To: New Jersey Law Revision Commission  
From: Jayne Johnson  
Re: N.J.S. 59:4-7 – Liability; Weather-related conditions of public streets and highways  
Date: September 8, 2015  

MEMORANDUM

Executive Summary

This Memorandum presents a potential project to clarify the statutory language of N.J.S. 59:4-7, which governs the liability of public entities for injuries resulting from weather-related road conditions. The concurring opinion of a 1989 New Jersey State Supreme Court decision noted that the statutory language of this provision failed to adequately describe the immunity available to public entities for injuries resulting from weather-related road conditions. Alex Firschbaum, a former NJLRC legislative clerk, encountered the case during the course of independent research and brought the issue to Staff’s attention. Staff is seeking authorization from the Commission to work in this area.

Background

This potential project results from the concurring opinion of Justice Clifford in Pico v. State, where the Court found that a motorist injured in an accident on an icy highway failed to demonstrate that an independent negligent act by the State caused the injuries complained of.1 The Court held that “[i]n the absence of the public entity’s independent negligence, the weather immunity provided in N.J.S.A. 59:4-7 trumps liability predicated on ordinary negligence under N.J.S.A. 59:2-2.”2

Justice Clifford, who joined “entirely in the opinion of the Court,” focused his concurring opinion on the “particularly unfortunate” statutory language of N.J.S. 59:4-7.3 The statute reads as follows: “Neither a public entity nor a public employee is liable for an injury caused solely by the effect on the use of streets and highways of weather conditions.”4

He observed that the statutory language “does not confer immunity, for there is no liability to immunize against if a claimant’s injuries find their cause solely in the weather conditions.”5 Justice Clifford added that, in its existing form, the statute “does no more than state the obvious, for if the injury results solely and exclusively from weather conditions, there could be no actionable claim against anyone. That is the old ‘act of God’ defense.”6

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2 Id.
3 Id. at 64.
4 N.J. STAT. ANN. § 59:4-7 (West 2015).
5 Pico, 116 N.J. at 64.
6 Id.
concluded that the legislative intent of the statute was to establish that there is “no duty to clean up those conditions of streets and highways that are produced by storms” and other natural events.7

Justice Clifford remarked that the “Society for the Preservation of Linguistic Hygiene” should come and rescue N.J.S. 59:4-7.8 He cautioned the judiciary against using the common reference “weather immunity” to identify the statute, a designation he described as “verbal pollution.” Justice Clifford also recommended that the Legislature “clean up” the statute in accord with the observations discussed in his concurring opinion.9

Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) recognizes liability for omissions, negligent or wrongful acts of federal entities and waives immunity to allow the federal government to face liability as an individual would in similar circumstances.10 The FTCA provides several exceptions, including the following, which limit the waiver of liability, in situations where sovereign immunity does not apply: (1) the discretionary function exception – “by which immunity still applies to essentially governmental functions that require discretion or judgment, such as planning or policy level decisions that often include resource allocation decisions;” and (2) the misrepresentation exception, “which protects governmental entities from liability for a failure to provide correct information.”11

State Tort Claims Act

In accord, several jurisdictions enacted state statutes to waive immunity for state entities in tort claims. Modeled after the federal provisions, many of these tort claims acts provide exceptions, including the discretionary function and the misrepresentation exception, to limit the waiver of liability, in circumstances where sovereign immunity does not apply.12 Most jurisdictions approach liability for injuries involving weather-related road conditions by one of the following: (1) specifically defining the limits of immunity for weather-related road conditions; (2) expressly providing immunity for injuries resulting from the weather-related road conditions; or (3) allowing the state to be held liable for dangerous road conditions, including weather-related conditions.13

7 Id.
8 Id.
9 Id.
11 28 U.S.C. § 2680(a) - (n) (West 2015) (providing the exceptions that limit the waiver of liability).
13 E.g. N.J. STAT. ANN. § 59:4-7 (providing express immunity for injuries resulting from weather-related road conditions); see Weather or Not? State Liability and Road Weather Information Sys. (Nat’l Conf. of State Legislators, Denver, CO) April 2010 at Appendix C (adapted in the list of 13 states provided by the NCSL in Appendix pp. 5-7); COL. STAT. ANN. § § 24-106 (waiving immunity for certain weather-related road conditions,
New Jersey Tort Claims

