DOLOMITE HIGHWAY DESIGN DECISION

New York State Court of Claims

STATE OF NEW YORK COURT OF CLAIMS

JOSEF TWIRBUTT and MARIA TWIRBUTT,

Claimants, DECISION

-V-

THE STATE OF NEW YORK, Claim No. 90316

Defendant.

BEFORE: HON. FERRIS D. LEBOUS
Judge of the Court of Claims

APPEARANCES: For Claimants:
LAW OFFICES OF MICHAEL L. PAIKIN
BY: Michael L. Paikin, Esq., of counsel

For Defendant:,
HON. ELIOT SPITZER, ATTORNEY GENERAL
BY: Richard Lombardo, Assistant Attorney General,
of counsel

Josef Twirbutt suffered catastrophic injuries on October 9, 1992 when he was struck by a motor vehicle while standing behind a parked car on the eastbound shoulder of State Route 129, in the Town of Yorktown, Westchester County, New York. ' The trial of this Claim, heard on August 9 through August 12, 1999 and August 24, 1999, was bifurcated and this Decision addresses the issue of liability only.

[1]The Claim of Maria Twirbutt is derivative in nature. Accordingly, any reference to Clairnant is to Josef Twirbutt only.

The gravamen of the Claim is that the State repaved Route 129 in 1986 with Dolomite, a substance used in a mixture with asphalt to make road pavement, despite the fact the State knew, or should have known, that Dolomite lacked sufficient skid resistance on high traffic volume roadways. Claimant contends the State created an inherently dangerous or defective condition in this roadway or had actual notice thereof In addition, Claimant argues the State posted improper speed advisory and curve warning signs. The relevant facts, as found by this Court after trial, are contained below.

1. Facts

Claimant was employed by the IBM Corporation as an architect engaged in the acquisition, construction, renovation and design of IBM facilities and offices for approximately 17 1/2 years. Claimant's job required him to travel to various sites and facilities owned by his employer. On October 9, 1992, at approximately 10:33 0 a.m., Claimant left his IBM Tarrytown office to travel to Monroe, New York to inspect a warehouse facility. He traveled to the facility by way of the Tappan Zee Bridge on the New York State Thruway and stayed until approximately 2:330 p.m. On his trip to Monroe, Claimant encountered numerous traffic delays due to rain. Hoping to avoid the same on his return trip to Tarrytown, Claimant asked for and received alternate directions by way of the Bear Mountain Bridge via the Taconic State Parkway. Claimant hoped this alternate route would afford an easier trip by avoiding the Tappan Zee Bridge. Tragically, this was not the case.

Claimant took the Bear Mountain Bridge and then traveled south on Route 9, hoping to connect to the Taconic Parkway. While Claimant knew the Taconic Parkway paralleled Route 9 in

an easterly direction, he saw no access signs to the Taconic Parkway from Route 9. When Claimant observed a sign for Route 129 East he decided to pursue that route hoping that it would, at some point, connect to the Taconic. Parkway. Claimant testified it was rainingy so'heavily he had his headlights on; his windshield wipers on high; and was driving slowly. After traveling a number of miles on Route 129, Claimant became concerned Route 129 would not connect to the Taconic Parkway. Claimant continued on Route 129, through its intersection with Underhill Avenue, and traveled through a series of successive curves described in further detail below. At approximately 4 p.m., Claimant observed a vehicle parked, on the eastbound shoulder of Route 129. He pulled onto the shoulder and parked his car directly behind the other vehicle.[2] Claimant could not obtain directions, since the parked vehicle was unoccupied. Claimant was driving his son's car on this date and knew his son often kept road maps in the trunk of his 1989 Plymouth Horizon, so he went back to his vehicle and opened the trunk, Claimant was leaning inside the open trunk when he heard what he believed to be the roar of an engine and the screeching of tires behind him. Claimant next recalled waking up in a Baltimore, Maryland hospital approximately 2 months later, having sustained severe injuries resulting in the amputation of both his legs above the knee. Other than as outlined above, Claimant has no recollection of the actual accident.

