

Fall 1999

Missouri's Mystifying Doctrine of Sovereign Immunity: The Imposition of Duty under the Dangerous Condition Exception

Stacy L. Nagel

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Stacy L. Nagel, *Missouri's Mystifying Doctrine of Sovereign Immunity: The Imposition of Duty under the Dangerous Condition Exception*, 64 Mo. L. REV. (1999)

Available at: <http://scholarship.law.missouri.edu/mlr/vol64/iss4/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Nagel: Nagel: Missouri's Mystifying Doctrine of Sovereign Immunity:
**Missouri's Mystifying Doctrine of Sovereign
Immunity: The Imposition of Duty Under
the Dangerous Condition Exception**

*Martin v. Missouri Highway & Transportation Department*¹

I. INTRODUCTION

In Missouri, the doctrine of sovereign immunity has been plagued with confusion. Much of this confusion has resulted from wrangling between the Missouri Supreme Court and the legislature. Statutes offering little guidance have been developed, and hard to reconcile cases have been produced. Perhaps nowhere is this confusion more evident than in the area of tort liability under the “dangerous condition” exception to sovereign immunity.

Martin v. Missouri Highway & Transportation Department is a prime example of the bewilderment bred by Missouri’s statute of sovereign immunity and particularly the “dangerous condition” exception. The *Martin* court discusses the conditions under which a duty will be imposed upon a public entity for a failure to maintain clear zones along state highways. In its attempt to clarify the law in this area, *Martin* may have discretely opened the doors to the broadening of the “dangerous condition” exception to sovereign immunity through the possible imposition of a duty upon some public entities to adequately safeguard motorists.

II. FACTS AND HOLDING

On a rainy night in October 1993, Christina Kelly was traveling from Lee’s Summit to Blue Springs, Missouri, when her car skidded off of the ramp leading from northbound Highway 291 to eastbound Interstate 70.² Her car spun around, slid backwards down a slope, and hit a tree twenty-four and one-half feet from the roadway.³ A branch from the tree broke through the passenger window of the car and struck Kelly in the back of the head.⁴ As a result of head injuries she received in the crash, Kelly died the next day.⁵

On March 16, 1995, Kelly’s mother, Marlene Martin, filed a wrongful death action against the Missouri Highway and Transportation Commission (MHTC)⁶

1. 981 S.W.2d 577 (Mo. Ct. App. 1998).

2. *Id.* at 579.

3. *Id.*

4. *Id.*

5. *Id.*

6. Since the filing of the suit, the Missouri Highway Department has changed its name to the Missouri Department of Transportation (MoDOT). *Id.* at 579 n.1. MoDOT is administered by MHTC and it is the MHTC which may sue and be sued in its official name. MO. REV. STAT. § 226.100 (1994).

in the Circuit Court of Jackson County.⁷ The petition alleged that MHTC was negligent in planting trees too close to the roadway, allowing those trees to remain near the roadway, and failing to adequately warn motorists of the trees.⁸

Further, the action alleged negligence in MHTC's failure to erect guardrails along the ramp.⁹ Martin contended that Kelly's death was a direct and proximate result of one or more of these acts.¹⁰

In November 1996, the Circuit Court of Jackson County entered judgment in favor of Martin for \$75,000 after a jury assessed damages at \$150,000 and found MHTC to be fifty percent at fault.¹¹ In December 1996, MHTC moved for judgment notwithstanding the verdict.¹² The trial court granted the motion and held that Martin did not allege evidence of a defect in the road and that MHTC did not owe a duty to a motorist leaving the traveled portion of the highway.¹³

On appeal, Martin claimed that the trial court erred in granting MHTC's motion for a JNOV.¹⁴ She argued that MHTC had created a dangerous condition and thus owed a duty to motorists, which was breached when MHTC failed to remove the tree.¹⁵ Consequently, she contended that MHTC was not immune from tort liability.¹⁶ The Missouri Court of Appeals for the Western District of Missouri reversed.¹⁷ The court held that MHTC had a duty to maintain a thirty-foot area of clearance along the edge of the highway and breached that duty by not removing the tree that caused Kelly's fatal injuries.¹⁸ The court ruled that MHTC could be sued under the "dangerous condition" exception to sovereign immunity and that MHTC was not entitled to a state of the art defense.¹⁹

7. *Martin v. Missouri Highway and Transp. Dep't*, 981 S.W.2d 577, 579 (Mo. Ct. App. 1998).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." *Id.* (citing *Missouri Highway & Transp. Comm'n v. Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 685 (Mo. Ct. App. 1997)).

15. *Id.* at 579-80.

16. *Id.*

17. *Id.* at 585.

18. *Id.*

19. *Id.* at 584-85.