New Jersey is one of the thirteen states that expressly provides statutory immunity to public entities for injuries resulting from weather-related road conditions.\textsuperscript{14} N.J.S. 59:4-7 is a part of the New Jersey Tort Claims Act (NJTCA) enacted in 1972.\textsuperscript{15} Several bills were introduced to address governmental liability in the years prior to the passage of the NJTCA, as judicial disfavor with sovereign immunity increased.\textsuperscript{16} The legislative history of the act dates back to 1962 when a commission was established to study the liability of counties and municipalities in tort actions, governed at that time solely by common-law.\textsuperscript{17} The New Jersey Supreme Court acknowledged that “‘there are certain kinds of acts or omissions of government, no matter how they are categorized, defined or labelled or how governmental immunity from suit is to be regarded, which should not give rise to tort liability.’”\textsuperscript{18}

The Legislature, seeking to draft a more comprehensive act than those previously considered, requested Attorney General George F. Kuhler, Jr. to study state tort claims against government entities.\textsuperscript{19} The Attorney General established a Task Force on Sovereign Immunity and issued a report of its findings in May 1972.

Bill S969 was subsequently introduced and enacted as the NJTCA, along with a companion bill to implement the “selected abolition of sovereign immunity” for tort claims.\textsuperscript{20}

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\textsuperscript{14} Weather or Not? State Liability and Road Weather Information Sys. (Nat’l Conf. of State Legislators, Denver, CO) April 2010 at Appendix C (adapting the list provided by the NCSL in Appendix pp. 5-7; see Fatal Motor Vehicle Crash, Comparative Data Report for Year ending December 31 2013 (New Jersey State Police, West Trenton, NJ) Dec. 31, 2013 (reporting 508 fatal motor vehicle crashes in N.J. during 2013 - 82.09% occurred during clear weather, 7.87% occurred during rain, 2.57% occurred during snow, 1.18% occurred during fog, and other conditions accounted for 6.31% of the fatal incidents; see also Dept. of Transp., Fed. Hwy Admin., Road Weather Program (reporting in its most recent study that on average annually, inclement weather and the effects of inclement weather on the road conditions results in: 17% of fatal collisions; 20% of collisions resulting in personal injury; 24% of collisions resulting in property damage alone) (noting that on an annual basis, nearly 6,250 fatal crashes, over 480,000 injury crashes and nearly 961,000 property-damage only PDO crashes occur nationally in adverse weather or on slick pavement); http://www.ops.fhwa.dot.gov/weather/q1_roadimpact.htm (citing ten-year averages from 2002 to 2012 analyzed by Booz Allen Hamilton, based on NHTSA data).


\textsuperscript{17} P.L.1962 - J.R.18.

\textsuperscript{18} Miehl v. Darpino, 53 N.J. 49, 54 (1968) (quoting Hoy v. Capelli, 48 N.J. 81, 87 (1966)); see also Rochinsky, 110 N.J. at 403-404 (1988) (establishing that both statutory and common-law immunity are available, particularly in circumstances involving snow and ice).


The signing statement provided by the office of Governor Cahill highlighted that:

immunity from liability is provided, under certain terms, in the following circumstances: (a) high-level discretionary activities; (b) the issuance, denial, suspension or revocation of permits, licenses, etc.; (c) the failure to inspect or negligent inspection of property; (d) actual fraud, malice or willful misconduct of public employees; (e) injuries occurring on unimproved property; (f) other areas of continued immunity are set forth.21

Other areas included injuries due to weather-related conditions on public streets or highways under N.J.S. 59:4-7.22

**Conclusion**

New Jersey, under the NJTCA, provides statutory immunity to public entities for injuries resulting from weather-related road conditions. The proposed project seeks to clarify the statutory language of N.J.S. 59:4-7, while preserving the existing immunity provided to public entities under the statute. The project seeks to better effectuate the legislative intent of the statute, in accord with the observations discussed in the concurring opinion of *Pico v. State.* Staff seeks authorization from the Commission to work in this area.