Claimant was struck by a vehicle owned and operated by one Christa Bakker. Ms. Bakker was an uninsured driver who gave a police report at the scene, but could not subsequently be located to provide testimony.

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[2] This "unofficial" parking area was adjacent to a popular fishing area at the Croton Reservoir where people often park while fishing at the reservoir below.

In the vicinity of this accident Route 129 is a two lane, winding, scenic highway which traverses basically in an east/west direction. The curves immediately proceeding the accident site are lined on either shoulder with white ~g lines and through the center of the roadway with double yellow lines. The area of the accident is best described as three successive curves, starting with a curve to the left ("Curve #1") and followed by a reverse "S" curve ("Curve #2" and Curve #Y) winding first to the right and then to the left. Curve #1 is announced to drivers by a posted 40mph speed advisory sign in conjunction with an arrow indicating an approaching curve to the left. Soon thereafter, Curve #2 and Curve 93 are made known by a 30 mph speed advisory sign and an arrow indicating an approaching reverse "S" curve. Additionally, as one approaches Curve #2 there are chevrons posted on the opposite side of the roadway immediately adjacent to the westbound shoulder. The parking area where this accident occurred is situated just beyond Curve #2, on the eastbound shoulder of the roadway.

Richard Dale, a doctor of psychology, was driving behind the Bakker vehicle on Route 129 east just prior to the accident. He firs i t noticed the Bakker vehicle about I to I V2miles from

Underhill Avenue and continued two to three car lengths behind the Bakker vehicle until the time of the accident. Dr. Dale recalled the speed of both vehicles at between 40 and 50 mph. He testified this accident happened on the portion of the roadway directly after the completion of Curve #2. Dr. Dale saw the posted speed advisory and curve signs so "maintained a safe distance between his vehicle and the Bakker vehicle and maintained a safe distance at all times".[3] While he could not

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[3] **Unless otherwise specified, all quotations are from the Court's trial notes.**

specifically recall the traffic conditions that day, Dr. Dale noticed nothing out of the ordinary from the Bakker vehicle. He believed the Bakker vehicle left the roadway approximately 60 feet prior to impact and did not observe any control problems such as skidding or fish tailing. Dr. Dale stated the Bakker vehicle had completed Curve #2 when it "drifted off the road" to the right side without any corresponding corrective or evasive maneuvers. In -fact, Dr. Dale saw no brake lights prior to impact.

Both Claimant and Defendant called as a witness police officer Timothy Tausz, a member of the Yorktown Police Department for approximately 18 years. The Court accepted Officer Tausz as an accident reconstruction expert. Officer Tausz arrived at the accident scene at approximately 5:45 p.m. on October 9, 1992 . While it had been raining all day, the Officer observed little or no pooling of water, furrowing, rutting or holes in the roadway. The Officer took photographs and measurements at the scene. In addition, the Officer drove east on Route 129 through and past the area of the accident at 30, 40 and 50 mph and at no time lost control of his vehicle. Additionally, the Officer performed a skid resistance test in the vicinity of the accident scene by locking his brakes while traveling eastbound just after Curve #2. The Officer explained his vehicle slid into the oncoming (westbound) lane and continued onto the westbound shoulder. Based on his investigation, Officer Tausz concluded that for some reason the Bakker vehicle lost control while on the roadway after completing Curve #2. The Officer concluded that Christa Bakker did not lock her brakes at any time between the time she left the roadway and the time she struck the Claimant since there was dirt from the shoulder of the roadway around the circumference of tires on the Bakker vehicle and there were no plowing marks in the dirt. After striking Claimant, the Bakker vehicle reversed direction

and rotated back approximately 90' and came to rest against a tree in a wooded area facing east and immediately south of Claimant's' vehicle.

