised.
- Directives issued by FHWA since 1965 dealing with highway engineering, indicate what constitutes a roadside hazard, and thus provide the basis for court ordered removal of such hazards.
- Courts could order the removal of hazards once it is shown that a state's overall program of highway projects does not "give priority" to safety as required by yet another provision of the Federal-aid Highway Act.

- Department of Transportation highway safety program standards applicable to states, promulgated under the Highway Safety Act of 1966, could be used to demonstrate that a particular state had failed to comply with the goals for clear roadsides or that DOT had defaulted in its duty to penalize a state for failure to implement the goals set by the standards. Standard No. 12 requires that each state have a program covering all of its public roads which provides as a minimum that "hazards within the right of way are identified and corrected . . . and the roadsides . . . clear of obstacles."

The book analyzes other statutory approaches, covering such laws as the National Environmental Policy Act, the Occupational Safety and Health Act, the National Labor Relations Act, the Federal Tort Claims Act, and legislation governing federal domain roads.

STATE

The other major portion of the book deals with new and traditional tort concepts, and is applicable at the state level. It focuses on the general principle that public bodies have a common law duty to maintain the roads in a safe condition, so as not to expose motorists to undue hazards. The book cites cases which show that courts are beginning to recognize that ordinary drivers will occasionally stray from the pavement. Flowing from this recognition is the demand that there be an unobstructed recovery zone in which drivers can bring their vehicles to a harmless stop.

For example, the book cites one case in which a state was found liable for a guard rail, which, because it was blunt-ended, increased the losses suffered in a collision, even though the collision was triggered by other factors. The state was found to share responsibility for the losses.

The authors also deal with the question of contributory negligence, a defense that may be raised by a state. They point out that even though a driver is negligent, if a hazard can be shown to have created a risk of harm, then contributory negligence does not necessarily prevent a successful suit.

The authors deal with another major defense that can be raised by the state – sovereign immunity. This concept is changing rapidly, the book says. It reviews the trend toward allowing private citizens to recover for government wrongdoing.

The book also presents arguments for "equitable remedies" – court-ordered hazard elimination – in addition to monetary compensation for injuries. The authors deal with the defense that a state might raise arguing that if a person is compensated monetarily for losses caused by a roadside hazard then the state has fulfilled its responsibility. The authors maintain, however, that while this provides compensation to that one victim, it does not provide equitable relief to society. Failing to grant such equitable relief would be "allowing tens of thousands of people to be killed or injured each year by these hazards," the book says. The authors conclude that "it would be inequitable not to prevent these injuries but instead to wait for motorists to be injured before supplying them with a remedy."

The Law and Roadside Hazards is available from The Michie Company, P. O. Box 7587, Charlottesville, Va. 22906 for \$28.50. The publisher allows a 15-day examination period.

A Summary

Liabilities And Responsibilities Explored

The Law and Roadside Hazards covers a wide range of issues and materials. Although of general interest, the 592-page book was designed primarily for use by the legal profession. It contains case references and citations. The chapters are divided on the basis of legal approaches and problems. Listed below are brief summaries of the major points explored in the book.

FEDERAL-AID HIGHWAY ACT: CHAPTER 2 . . .

Explores whether the federal government's broad supervisory and regulatory authority under the Federal-aid Highway Act – including power and responsibility to provide or withhold funding support to states – can be used to *compel states to pay more attention to roadside hazards*. Using precedents in environmental cases, provides a conceptual framework for *suits by private citizens and organizations against the U.S. Department of Transportation* to prevent road construction projects (or to remedy the defects of those already built) that do not provide for clear roadside recovery areas. Details opportunities for intervention at various stages of federal involvement in highway planning, construction and maintenance.

HIGHWAY SAFETY ACT OF 1966: CHAPTER 3 . . .

Points out that each state must have a highway safety program in accordance with standards promulgated by the Secretary of Transportation. Notes that the statute makes compliance mandatory with a *10 per cent reduction of federal-aid highway construction funds* and a *total withdrawal of safety act grant-in-aid funds* for "failure to implement" an approved program. Suggests that concerned citizens could select a state which has hazardous highways and poor safety improvement efforts and could *sue to impose* the safety act penalties upon the state.

FEDERAL DOMAIN ROADS: CHAPTER 4 . . .

Examines laws regulating the extensive network of *roads owned and administered by the federal government*. Explains how a roadside hazard suit involving these highways could proceed on a theory of *direct federal liability*, either at common law (using the tort law of the state in which a crash occurred), or under the statute governing this particular class of federal domain highways, or, finally, under the newly expanded Highway Safety Act of 1966.

RELATED REGULATORY LEGISLATION: CHAPTER 5 . . .

Explores several "indirect" possibilities for legal action on roadside hazards: Motor Carrier Safety Regulations, the Occupational Safety and Health Act, the National Environmental Policy Act and the National Labor Relations Act. Points out difficulties associated with such statutory approaches, but indicates that the *potential for attacking the problem of roadside hazard loss definitely exists*.

PENDENT JURISDICTION: CHAPTER 6 . . .