III. LEGAL BACKGROUND

The doctrine of sovereign immunity precludes a party from asserting a cause of action against the government without its consent.²⁰ Sovereign immunity has its roots in English common law.²¹ Originally, the doctrine was conceived solely to protect the king; thus, the saying the “King can do no wrong” emerged.²² However, sovereign immunity was soon extended to a variety of actors in the English government.²³ Today, the doctrine of sovereign immunity has spread to America and invaded both federal and state governments at all levels.

A. The Colorful History of Sovereign Immunity in Missouri

In Missouri, the doctrine of sovereign immunity has had a checkered past. The wording of Missouri Revised Statutes Section 537.600 alone indicates the piecemeal fashion in which this doctrine has developed.²⁴ In order to comprehend modern sovereign immunity in Missouri, one must first understand this statute. Developed bit by bit, each subsection of the statute can be seen as a reaction by the Missouri legislature to a controversial decision of the Missouri Supreme Court.

Rumblings about the propriety of sovereign immunity first began in *O’Dell v. School District of Independence*.²⁵ In this opinion, the dissent argued that the doctrine of sovereign immunity should be abolished because it served no legitimate purpose.²⁶ The majority, however, would not consider such a change and left the decision to the legislature.²⁷

This notion, however, again resurfaced in *Jones v. State Highway Commission*,²⁸ and this time it was successful. In September 1977, the Missouri Supreme Court ruled that sovereign immunity would be abrogated as of August 15, 1978.²⁹ The court stated that a “‘maze of inconsistency’ has developed in suits against cities, producing uneven and unequal results which defy

20. BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

21. See generally William S. Holdsworth, *The History of Remedies Against the Crown*, LAW Q. REV., April 1922, at 141 (1922).

22. *Id.*

23. *Id.*

24. MO. REV. STAT. § 537.600 (1994).

25. 521 S.W.2d 403 (Mo. 1975) (Finch, J., dissenting) (holding that a school district was not liable in tort for the injury of a high school student by his gym teacher).

26. *Id.*

27. *Id.* at 409.

28. 557 S.W.2d 225 (Mo. 1977).

29. *Id.*

understanding.”³⁰ In that one decision, the court reversed over one hundred years of precedent.

Outraged by this decision, the Missouri legislature reinstated sovereign immunity. Thus, the current statute states that “[s]uch sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect.”³¹ During this same session, the legislature also established two waivers of sovereign immunity. The first was for injuries directly resulting from the negligent operation of a motor vehicle by a public employee during the course of his employment.³² The second was for injuries caused by the condition of a public entity’s property.³³

*Bartley v. Special School District*³⁴ continued the controversy over sovereign immunity. In *Bartley*, the plaintiffs argued that the school district waived its sovereign immunity because it had purchased liability insurance. The Missouri Supreme Court rejected this argument and held that the legislature had waived sovereign immunity for public entities only as provided in Section 537.600.1 subdivisions one and two and only then to the extent that the entity had purchased liability insurance for such purposes.³⁵

Once again the legislature countered by passing subsection two of Section 537.600, which states:

The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.³⁶

This subsection expressly overruled *Bartley* by stating that sovereign immunity was waived if the entity fell under one of the express statutory exceptions, regardless of whether liability insurance had been purchased.

The Missouri Supreme Court’s next move came in *State ex rel. Trimble v. Ryan*.³⁷ The issue in this case was whether the Bi-State Development Agency

30. *Id.* at 229 (citing *O’Dell*, 521 S.W.2d at 417-19).

31. MO. REV. STAT. § 537.600.1 (1994).

32. MO. REV. STAT. § 537.600.1 (1) (1994).

33. MO. REV. STAT. § 537.600.1 (2) (1994).

34. 649 S.W.2d 864 (Mo. 1983). In *Bartley*, the plaintiffs sued the special school district for their injuries, which were inflicted when another student assaulted them on the school bus. *Id.* at 865.

35. *Id.* at 868.

36. MO. REV. STAT. § 537.600.2 (1994).

37. 745 S.W.2d 672 (Mo. 1988).

was a public entity under Section 537.600 and thus immune from tort liability unless exempted by one of the exceptions.³⁸ The supreme court concluded that Bi-State was a public entity and not a municipality because it exercised "substantial governmental authority and power."³⁹ This holding was important because municipalities did not have sovereign immunity when exercising a property function like bus transportation.⁴⁰

In response to *Trimble*, the legislature enacted subsections three through five of Section 537.600.⁴¹ Subsection three set up an express waiver of sovereign immunity for proprietary functions of multi-state compact agencies, such as Bi-State.⁴² Subsection four declared that prior to *Jones* public entities were never immune from suit for torts committed by employees engaged in proprietary functions.⁴³ Subsection five stated that *Trimble* erroneously interpreted the law and public policy of the state.⁴⁴

38. *Id.* at 673.

39. *Id.* at 674; *see also* Stacy v. Truman Med. Ctr., 836 S.W.2d 911 (Mo. 1992) (analyzing when a defendant, such as a hybrid agency, may be classified as a public entity).

