



DOES UNAVAILABILITY OF RESOURCES FOR MAINTENANCE OR REPAIR HAVE ANY BEARING ON HIGHWAY LIABILITY CLAIMS?

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Road Commissions are political bodies – meaning that they engage in a political process each and every day. “Politics” has been defined as the art and science of allocating scarce resources among competing interests. Certainly, then, road commissions perform politics on a daily basis. They have the obligation to allocate available tax revenues to the repair and maintenance of the thousands of miles of roadway within their charge. The resources are “scarce,” meaning not unlimited. Thus, road commissions must constantly make political, policy decisions – what repairs and maintenance are most needed, having the greatest benefit for the greatest number of motorists. If resources were not scarce, road commissions would be obligated to repair and maintain every foot of roadway to autobahn standards. But the real world does not, and cannot, provide unlimited resources.

Thus, the road commission’s statutory obligation is to repair and maintain roadways so that they are “reasonably” safe for public travel. The reasonableness analysis must include the availability of resources for particular repairs and maintenance. In other words, isn’t it more reasonable to allocate the most money for repair and maintenance of highly traveled highways accommodating thousands of motorists daily, before devoting those funds to seldom traveled roads serving very few motorists? All roadways must be “reasonably” safe, but proper resource allocation suggests that money is better spent, beyond that, on the most traveled roads.

A recent decision of the Michigan Court of Appeals illustrates the point. In *Minhas v Oakland County Road Commission* (unpublished per curiam opinion of the Court of Appeals dated July 15, 2008, Docket No. 278477), the court upheld the circuit court’s dismissal of the plaintiff’s claim that she lost control of her vehicle due to a large pothole in a “very bad,” unpaved, gravel-covered road. The plaintiff acknowledged that she had driven the road at least once a week for over three years,

and that she had not seen this particular pothole before the day of the accident. She agreed that conditions on a gravel road may change overnight.

Citing the Michigan Supreme Court’s decision in *Wilson v Alpena County Road Commission*, 474 Mich 161 (2006) (which involved a badly deteriorated, lightly traveled road with a patchwork of repaired potholes), the court said that immunity is not waived unless the road commission has notice of a defect such that the roadway is not reasonably safe. Further, “notice that a road was bumpy and required frequent maintenance measures does not necessarily establish that it was not reasonably safe for public travel. A road in bad repair, or with rough pavement, is not per se one that is not reasonably safe.” The court went on to say, “It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it.

Implicit in this analysis is the fact that the road commission does not have unlimited resources. Thus, the road need only be repaired and maintained so as to be “reasonably” safe. Surely, the “very bad” gravel road in the *Minhas* case could have been repaired or maintained so that it would have been “safer.” The road could have been paved, for example. Or the road commission could have inspected and repaired it daily, in which case it would never have potholes. But the obligation of “reasonable” repair and maintenance does not require absolute safety. The road commission has a political obligation to allocate its limited resources to make roadways “reasonably safe.” So long as it does so, immunity bars claims that the roadway could have been “safer.”

In short, unavailability of resources to repair and maintain highways to a higher level of safety is a relevant part of the governmental immunity defense. Whether the roadway has been maintained and repaired to be “reasonably” safe depends, to some degree, on whether funds were, or were not, available for more maintenance and repair to the particular roadway in question.