The Officer prepared a report summarizing his investigation. (Joint Ex. 15, pages 3 and 4). While Officer Tausz and other officers who investigated at the scene referred to Route 129 as "traffic polished asphalt" they all explained that the phrase "traffic polished" implied that the roadway was well traveled, worn, and not freshly paved. The officers insisted that "polished" did not mean slippery or unsafe. While Officer Tausz could not say what caused Christa Bakker to lose control of her vehicle, the witness opinioned that it was not the road surface simply because the evidence at the scene, coupled with the testimony of Dr. Dale, indicate that Bakker did not hit her brakes or lock her wheels prior to impact. He hypothesized possible causes could be mechanical failure, human error, or just about anything. Other than sheer speculation, the witness simply had no idea what caused the accident.

Claimant called Dr. Donald Campbell, who the Court accepted as an expert in the area of geology and petrographic analysis. Dr. Campbell analyzes various substances such as concrete and cement aggregates, mortar, bricks, ceramic tiles, and other raw materials to determine their qualitative composition. The witness performed analysis on two core samples of Route 129 east which were taken by Claimant's representatives on August 4, 1999. While the witness testified at great length as to the various tests and analysis performed on the sample provided, his opinion was that the roadway surface was composed of between 90 and 95% Dolomite. The witness further testified that he forwarded a portion of the core sample to Construction Technology Laboratories

(CTL) who in turn performed x-ray diffraction and other spectrographic tests. CTL confirmed Dr. Campbell's findings as to this roadway's composition.

Dr. Campbell next reviewed a 1976 American Association of State Highway Transportation Officials report (AASHTO) which indicates that Dolomite roadways of high traffic volume (in excess of 3,000 vehicles per lane per day) will wear more rapidly, thereby reaching an equilibrium state providing a minimum level of skid resistence. (Cls. Ex. 9). In addition, the witness reviewed a Department of Transportation (DOT) Dolomite Friction Study of January 19, 1992 (hereinafter "DOT report") which established guidelines for Dolomite use and composition. (Joint Ex. 10). The DOT report concluded Dolomite should not make up more than 85% of a roadway's total aggregate in order to ensure adequate skid resistance. Since the composition of Route 129 was 90 to 95% Dolomite on the date of Claimant's accident, the witness concluded this roadway did not comply with the standards established by the DOT report. However, on cross-examination, Dr. Campbell acknowledged this DOT report also concluded that "sites containing Dolomite having an acid insoluble residue content less than 15% [4] are providing adequate friction in low traffic volume pavements". (Emphasis added; footnote added). Low traffic volume is defined as 3,000 vehicle passes per lane per day or less.

Samuel Hochstein, a consulting engineer since 1953 and former Deputy Commissioner Chief Engineer of the New York City Department of Traffic for 13 years, testified as an expert witness for

[4] In other words, the aggregate is composed of greater than 85% Dolomite.

Claimant. While Mr. Hochstein initially was critical of the posted recommended speed limit signs on Curve #2, on cross-examination he acknowledged the as-built plans and the radius of the curve indicated the recommended 30 mph s peed limit sign was appropriate. His stu# and analysis of the roadway led him to conclude that the critical speed (the speed at which a vehicle begins to slide) on Curve #2 would be approximately 40 to 45 mph, However, when asked how Officer Tausz possibly could have negotiated the subject curve at 50 mph without losing control, the witness was at a loss to explain. The witness also reviewed the DOT Dolomite report (Joint Ex. 10) and concluded that aggregate pavement composition of greater than 80 to 85% Dolomite should not be used on high traffic roadways. However, the witness reluctantly acknowledged pursuant to the DOT report that continued use of aggregate Dolomite greater than 85% was permissible, without regard to its repair or replacement, if traffic volumes are less than 3,000 vehicle passes per lane per day. Under such circumstances the witness suggested additional warning signs, such as "slippery when wet" with flashing lights, might be necessary. Mr. Hochstein concluded his direct testimony with his opinion the Bakker vehicle lost control because the wet roadway provided insufficient skid resistance due to its Dolomite composition.