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21 P.L. 1972, c. 45 (signing statement indicates that Gov. Cahill signed S-969, sponsored by Senator Alfred D. Schiaffo, which provides the procedure for processing claims against the State; along with S-993, also sponsored by Senator Schiaffo, which authorizes the Attorney General to defend State employees in suits arising out of their duties as employees of the State. Under both provisions, a public body is liable for claims of injury caused by a public employee while performing his or her duties, and is held liable to the same extent as a private individual in a similar tort act. Both provisions provide that public employees will be indemnified for claims against them arising out of the course of their employment).

22 N.J. STAT. ANN. § 59:4-7 (West 2015).
## APPENDIX

**List of Statute Statutes Providing Immunity to Public Entities for Injuries Resulting from Weather-Related Road Conditions**

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<th>STATE</th>
<th>CITATION</th>
<th>STATUTORY LANGUAGE</th>
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<tr>
<td>CALIFORNIA</td>
<td>Ca. Government Code § 831</td>
<td>Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice, or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions.</td>
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| INDIANA | Ind. Code § 34-13-3-3        | Sec. 3 – A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from:  
(3) The temporary condition of a public thoroughfare or extreme sport area that results from weather. |
| IOWA   | Iowa Code Ann. § 668.10      | 1. In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:  

b. The failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt, or other abrasive material on a highway, road, or street if the state or municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt, or other abrasive material on its highways, roads, or streets. |
| KANSAS | Kan. Stat. Ann. § 75-6104    | A governmental entity or an employee acting within the scope of the employee’s employment shall not be liable for damages resulting from:  

(1) Snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity; |
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List of Statute Statutes Providing Immunity to Public Entities for Injuries Resulting from Weather-Related Road Conditions, cont.

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| MINNESOTA   | Minn. Stat. Ann. § 3.736(3) | Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not liable for the following losses:  
  (d) a loss caused by snow or ice conditions on a highway or public sidewalk that does not abut a publicly owned building or a publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of a state employee; |
| MISSISSIPPI | Miss. Code Ann. § 11-46-9   | (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:  
  (q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways. |
| NEBRASKA    | Neb. Rev. St. § 81-8.219    | The State Tort Claims Act shall not apply to:  
  (1) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 60-624, bridge, public thoroughfare, or other state-owned public place due to weather conditions.  
Nothing in this subdivision shall be construed to limit the state’s liability for any claim arising out of the operation of a motor vehicle by an employee of the state while acting within the course and scope of his or her employment by the state; |
| NEW HAMPSHIRE | N.H. Rev. Stat. Ann. § 230.81 | Notwithstanding RSA 230:78-80, the department of transportation shall not be held liable for damages arising from insufficiencies or hazards on public highways or highway bridges thereon, even if it has actual notice or knowledge of them, when such hazards are caused by snow, ice, or other inclement weather, and the department of transportation’s failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities adopted in good faith by the officials responsible for such policy; and all department of transportation employees and officials shall be presumed to be acting pursuant to such a policy or set of priorities, in the absence of proof to the contrary. |
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<td><strong>NEW JERSEY</strong></td>
<td>N.J. Rev. Stat. § 59:4-7</td>
<td>Neither a public entity nor a public employee is liable for an injury caused solely by the effect on the use of streets and highways of weather conditions.</td>
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<tr>
<td><strong>NORTH DAKOTA</strong></td>
<td>N.D. Cent. Code c 32-12.2-02</td>
<td>3. Neither the state nor a state employee may be liable under this chapter for any of the following claims: i. A claim resulting from snow or ice conditions, water, or debris on a public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;</td>
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<td><strong>OKLAHOMA</strong></td>
<td>Okla. Stat. tit. 51 § 155</td>
<td>The state of a political subdivision shall not be liable if a loss or claim results from : 8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision.</td>
</tr>
<tr>
<td><strong>SOUTH CAROLINA</strong></td>
<td>S.C. Code Ann. § 15-78-60</td>
<td>The governmental entity is not liable for a loss resulting from: 8. snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by the negligent act of the employee;</td>
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<tr>
<td><strong>WYOMING</strong></td>
<td>Wyo. Stat. § 1-39-120</td>
<td>(a) The liability imposed by W.S. 1-39-106 through 1-39-112 does not include liability caused by : (iii) the maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area.</td>
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