40. Municipalities are immune from suit for torts arising from their governmental functions, but not from torts arising from proprietary functions. *See State ex rel. Trimble v. Ryan*, 745 S.W.2d 672, 673-77 (Mo. 1988).

41. H.B. 161, § A, 85th Leg., 1st Sess. (Mo. 1989).

42. MO. REV. STAT. § 537.600.3 (1994) states:

The term 'public entity' as used in this section shall include any multi-state compact agency created by a compact formed between this state and any other state which has been approved by the Congress of the United States. Sovereign immunity, if any, is waived for the proprietary functions of such multi-state compact agencies as of the date that the Congress of the United States approved any such multi-state compact.

43. MO. REV. STAT. § 537.600.4 (1994) declares:

Pursuant to the prerogative of the general assembly to declare the public policy of the state in matters concerning liability in tort for public entities, the general assembly declares that prior to September 12, 1977, there was no sovereign or governmental immunity for the proprietary functions of multi-state compact agencies operating pursuant to the provisions of sections MO. REV. STAT. §§ 70.370 to 70.440, and MO. REV. STAT. §§ 238.030 to 238.110, including functions such as the operation of motor vehicles and the maintenance of property, involved in the operation of a public transit or public transportation system, and that policy is hereby reaffirmed and declared to remain in effect.

44. MO. REV. STAT. § 537.600.5 (1994) states:

Any court decision dated subsequent to August 13, 1978, holding to the contrary of subsection 4 of this section erroneously interprets the law and the public policy of this state, and any claimant alleging tort liability under such circumstances for an occurrence within five years prior to February 17, 1988, shall in addition to the time allowed by the applicable statutes of limitation or limitation of appeal, have up to one year after July 14, 1989 to file or refile an

Missouri's sovereign immunity law remains in flux. More changes are bound to occur as the legislature and the Missouri Supreme Court battle over the definition of sovereign immunity. An area likely to encounter much change in the coming years and undergo an abundance of court debate is the "dangerous condition" exception to sovereign immunity, which is the focus of *Martin v. Missouri Highway & Transportation Department*.

B. The "Dangerous Condition" Exception to Sovereign Immunity

In order to state a claim under the "dangerous condition" exception to sovereign immunity, a plaintiff must establish: (1) that the property is in a dangerous condition; (2) that the plaintiff's injuries directly resulted from the dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of harm of the kind the plaintiff incurred; and (4) that a public employee in the course of his employment negligently created the condition or that the public entity had actual or constructive notice of the dangerous condition.⁴⁵

The courts have defined a dangerous condition as a defect that is physical in nature.⁴⁶ "Intangible acts such as inadequate supervision, the lack of warnings and/or signs, the inability to secure an area and the lack of barricades do not create a dangerous condition."⁴⁷ A dangerous condition must pose a physical threat of harm to an individual without intervention by third parties.⁴⁸

Once it is established that a dangerous condition exists, the plaintiff must show that the plaintiff's injuries directly resulted from the dangerous condition.⁴⁹

action against such public entity and may recover damages imposed by the common law of this state as for any other person alleged to have caused similar damages under similar circumstances.

45. See MO. REV. STAT. § 537.600(2) (1994). See generally *Alexander v. State*, 756 S.W.2d 539, 541 (Mo. 1988); *Warren v. State*, 939 S.W.2d 950 (Mo. Ct. App. 1997); *Thompson v. City of West Plains*, 935 S.W.2d 334 (Mo. Ct. App. 1996); *Ielouch v. Warsaw R-IX Sch.*, 908 S.W.2d 769 (Mo. Ct. App. 1995).

46. *Alexander*, 756 S.W.2d at 542.

47. *Necker v. City of Bridgeton*, 938 S.W.2d 651, 655 (Mo. Ct. App. 1997); see also *Hedayati v. Helton*, 860 S.W.2d 795, 796 (Mo. Ct. App. 1993); *Kanagawa v. State ex rel. Freeman*, 685 S.W.2d 831, 835 (Mo. 1985), overruled by *Alexander*, 756 S.W.2d at 540.

48. See *Alexander*, 756 S.W.2d at 541 (dangerous condition created by placement of partition against ladder, creating physical deficiency in state's property); *Necker*, 938 S.W.2d at 655 (dangerous condition not found in a non-defective four inch wide, twelve inch high balance beam placed next to wall in gym); *Kilventon v. United Missouri Bank*, 865 S.W.2d 741, 746 (Mo. Ct. App. 1996) (dangerous condition found when explosives were discovered in unmarked trailer); *State ex rel. St. Louis State Hosp. v. Dowd*, 908 S.W.2d 738, 740 (Mo. Ct. App. 1995) (dangerous condition not found in paper shredder because there was no risk of harm until activated by a third party).

49. *Ielouch*, 908 S.W.2d at 771-72.