However, on cross-examination, Mr. Hochstein conceded he had no idea what Christa Bakker was doing at the time of the accident; such as whether she was sitting, talking, or having any physical contact with the passenger in the vehicle. In short, without the testimony of Christa Bakker herself, he had no idea what Ms. Bakker was doing in those moments immediately before the accident. Moreover, the witness indicated that he could not tell, and there was no independent way to determine, if Bakker applied her brakes or whether she started to skid while on the travel lane portion

of Route 129. He further acknowledged that "anything was possible", including the loss of control of the Bakker vehicle as a result of human error or mechanical malfunction. However, he stated he cc assumed" that she lost control in the curve or overcorrected on a road that was-slippery**.** In sum, his assumptions were based solely upon the presence of Dolomite and the testimony of Dr. Dale.

The State called as an accident reconstruction expert Richard Hermance who has over 18 years of experience in investigating and reconstructing accidents. Mr. Hermance opined that the Bakker vehicle traveled off the paved portion of the roadway and onto the shoulder at about 45' and continued to rotate a total of 90', resulting in the left rear wheel of the vehicle striking the victim. He testified that this was clearly a high friction (no loss of traction) as opposed to a low friction (loss of traction) accident. Mr. Hermance opined that if, in fact, slippery road conditions and Dolomite had caused a loss of traction then, instead of the Bakker vehicle veering sharply to the right off the pavement and rotating 90', the car would have lost traction coming out of Curve #2 and would have continued in a straight line crossing into the westbound lane and coming, to rest on the westbound shoulder of the roadway.[5] The witness testified the very fact that the vehicle continued to veer to the right after completion of Curve #2 evidenced high friction. In short, the motion, speed, and movement of the Bakker vehicle, together with the geometry and superelevation of the eastbound lane of the roadway, led this witness to the conclusion that this was a classic "oversteer" situation resulting from very good friction as opposed to no friction at all. This, in the witness's opinion, was consistent with the description given by Dr. Dale, Of course, without the benefit of testimony from

[5] In much the same manner as did Officer Tausz's vehicle when he performed his skid test.

Ms. Bakker, Mr. Hermance could not say with certainty what actually caused the accident. However, Mr. Hermance was satisfied that the Dolomite pavement was not a factor because this was a high friction accident. It was Mr. Hermance's opinion that this accident and the motion of the Bakker vehicle is consistent with either driver error, deliberate driver input, or mechanical failure.

The State also called William Skerritt, who has been employed by DOT as an engineering geologist since 1979 and is the author of the 1992 DOT report on Dolomite (Joint Ex. 10). He is fully familiar with aggregate paving sources for State highway projects involving various types of asphalt and concrete paving substances, including Dolomite. Mr. Skerritt stated that an 85% or greater Dolomite aggregate is permissible in low traffic areas. The witness testified that while the State's own core samples of Route 129 showed acid insoluble residue of the roadway less than 15% (i.e., greater than 85% Dolomite), DOT traffic counts in this area in 1992 and 1993 show approximately 1,200 average daily vehicle passes per lane per day, both eastbound and westbound. This is well below the 3,000 average lane passes per day which would otherwise render this area inappropriate for use of Dolomite pavement in such concentration. The witness concluded that the presence of Dolomite at the accident site would have no negative impact on skid resistence since this was a low volume roadway. The witness opined that if this roadway were constructed of 100% Dolomite, it would still provide adequate friction and skid resistence for this low volume of traffic per his DOT report.

The State also called Thomas Weiner, who has been employed by New York State DOT for 18 years and currently works in the Engineering Safety Group. This witness compiled a record of

all reported accidents on Route 129 between mile markers 1054 to 1059 (the site of this accident) from Nov. 1987 to Nov. 1992. (Joint Ex. 14). During this five-year period there were 20 "roadway"[6] related accidents reported; 7 on dry pavement and 13 on wet pavement. The witness testified that this number of accidents is well below the Safety Engineering Group's minimum threshold (20 accidents over a two-year period) for identification of accident prone locations. Consequently, pursuant to DOT's internal safety guidelines, since the accident site was not designated an "accident prone" location, no safety study or remediation plan needed to be prioritized or implemented. Furthermore, the witness testified that all the posted recommended speed limit signs were established by ball banking tests and that all traffic control signs were up and posted in full compliance with the Manual of Uniform Traffic Control Devices.