Suggests that an omnibus suit could be brought in the federal courts *combining federal statutory claims against federal officials with common law claims against state officials*. Notes that although there has not been a definitive Supreme Court pronouncement on the issue, federal appellate courts have clearly indicated that such joinder is possible. Discusses the "*common nucleus of operative facts*," necessary for a federal court to entertain such a case.

GOVERNMENT NEGLIGENCE: CHAPTER 7 . . .

Analyzes traditional approaches and emerging legal concepts to show that roadside hazards can be *attacked on common law principles of negligence*. Studies the court-imposed common law responsibilities of state and local governments to maintain roads so as not to expose motorists to any undue hazards. Probes the *duty of highway authorities to provide motorists with an unobstructed recovery zone* in which they can bring their vehicles to a safe stop. "If a government maintains dangerous obstacles or devices on or near the highway, even if they are devices such as guardrails, the courts will hold the government liable for the injuries suffered in collisions with them," the book says. Cites cases focusing on the need to *reduce losses when crashes occur*. Shows it would be *no defense* for a government body to argue that a road was designed without breakaway poles because they were unknown when the road was built. Suggests that a court could impose liability for failure to modify a road that is hazardous by present-day standards.

NEGLIGENT PRIVATE PARTIES: CHAPTER 8 . . .

Shows that private individuals and corporations – contractors, builders, utility companies – as well as government entities, *may be liable for their roles in creating or maintaining highway hazards*. Discusses how architects and engineers remain liable for designing unsafe public property and equipment, not only while the work is in progress, but also for subsequent use. Explains how utilities and other private parties may be liable for poles and other privately owned highway hazards located either in or adjacent to the traveled portion of the road. Contends that a *government tolerating the existence of a privately owned highway hazard may also be liable*.

NEGLIGENCE AND LIABILITY: CHAPTER 9 . . .

Questions the traditional concept that whatever caused the vehicle to leave the traveled portion of the road is the "proximate cause" of a subsequent collision with a fixed obstacle near the road. Instead, the study points out that the basic issue for liability in a hazard-involved negligence suit is that *no injury would occur when the car moves into the recovery zone "but for the roadside hazard."* Notes that liability may exist if negligence was at least one cause of an injury, but not necessarily the exclusive cause. Explains that the fixed object in a crash plays a substantial role in producing injuries and how recovery can occur because "accepted standards of good highway design call for clear recovery areas. . . . If a manufacturer may be liable for designing a car in such a way that it exacerbates the injuries suffered by its passengers in a collision, even though the design did not cause the collision, then highway authorities ought to be liable for designing a highway environment with fixed roadside obstacles which exacerbates injuries," the book reasons.

STANDARD OF CARE: CHAPTER 10 . . .

Shows that courts are beginning to accept the *inevitability of many crashes* and that "highway authorities must expect that motorists will often leave the road (and) therefore must provide suitable protection."

STATUTORY DUTY: CHAPTER 11 . . .

Examines not only statutes which specifically impose duties of highway safety, but also *other state laws* that could be construed to *require the elimination of roadside hazards*. Notes that not all highway safety statutes expressly provide a private right of recovery for injuries caused by a violation, but courts have generally found this right to be implied and thus an *individual can sue to recover for injuries suffered as a result of a violation of such a statute*.

PUBLIC NUISANCE: CHAPTER 12 . . .

Points out that any man-made device or structure on or adjacent to the highway that poses a threat of injury to travelers can be a *public nuisance*. Notes that the decisive issue is *whether roadside hazards presently pose a threat of injury to drivers*. A structure can be a nuisance "even though it still conforms to the design standards which prevailed when it was built and even though the conduct involved in its creation was above reproach," the authors say.

REMEDIES: CHAPTER 13 . . .

Reviews the traditional remedy of money damages in highway crashes. Notes that courts permit equitable relief – such as orders by the court to correct or otherwise rebuild hazardous roads – when the traditional remedy is found inadequate. Suggests that the *threat of future or further injury from roadside hazards is clear* and it would take a burdensome "multiplicity" of damage suits to achieve any meaningful reduction of hazard losses. Notes that public and private interest in highway loss reduction may *override considerations of repair costs*. Otherwise, "the law would be allowing tens of thousands of people to be killed or injured each year by these hazards. It would be inequitable not to prevent these injuries, but instead to wait for motorists to be injured before supplying them with a remedy," the authors stress.

DEFENSES: CHAPTER 14 . . .

Finds that *contributory negligence may not be applicable* if it can be shown that the hazard creates a risk of harm after negligent driving has taken place and that therefore the hazard is an intervening cause of harm. Examining the defense argument of sovereign immunity, points out that the law in this area is changing rapidly. Reviews the trend toward *allowing private citizens to recover for government wrongdoing*.

EVIDENTIARY BACKGROUND: APPENDICES . . .

Provides background information useful to a litigant in *establishing the extent of losses involving roadside hazards* and in showing the *engineering advances and research* that constitute the proper standard of care. Contains selective federal directives useful to the issue of the standard of care, and a bibliography of other non-legal work in this area.

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the highway
loss reduction

STATUS REPORT

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