The courts have held that direct cause is synonymous with “proximate cause” or “cause which directly, or with no immediate agency, produces an effect.”⁵⁰ The test is “whether, after the occurrences, the injury appears to be the reasonable and probable consequence of the act or omission of the defendant.”⁵¹ For instance, in *Patterson v. Meramec Valley R-III School District*,⁵² the Eastern District found the “dangerous condition” exception to sovereign immunity inapplicable due to a lack of causation.⁵³ The plaintiff brought a negligence claim against the school district arising from an injury that occurred when the plaintiff’s classmate threw a broken piece of asphalt at the plaintiff.⁵⁴ The court found no causation in that the plaintiff did not allege in his petition that he was injured as a pedestrian by the defect in the asphalt.⁵⁵ In contrast, in *Dorlon v. City of Springfield*,⁵⁶ the Southern District found that the plaintiff had made a submissible case on the issue of causation in a tort action for a slip and fall accident.⁵⁷ The plaintiff claimed that a dangerous condition in the sidewalk, a raised chunk of concrete, caused her fall.⁵⁸ The court held the jury was free to believe or disbelieve the direct testimony of the plaintiff.⁵⁹

Further, a plaintiff must show that the dangerous condition created a reasonably foreseeable risk of harm of the type incurred by plaintiff.⁶⁰ For example, in *Godrey v. Union Electric Co.*,⁶¹ the Eastern District implicitly held that a car accident was not foreseeable when the driver crashed into a privately owned utility pole located a few feet from the roadway because the court found that Union Electric owed no duty to the plaintiff.⁶² However, in *Linton v. Missouri Highway & Transportation Commission*,⁶³ the Eastern District found a car accident, in which a vehicle hit a retaining wall at an intersection, to be

50. *Id.* at 771.

51. *Oldaker v. Peters*, 869 S.W.2d 94, 100 (Mo. Ct. App. 1993).

52. 864 S.W.2d 14 (Mo. Ct. App. 1993).

53. *Id.* at 16.

54. *Id.* at 15.

55. *Id.* at 16; *see also* *Theodoro v. City of Herculaneum*, 879 S.W.2d 755 (Mo. Ct. App. 1994) (holding that business owner failed to allege facts showing that the condition of the city’s fire hydrant directly resulted in the fire which destroyed his property).

56. 843 S.W.2d 934, 943 (Mo. Ct. App. 1992).

57. *Id.*

58. *Id.* at 936.

59. *Id.* at 942-43; *see also* *Oldaker v. Peters*, 869 S.W.2d 94 (Mo. Ct. App. 1993) (holding that testimony of traffic engineer that lighting should have been installed at time roadway was constructed and testimony of eye witness as to blind spot was sufficient to establish causation and make MHTC liable).

60. *See generally* *O’Dell v. City of Breckenbridge*, 859 S.W.2d 166 (Mo. Ct. App. 1993).

61. 874 S.W.2d 504, 505 (Mo. Ct. App. 1994).

62. *Id.* at 505.

63. 980 S.W.2d 4 (1998).

reasonably foreseeable in light of the fact that the car never deviated from public property.⁶⁴

Lastly, the evidence must prove that the public employee negligently created the condition or that the public entity had constructive or actual notice of the dangerous condition.⁶⁵ For instance, in *Lockwood v. Jackson County*,⁶⁶ the Western District held that the county had sufficient constructive or actual notice of a dangerous condition at the county park's exercise station and thus was not immune from a personal injury claim.⁶⁷ The court noted that the county designed and constructed the park trail and had responsibility for maintaining the exercise stations on that trail.⁶⁸ Further, the court found that even if the county did not have actual notice, it was on constructive notice.⁶⁹ The dangerous condition, even though it may not have been obvious or notorious, existed for such a length of time that the city should have discovered it in the exercise of ordinary care.⁷⁰ In contrast, in *Koppel v. Metropolitan St. Louis Sewer District*,⁷¹ the Eastern District held that the St. Louis Sewer District was immune from liability for property damage to homes caused by a raw sewage back up.⁷² The court found that the owners had failed to show that the public employees negligently created the condition or that the district had actual or constructive knowledge of the condition.⁷³

Even if all four of these elements have been met, a defendant may still escape liability under the "dangerous condition" exception by asserting the state of the art defense found in Section 537.600.2.⁷⁴ This defense applies only to

64. *Id.* at 8.

65. See generally *Trumbo v. Metropolitan St. Louis Sewer Dist.*, 877 S.W.2d 198 (Mo. Ct. App. 1994); *Beyerbach v. Girardeau Contractors, Inc.*, 868 S.W.2d 163 (Mo. Ct. App. 1994); *O'Dell*, 859 S.W.2d at 166; *Stevenson v. City of St. Louis Sch. Dist.*, 820 S.W.2d 609 (Mo. Ct. App. 1991).