The State also called Nicholas Pucino, who was recognized by the Court as an expert on highway safety design and construction, as well as accident reconstruction. Based on his testing and analysis, Mr. Pucino concluded the recommended speed limit sign and the curve warning signs were appropriate and were properly located and posted. Moreover, he opined the chevrons, posted on the westbound shoulder just prior to Curve #2, appropriately supplemented the speed advisory and warning signs. Mr. Pucino also testified that all the aforementioned signs were posted and maintained in full compliance with the Manual of Uniform Traffic Control Devices.

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6 A "roadway" accident is directly attributable to the physical characteristics or condition of the roadway itself.

Moreover, Mr. Pucino reviewed the accident history for this portion of the roadway and indicated that the 13 wet weather accidents over the preceding five-year period resulted in a loss of control for a number of reasons and factors; most not relevant to the issues in 1his case. (Joint Ex. 14). Moreover, his uncontroverted opinion was that this number of accidents was within the normal range for a roadway of this geometry and design, and not so inordinately high as to trigger a DOT safety study of the site pursuant to the Department's internal safety guidelines. Mr. Pucino opined from the proof that Christa Bakker steered her vehicle to the inside of the curve, demonstrating she had good traction. While this witness could not say, absent Ms. Bakker, what caused the vehicle to veer in that direction (whether it was inattentiveness, intentional conduct, or mechanical failure), he nonetheless reached the conclusion this was a high friction accident. It was this witness's opinion that the roadway geometry presented Christa Bakker with a moderate to sharp curve with properly posted signs which met DOT safety standards and regulations in all respects.

II. Law

It is well-settled the State has a duty to maintain its highways and their adjacent areas in a reasonably safe condition for the benefit of travelers. This duty includes the obligation to post adequate and unambiguous signs along a roadway informing travelers of upcoming conditions and hazards. *(Merrill Tansp. Co. v State of New York, 97* AD2d 921, 922). However, the mere happening of an accident on a State roadway does not render the State liable. *(Brooks v New York State Thruway Auth., 73* AD2d 767, 768, *affd5l* NY2d 892). Of course, the State is not an insurer of the safety of its roads and no liability will attach unless the alleged negligence of the State is the proximate cause of the accident. *(Tomassi v Town of Union,* 46 NY2d 91, *97).* Consequently, it is

Claimant's burden to show that the State was negligent and that such negligence was the proximate cause of the accident. *(Basso v Miller, 40* NY2d 233).

A. Dolomite

Claimant asks this Court to make two inferences in order to reach a finding of liability against the State due to the presence of Dolomite in this roadway. The first inference--that this was a low friction accident, and the second inference--that the low friction was *caused by* Dolomite in the roadway. Generally, there is no rule prohibiting placing an inference upon an inference, rather the rule is that an inference may not be based upon conjecture. (Pollockv *RapidIndus. Plastics Co., 113)* AD2d 520, 524). An "inference based on inference" is impermissible only when:

> one or more of the links in a chain of inferences has failed to establish an issue with the degree of proof required in the particular case involved. In other words, the phrase refers to the sufficiency of the proof rather than to the admissibility of any particular proposition as the basis for a circumstantial inference.

(Fisch on New York Evidence § 164, at 94 [2 d ed]). However, for the reasons that follow, the proof submitted at trial does not support either inference which Claimant offers to support a finding of liability against the State.

1. First inference: Low friction accident

Claimant attempted to prove at trial that the Bakker vehicle lost control due to a loss of traction, thereby enabling this accident to be categorized as a "low friction" accident. However, the

Court finds that the proof supports the contrary conclusion, namely this was a "high friction" accident.

