

**[J-112B-1999; MO-ZAPPALA, J]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

STACEY L. DEAN,	:	No. 33 M.D. Appeal Docket 1999
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court dated September
v.	:	18, 1998, at No. 621 C.D. 1998, vacating
	:	the Order entered 01/26/98 at No. 93-91
	:	and remanding to the Court of Common
COMMONWEALTH OF PENNSYLVANIA,	:	Pleas of Huntingdon County, Civil
DEPARTMENT OF TRANSPORTATION;	:	Division.
AND RONALD EUGENE BELL,	:	
	:	718 A.2d 374 (Pa. Commw. 1998)
APPEAL OF: COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	ARGUED: September 13, 1999
TRANSPORTATION	:	

DISSENTING OPINION

MADAME JUSTICE NEWMAN

DECIDED: MAY 18, 2000

Because I believe that the failure of the Commonwealth to install a guardrail when constructing a highway can qualify as a dangerous condition of Commonwealth realty, and did so in this case, I dissent.

The test for whether the real property exception to sovereign immunity applies should depend on whether the condition of government property created a reasonably foreseeable risk of harm that actually happened. In this case, the “condition” of Commonwealth realty that the plaintiff claims was dangerous was the design of the highway. Plaintiff averred that prevailing engineering standards required the installation of guardrails in this location because of the curvature of the road and the proximity of a

steep embankment.¹ The reasonably foreseeable risk of harm created by this defectively-designed highway was that an occupant of a vehicle that leaves the paved surface would suffer more serious injuries by traveling down the embankment than if a guardrail had halted the impact.² I disagree with the majority when it holds that the allegedly defective design of the highway (i.e., the failure to incorporate guardrails at this location when the highway was constructed) cannot qualify as a dangerous condition of the highway. In my view, the plaintiff has established a prima facie case that a defect of a Commonwealth highway constituted a substantial concurrent cause of her injuries, and therefore the ultimate question of whether this purported defect of design qualified as a “dangerous condition” should have been presented to a jury. See Kilgore v. City of Philadelphia, 717 A.2d 514 (Pa. 1998).

Of course, the failure to install a guardrail along a Commonwealth highway will not always trigger the sovereign immunity exception. Where engineering standards would not mandate the inclusion of guardrails, such as where the location of the highway is relatively flat and not surrounded by a steep embankment, or unless there is another dangerous condition of which the Commonwealth is or should be aware, then there would be no

¹ The majority suggests, in footnote eight, that “[t]he fact that engineering standards may suggest that a highway would be ‘safer’ if a guardrail were imposed does not render the highway ‘dangerous’ without one.” Plaintiff, through her proposed expert testimony, offered to prove otherwise. The majority has removed this question, usually for the jury to resolve, by holding here that the failure to erect a guardrail during the construction of a Commonwealth highway that is in close proximity to a steep embankment can never qualify as a dangerous condition of Commonwealth realty. I disagree and would permit this question to proceed to the jury.

² The companion case of Lockwood v. City of Pittsburgh, No. 26 W.D. Appeal Docket 1999, illustrates that such an increased risk of harm may be more than one of degree, and may in fact be the difference between an ordinary negligence action and a wrongful death action.

design defect of the Commonwealth highway that would create a dangerous condition. However, in the present case, where the plaintiff adduced evidence that prevailing engineering standards would require the inclusion of a guardrail in the design of the highway, then the plaintiff is entitled to present to the jury whether this design defect created a dangerous condition that resulted in a reasonably foreseeable risk of harm.

Accordingly, I respectfully dissent.