66. 951 S.W.2d 354 (Mo. Ct. App. 1997).

67. *Id.* at 357-59.

68. *Id.* at 357.

69. *Id.* at 357-58.

70. *Id.* at 358.

71. 848 S.W.2d 519 (Mo. Ct. App. 1993).

72. *Id.* at 520.

73. *Id.*

74. MO. REV. STAT. § 537.600.1(2) (1994) provides:

In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective, or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

highway design and acts as a complete bar to recovery.⁷⁵ If a defendant can prove by a preponderance of the evidence that the allegedly dangerous, negligent, or defective design of the highway or road reasonably complied with design standards at the time the road or highway was built, the plaintiff may not recover.⁷⁶

If all four of these elements have been established and the state of the art defense is unavailable, sovereign immunity is waived, and a plaintiff may recover in tort against a public entity. However, a plaintiff's recovery is capped at \$100,000.⁷⁷ This cap applies regardless of whether the public entity is a municipality, whether it carries liability insurance, or whether it was engaged in a proprietary function.⁷⁸

C. The "Dangerous Condition" Exception and the Duty to Maintain Clear Zones Near Roadways

Prior to *Martin*, Missouri courts had consistently held that an accident was not foreseeable even if it occurred only a few feet from the roadway.⁷⁹ Consequently, public entities had no duty to maintain clear zones and thus were not liable under the "dangerous condition" exception to sovereign immunity. This basic principle was reiterated in *Williams v. City of Independence*,⁸⁰ in which the Western District held that "an injury is reasonably foreseeable if a 'driver and vehicle normally using the roadway or deviating slightly in the normal use of the roadway will potentially encounter injury from the placement and maintenance of the [condition].'"⁸¹ The court, in that instance, held that a car crossing the center line of the road, traveling through the opposite lane of traffic, and driving across several private lawns, before hitting a wall eight feet off of the road, was not foreseeable.⁸² More importantly, the opinion contained

75. See MO. REV. STAT. § 537.600.1(2) (1994).

76. See MO. REV. STAT. § 537.600.1(2) (1994).

77. See MO. REV. STAT. § 537.610.2 (1994).

78. See *Wollard v. City of Kansas City*, 831 S.W.2d 200 (Mo. 1992). *Wollard* involved a claim against Kansas City for an injury sustained as the result of a dangerous condition on the city's property. *Id.* at 201. The Missouri Supreme Court held that MO. REV. STAT. § 537.600.2 (1994) eliminated the distinction between governmental and proprietary capacities of public entities in relation to the dangerous conditions and motor vehicle exceptions of the Section. *Id.* at 203-05. Therefore, any claim of damages under either exception is subject to the \$100,000 cap. *Id.* at 205-06.

79. See generally *Clinkenbeard v. City of St. Joseph*, 10 S.W.2d 54 (Mo. 1928); *Godfrey v. Union Elec. Co.*, 874 S.W.2d 504 (Mo. Ct. App. 1994); *Noe v. Pipe Works, Inc.*, 874 S.W.2d 502 (Mo. Ct. App. 1994); *Rothwell v. West Cent. Elec. Coop.*, 845 S.W.2d 42 (Mo. Ct. App. 1992); *Lavinge v. City of Jefferson*, 262 S.W.2d 60 (Mo. Ct. App. 1953).

80. 931 S.W.2d 894 (Mo. Ct. App. 1996).

81. *Id.* at 896 (quoting *Rothwell*, 845 S.W.2d at 44).

82. *Id.* at 897.

dicta that driving directly off of a paved roadway and eight feet down a slope would not be a "slight deviation."⁸³

Williams v. City of Independence followed a long line of cases that reached a similar narrow definition of what constitutes a "slight deviation" from the roadway. The first case to deal with this issue was *Clinkenbeard v. City of St. Joseph*.⁸⁴ In that case, the plaintiff was injured when his vehicle hit a utility pole located one to three feet off of the roadway.⁸⁵ The Missouri Supreme Court held that the city was not "chargeable with actionable negligence in the maintenance of the parkway . . . [or pole], which were entirely and wholly outside of the traveled and improved roadway . . . designated by the defendant city for ordinary vehicular travel and use of the public."⁸⁶

*Lavinge v. City of Jefferson*⁸⁷ also reached a similar holding when a plaintiff was injured as the result of striking a concrete wall on private premises a few feet outside of a public street.⁸⁸ The Western District characterized the accident as a "complete departure from the street over a course not shown ever to have been used for travel."⁸⁹ More recently, the Western District held in *Rothwell v. West Central Electric Cooperative*⁹⁰ that it was not foreseeable that the plaintiff would veer off of the roadway and strike a utility pole located eight to eleven feet from the roadway.⁹¹

Finally, in the case of *Noe v. Pipe Works, Inc.*,⁹² the Eastern District seemed to shrink the definition of slight deviation from the roadway to the point that it became meaningless, where nothing would constitute a "slight deviation." The court held that a utility company had no duty to a motorcyclist who collided with a utility pole situated forty to fifty-six inches off the roadway.⁹³ While the court could have distinguished this case and found liability, it instead chose to follow *Clinkenbeard*, using precedent as a way to avoid the consequences of increased liability. The court stated that "[e]ven if we were to ignore the practical ramifications which would affect utility companies, state, county and municipality highway and road departments statewide as a result of such ruling, we are constitutionally without authority to overrule the controlling decisions of the Supreme Court."⁹⁴

83. *Id.*

84. 10 S.W.2d 54 (Mo. 1928).