According to the credible testimony of Mr. Hermance and Officer Tausz, a "low friction" accident would have caused the Bakker vehicle to have continued the path that centrifugal force dictated; namely across the westbound lane of the roadway and onto the westbound shoulder. Instead, the Bakker vehicle traveled eastbound against the force of gravity making almost an acute turn to the right, implying a "high friction" accident or, in other words, an ability on the part of the driver to steer her vehicle counter to the pull of gravity and the superelevation of the roadway. Ironically then, a truly "low friction" scenario might have altered the outcome by causing the Bakker vehicle, upon rounding the curve, to continue off in a direction tangent to the apex of Curve 42 and into the westbound lane. That this was a higli friction accident is also supported by the testimony of Dr. Dale, the only eyewitness to this accident. Dr. Dale's observations are that the Bakker vehicle completed Curve 42 with no visible loss of control. Dr. Dale stated Bakkerjust "drove" to the right of the pavement and onto the shoulder without braking or taking any apparent evasive or corrective action.

In sum, absent the benefit of direct testimony from the driver Christa Bakker to the contrary, no evidence was presented to the Court from which to conclude this was a "low friction" accident. In fact, the proof as outlined above leads the Court to the contrary conclusion that this was a "high friction" accident.

2. Second inference: Lack of traction caused bv Dolomite aggregate

Assuming, *arguendo,* the Court accepted Claimant's first inference that this was a "low friction" accident, Claimant next asks this Court to infer the Dolomite aggregate caused the lack of traction. The proof does not support such an inference for the following reasons. First, the more credible testimony of the State's experts support the conclusion that roadways, such as Route 129, consisting of high levels of Dolomite lose skid resistance only when the roadway is subject to high traffic volume. It was uncontested at trial that Route 129 was a low volume traffic roadway. As such, the mere presence of at least 90% Dolomite in this roadway, without the requisite high volume traffic, does not support an inference that this roadway suffered from a loss of skid resistance.

Secondly, Claimant relies in large part upon Ross *v State of New York,* a 1997 Court of Claims decision in which the State was found liable for failing to timely remedy a Dolomite roadway. (Ross *v State of New York,* Ct Cl., February 14, 1997, Ruderman, J., Claim No. 90987). However, Claimant's reliance on Ross is misguided since the facts in Ross are distinguishable from the case at bar. The Ross decision involved a high volume traffic roadway containing 95% Dolomite aggregate; a higher than normal wet weather accident history; the driver's testimony that she lost traction; a DOT determination that the roadway was a dangerous condition; as well as a DOT decision to resurface the roadway almost one year prior to the accident at issue. By comparison, here we have a low volume traffic roadway; an inconsequential prior accident history in terms of frequency and cause; no testimony from the driver (Bakker) as to how the accident actually happened; and no determination from DOT pursuant to their internal safety guidelines that the roadway presented a dangerous condition or needed repair. In fact, the only similarity between Ross

and the case at bar is that both roadways contained 90-95% Dolomite aggregate. In sum, the inference in Ross, that Dolomite aggregate in the roadway was the proximate cause of the accident, was supported by the evidence. Here, neither the first inference - a low friction accident, or the second inference - Dolomite caused the low friction, is supported by the proof, either independently or in tandem.

In short, the Court finds that on the facts of this case, Route 129 does not present the same notice of a dangerous condition to the defendant as in the Ross case. Consequently, the Court finds no basis to impose liability upon DOT for failure to adopt and follow a remediation plan in a timely fashion.

B. Failure to Warn/Signage

Claimant also proffered the theory the State was negligent in failing to properly sign Route 129. Again, the proof established the contrary, namely that adequate and unambiguous signs were posted on Route 129 prior to and at the place of this accident. The Court credits the uncontroverted testimony of Mr. Pucino, as well as Mr. Weiner, that proper curve warning signs were posted. With respect to the speed advisory signs, Claimant's own expert, Mr. Hochstein, opined the 30 mph speed advisory sign at Curve #2 was warranted based upon, among other things, his own independent ball banking tests. In addition, no evidence was presented establishing that either the posted curve warning signs, the recommended speed advisory signs, or the chevrons were in any way inconsistent with the rules and regulations set forth in the Manual of Uniform Traffic Control Devices.