85. *Id.* at 55.

86. *Id.* at 62.

87. 262 S.W.2d 60 (Mo. Ct. App. 1953).

88. *Id.* at 61.

89. *Id.* at 64.

90. 845 S.W.2d 42 (Mo. Ct. App. 1992).

91. *Id.* at 44.

92. 874 S.W.2d 502 (Mo. Ct. App. 1994).

93. *Id.* at 503-04.

94. *Id.* at 504.

Thus, for twenty years prior to *Martin*, the Missouri courts had so narrowed the definition of "slight deviation" from the roadway that entities such as the highway department could safely assume that if a motor vehicle deviated from the roadway it would not be held liable. However, *Martin v. Missouri Highway & Transportation Department* may have signaled a change in such immunity, and entities may no longer be safe in assuming that they will not be liable for failing to adequately safeguard motorists who deviate slightly from the roadway.

IV. INSTANT DECISION

In *Martin*, the Missouri Court of Appeals for the Western District of Missouri reviewed Missouri's doctrine of sovereign immunity to determine whether MHTC was liable in tort for not maintaining certain clear areas along Missouri roadways.⁹⁵ The court found MHTC liable under the "dangerous condition" exception to sovereign immunity and held that MHTC had waived any defenses to such liability through the adoption of certain national safety guidelines.⁹⁶

In reaching its holding, the court of appeals first considered the propriety of the trial court's decision to grant a JNOV to the defendant.⁹⁷ The court found the trial court's ruling to be erroneous in that it mistakenly relied on *Williams v. City of Independence*⁹⁸ to establish that MHTC owed no duty to anyone leaving the traveled way.⁹⁹ The court of appeals examined *Williams* and the line of cases that preceded it, which had held that municipalities and utility companies were not liable to drivers who deviated slightly from the roadway.¹⁰⁰ The court distinguished those cases on the ground that the public entities involved did not assume a duty to maintain the area adjacent to the traveled way and protect against the dangerous condition.¹⁰¹

In this case, however, the court found that MHTC had assumed a duty to create safe clear zones for motorists.¹⁰² The court examined several statutes before implying such a duty. Under Missouri Revised Statutes Section

95. *Martin v. Missouri Highway & Transp. Dep't*, 981 S.W.2d 577 (Mo. Ct. App. 1998).

96. *Id.* at 585.

97. *Id.* at 579. A JNOV is only appropriate when the plaintiff fails to make a submittable case. See *supra* note 14.

98. 931 S.W.2d 894 (Mo. Ct. App. 1996). *Williams* held that a car crossing the center line of the road, traveling through the opposite lane of traffic, and driving across several lawns did not qualify as a slight deviation from the road. *Id.* at 896.

99. *Martin*, 981 S.W.2d at 580.

100. *Id.* See also *supra* notes 80-95 and accompanying text.

101. *Martin v. Missouri Highway & Transp. Dep't*, 981 S.W.2d 577, 580 (Mo. Ct. App. 1998).

102. *Id.*

227.030.1, MHTC was given control over the construction and maintenance of the highway system.¹⁰³ MHTC was also authorized under Section 227.220 to remove any obstruction to the lawful use of the highway system, including removing or trimming trees within or overhanging the right-of-way.¹⁰⁴ From these statutes, the court concluded that MHTC had control over the entire right-of-way for highway purposes and was responsible for cutting vegetation growing in such right-of-way that might interfere with driving safety.¹⁰⁵

The court also found that MHTC was a member of the American Association of State Highway Transportation Officials (AASHTO) and had adopted its guidelines.¹⁰⁶ As a member of AASHTO, MHTC received guideline manuals in both 1967 and 1974, which prescribed unencumbered roadside recovery areas of thirty feet or more in width from the edge of the traveled way.¹⁰⁷ The manuals stated that "corrective programs should be undertaken at once to eliminate from the roadside or to relocate to protected positions such hazardous fixed objects as trees."¹⁰⁸ They further warned that trees of large trunk size planted next to the roadside were "potential hazards."¹⁰⁹ In 1989, MHTC also received AASHTO's "Roadside Design Guide," which prescribed formulas for determining the appropriate clear zones.¹¹⁰ The court noted that the prescribed clear zone for the area of the accident was sixty-four and one-half feet from the edge of the ramp.¹¹¹

After a thorough examination of the Missouri statutes and the AASHTO guidelines, the court determined that MHTC had a duty to maintain clear areas along state highways.¹¹² The court rejected MHTC's arguments that a duty to maintain clear zones did not arise until after it adopted a clear zone policy in 1966 and that its maintenance policy dictated that mature trees should be cut only if dead or if determined to be in extremely hazardous locations.¹¹³ MHTC argued that the tree involved in Kelly's accident was neither dead nor extremely dangerous; therefore, it owed no duty to remove it.¹¹⁴ The court stated that even if MHTC did have a duty to remove only extremely dangerous trees, the

103. *Id.* at 580.

104. *Id.* at 581.

105. *Id.*

106. *Id.* AASHTO is made up of highway departments from all fifty states. *Id.* The association develops standards for the design and maintenance of state highways. *Id.*

107. *Id.*

108. *Id.* The AASHTO guidelines are published in a manual entitled "Highway Design and Operational Practices Related to Highway Safety." *Id.* It is referred to by AASHTO members as the "Yellow Book." *Id.*

109. *Id.*

110. *Id.* at 582.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

evidence sufficiently showed that the tree was located in a very hazardous area.¹¹⁵ The court reviewed testimony that the tree was less than thirty feet from the roadway on an unrecoverable slope, where two accidents had occurred in the previous month.¹¹⁶

MHTC set out two additional arguments in support of the trial court's grant of a JNOV.¹¹⁷ First, MHTC claimed that Martin failed to make a submissible case that the tree constituted a dangerous condition under Section 537.600.¹¹⁸ The court found, however, that Martin presented sufficient evidence to establish a dangerous condition.¹¹⁹ First, Martin established that there was a dangerous condition of the property in that the tree was placed less than thirty feet down a non-recoverable slope.¹²⁰ Second, the evidence proved that Kelly's injuries directly resulted from the dangerous condition, as the tree branch caused her fatal head injuries.¹²¹ Third, the evidence showed that the injuries Kelly sustained were reasonably foreseeable in light of the dangerous condition because the clear zones were established to prevent those types of injuries.¹²² Fourth, the plaintiff established that the employees of MHTC had planted the tree in 1966 as part of the Federal Highway Beautification Act, and that it was reasonable to infer that by 1967 MHTC knew that the recently planted tree did not comply with the prescribed clear zones.¹²³

Finally, MHTC argued that it was entitled to a state of the art defense under Section 537.600.1(2).¹²⁴ The court, however, disagreed,¹²⁵ holding that the defense applied only to claims relating to the design of the highway. Martin's

115. *Id.* at 582-83.

116. *Id.* According to the expert testimony at trial, a recoverable slope has at least a 4 to 1 ratio. The slope leading to the tree had a ratio of 3.1 to 1. *Id.* at 583.

117. *Id.* at 583.

118. *Id.* See *supra* notes 45-78 and accompanying text for an analysis of the dangerous condition exception to sovereign immunity.

119. *Id.*

120. *Id.*

121. *Id.* at 584.

122. *Id.*

123. *Id.*

124. *Id.* at 584-85. This defense in Section 537.600.1(2) states:

In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective, or dangerous design of a highway or road, which was designed or constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

MO. REV. STAT. § 537.600.1(2) (1994).

125. *Martin v. Missouri Highway & Transp. Dep't*, 981 S.W.2d 577, 585 (Mo. Ct. App. 1998).

claim was not based on the original design of the ramp,¹²⁶ as the tree was planted as part of a separate program over one year after the ramp was designed.¹²⁷ Further, MHTC could not claim such a defense as it had assumed a duty to remove the tree by its adoption of a clear zone principle.¹²⁸

After considering all of the evidence, the court found that Martin had presented a submissible case.¹²⁹ Therefore, it reversed the trial court's grant of a JNOV in favor of MHTC.¹³⁰ The court remanded the case for a reentry of judgment in favor of the plaintiff.¹³¹

V. COMMENT

The *Martin* court seemed to extend the duty to maintain clear zones under the "dangerous condition" exception to sovereign immunity further than any other Missouri court had in the preceding twenty years. This can partly be attributed to the court's broader definition of what constitutes a slight deviation from the roadway.¹³² In *Martin*, the court found that MHTC had assumed a duty to maintain clear zones along the outer portion of the highways, and thus it was liable for failing to remove the tree that Kelly struck when her vehicle deviated twenty-five feet from the roadway.¹³³

If the *Martin* court had wanted to avoid the practical consequences of increased liability upon the highway department, as was the worry of the *Noe* court, it simply could have followed *Clinkenbeard*; however, it chose not to do so.¹³⁴ The court, in an effort to avoid *Clinkenbeard* and its successors, distinguished its decision on the ground that in this case MHTC had assumed a duty to maintain the roadway through its participation in AASHTO.¹³⁵

It is interesting to note, however, that the court implied that a duty could have been found in several of those cases.¹³⁶ This criticism about the narrowness of earlier decisions came in a footnote, which stated that "[s]ome of the cases following *Clinkenbeard* have gone so far as to read it as stating that as a matter

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 582-83.