Assuming, *arguendo,* the Court were to accept Claimant's position that the posted signs were inadequate in some manner, Claimant has still failed to establish that the presence of some other sign would have avoided this accident. For instance, Claimant contends a flashing "slippery when wet" sign should have been posted, but there was no proof the same was warranted at this location or that this accident would have been avoided if such a sign was in place.[7] In other words, the signs that were posted were readily apparent and a driver exercising due care should have seen the signs and heeded their warnings. Without Ms. Bakker's testimony there is no proof - only conjecture - that some other sign would have altered her behavior in any manner. *(Hearn v State of few York,* 157 AD2d 883, 885, *lv denied* 75 NY2d 710). Consequently, Claimant's position that the State inadequately posted Route 129 immediately preceding the site of this accident, resulting in a failure to warn of danger ahead, is without merit.

Finally, this Court specifically directed the parties to address the issue of proximate cause in light of *Gayle v City of New York,* 92 NY2d 936 in their post-trial briefs. The Court of Appeals has stated that on the issue of causation a claimant:

> need not positively exclude every other possible cause of the accident. Rather, the proof must render those other causes sufficiently "remote" or "technical" to enable the [fact finder] to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence *(see, Schneider v Kings Highway Hosp. Ctr., 67* NY2d 743, 744). A [claimant] need only prove that it was "more likely" (id, at 745) or "more reasonable" *(Wragge v Lizza Asphalt Constr.* Co., 17NY2d3l3,321)that the

[7] In fact, as Mr. Pucino testified, it is generally agreed the posting of flashing warning signs can have greater negative consequences than the harm they are designed to avoid simply because if the sign is not warranted, drivers learn to ignore them. Once a driver gets used to ignoring these signs, their general effectiveness is lessened when encountered in other locations.

> alleged injury was caused by the defendant's negligence than by some other agency.

(Gayle v City of few York, supra, 92 NY2d 93 6, 93 7).

Here, Claimant has not met the threshold set forth in *Gayle.* All of the witnesses at trial, whether called by Claimant or the State, inevitably conceded the obvious; they could only [11] speculate" that any number of reasons could have led the Bakker vehicle on its tragic course including, but not limited to, driver inattention, excessive speed, influence of drugs or alcohol, mechanical failure, or an intentional act of Ms. Bakker. Unfortunately for the Claimant, Christa Bakker has chosen to secrete herself from these proceedings so we may never know what caused Ms. Bakker to drive her vehicle off Route 129. As such, under *Gayle,* none of these other possible causes can be viewed as "sufficiently remote", nor may the presence of Dolomite or alleged improper signage be accepted as potential causes of this accident any "more likely" than any number of other possibilities. In fact, from this record the Court concludes the issues of Dolomite and signage cannot be raised to a level of consideration any more viable than one of these other possibilities. Consequently, Claimant has failed to prove "that it was ‘more likely’... or 'more reasonable' that [his injury] was caused by the defendant's negligence than by some other agency." *(Gayle v City of New York, supra,* at 937).

Although the Court is aware of the catastrophic nature of Claimant's injuries and the attendant effect thereof on Claimant's life, the Court is bound to weigh the evidence submitted at trial; find the facts of this case from that evidence; and apply the appropriate law. In so doing, there

is no basis for this Court to find that any negligence attributable to the State proximately caused Claimant's injury.

In view of the foregoing, State's motion to dismiss, on which the Court previously reserved at trial, is now GRANTED and Claim No. 90316 is DISMISSED. All other motions on which the Court previously reserved, or which were not previously determined, are hereby denied,

ENTER JUDGMENT ACCORDINGLY.

Binghamton, New York
April 14, 2000

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FERRIS D. LEB0US
Judge of the Court of Claims