134. *Clinkenbeard v. City of St. Joseph*, 10 S.W.2d 54, 62 (Mo. 1928); *Noe v. Pipe Works, Inc.*, 874 S.W.2d 502, 504 (Mo. Ct. App. 1994).

135. *Martin v. Missouri Highway & Transp. Dep't*, 981 S.W.2d 577, 580 (Mo. Ct. App. 1998).

136. *Id.* For instance, the court criticized the holding of *Noe*. *Id.*

of law municipalities and utility companies do not have a duty to motorists to keep safe any of the area outside the traveled portion of the road."¹³⁷

It is difficult to determine whether this note may indicate a change of sentiment that could signal the potential overruling of cases, such as *Clinkenbeard* and *Noe*, and the widening of tort liability for highway departments, municipalities, and utilities. For years, plaintiffs' attorneys have criticized the court's reliance on *Clinkenbeard* as outdated.¹³⁸ Indeed, it does seem that *Clinkenbeard* has been used to so narrowly define the phrase "slight deviation from the roadway" that almost no accident qualifies as reasonably foreseeable.¹³⁹ Thus, many public entities may escape liability when in actuality they should have a duty to make the roadways reasonably safe for all drivers.

Even if *Clinkenbeard* and its progeny are not overruled, lower courts that criticize their rationality may be able to avoid the harshness of sovereign immunity. Through the use of the "dangerous condition" exception, if a duty on the part of a public entity to maintain and keep the untraveled portion of the road safe can be found, liability may be imposed. In *Martin* itself, for instance, a JNOV for the defendants would have been sustained but for the court's active search of the record for evidence that a duty had been established through the adoption of AASHTO guidelines. Courts could possibly, in this way, distinguish a case from precedent.

However, it may be just as likely that the law will remain unchanged, and *Clinkenbeard* will be the rule for years to come. The Missouri Supreme Court does indeed consider the practical consequences of overruling precedent and may worry that imposing liability on highway departments, municipalities, and other public entities will create an avalanche of lawsuits and dire financial consequences for those affected. For instance, the possible future consequences to the Missouri Department of Transportation from one decision like *Martin* may be immeasurable. How many large trees are located within the supposed thirty foot clear zones on any Missouri highway? Courts simply may not want to decrease the protections of sovereign immunity and impose such liability.

Further, even if courts react favorably to *Martin*, given the history between the Missouri judiciary and the legislature, the Missouri legislature may respond to any such loosening of the doctrine of sovereign immunity in a very unsympathetic manner.¹⁴⁰ The legislature may react, as it has in the past, by modifying Section 537.600 to protect such entities as the highway department from liability.¹⁴¹

Martin could perhaps be the instigator of yet another battle between these two branches of the government. In the past, the legislature has had a strong interest in preserving sovereign immunity and protecting agencies, such as

137. *Martin*, 981 S.W.2d at 580 n.2.

138. See, e.g., *Noe*, 874 S.W.2d at 502.

139. See *supra* notes 79-95 and accompanying text.

140. See *supra* notes 25-44 and accompanying text.

141. See *supra* notes 25-44 and accompanying text.

MHTC, from tort liability.¹⁴² In contrast, Missouri courts have often worried about the implications of the doctrine of sovereign immunity, as dramatically demonstrated by their abolition of the doctrine in 1977.¹⁴³

Martin does seem to signal a possible change in the “dangerous condition” exception to sovereign immunity in connection with the duty to safeguard motorists who deviate slightly from the roadway. Such a change seems to be a positive move. Earlier case law regarding the “dangerous condition” exception as it applied to vehicles veering off of the traveled portion of the highway had carried the definition of slight deviation from the roadway to the point of absurdity, where no duty could ever be found. The question remains, however, whether *Martin* will ever be extended to other factual situations or whether courts will continue to follow *Clinkenbeard* given the possible consequences of increased liability upon such entities as the highway department.

VI. CONCLUSION

The future of sovereign immunity in Missouri is difficult to predict. The legislature and the Missouri Supreme Court have been at war for years over tort liability and sovereign immunity, and the battle is likely to continue. The Missouri Court of Appeals for the Western District of Missouri’s imposition of liability in *Martin* was probably a step in the right direction, as MHTC undoubtedly accepted a duty to maintain clear zones along the highways. Whether a duty to keep motorists safe outside of the traveled portion of the roadway will ever be implied in other situations is questionable, but *Martin* may hint at such a future.

STACY L. NAGEL

142. See *supra* notes 25-44 and accompanying text.

143. See *supra* notes 28-30 and accompanying text.