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KATZ, J., dissenting. The majority concludes that the doctrine of sovereign immunity bars the claim brought by the plaintiff, Adalbert H. McIntosh, Sr., against the defendant, James F. Sullivan, the commissioner of transportation (commissioner), under General Statutes § 13a-144,[1] the defective highway statute, alleging that, while operating his automobile on an interstate highway that was situated dangerously close to a rock ledge, he suffered serious physical injury when rocks fell from the ledge onto his car. I disagree with the majority's conclusion that the plaintiff cannot establish, under any circumstances, a cognizable highway defect claim under § 13a-144 because, in my view, that conclusion is based upon an unduly narrow construction of the statute and our case law, and is counterintuitive to the public policy underlying the state's waiver of immunity for defective highway claims. Therefore, I respectfully dissent.

The majority bases its decision on the following principles. First, the majority determines that a condition or hazard cannot be considered a highway defect, ''unless and until the condition or hazard is in the roadway or so close to it that it actually obstructs or impedes travel upon the roadway.'' Applying this principle to the plaintiff's claim, the majority, quoting *Hewison* v. *New Haven*, 34 Conn. 136, 142 (1867), concludes that falling rocks from a rock ledge situated directly next to the highway cannot be a highway defect because the rocks and rock ledge are not an object or condition that would ''*necessarily* obstruct or hinder one in the use of the road for the purpose of traveling thereon . . . .'' (Emphasis in original; internal quotation marks omitted.) Second, the majority reasons that, because we have determined that the commissioner's statutory obligation to remedy a highway defect does not arise until he has actual or constructive notice of the defect; see *Ormsby* v. *Frankel*, 255 Conn. 670, 676–77, 768 A.2d 441 (2001); the crumbling rock ledge would not trigger the commissioner's remedial duty unless rocks from the ledge actually were in the roadway and the commissioner knew of their presence *before* the plaintiff's automobile struck them. Finally, the majority concludes that certain cases in which we have rejected highway defect claims wherein objects have fallen from above the road are dispositive of the plaintiff's claim. I disagree with each of these conclusions.

I begin with certain well established principles. The defective highway statute expressly imposes liability on the state for injuries sustained ''by means of any defective highway,'' through the state's fault or neglect, as a result of its failure to keep the highway in repair. General Statutes § 13a-144. We have recognized that

''[t]he policy of § 13a-144 is to compensate those injured [by a highway defect] and to penalize the commissioner . . . for his neglect and default in carrying out his statutory duty to repair and maintain the state highways.'' *Hall* v. *Burns*, 213 Conn. 446, 460–61, 569 A.2d 10 (1990). Although the state has waived its sovereign immunity in § 13a-144 for claims arising from such defects, the legislature has not defined or in any way limited what constitutes a highway ''defect.'' Therefore, this court has defined and thereafter refined the meaning of that term on a case-by-case basis, mindful of the policy embodied in the statute. See *Chazen* v. *New Britain*, 148 Conn. 349, 353, 170 A.2d 891 (1961) (''[w]hether a condition in a highway constitutes a defect must be determined in each case on its own particular circumstances'').

This court has defined a highway defect that gives rise to liability under § 13a-144 as '' '[a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result.' *Hewison* v. *New Haven*, [supra, 34 Conn. 142].'' *Comba* v. *Ridgefield*, 177 Conn. 268, 270, 413 A.2d 859 (1979). The court further has determined that a defective design may, under certain circumstances, constitute an actionable highway defect. *Hoyt* v. *Danbury*, 69 Conn. 341, 352, 37 A. 1051 (1897); see, e.g., *Federman* v. *Stamford*, 118 Conn. 427, 429–30, 172 A. 853 (1934) (affirming judgment in favor of plaintiff on design defect claim); *Perrotti* v. *Bennett*, 94 Conn. 533, 541, 109 A.2d 890 (1920) (reversing judgment in favor of defendant state highway commissioner on plaintiff's design defect claim); see also *Bovat* v. *Waterbury*, 258 Conn. 574, 585–86, 589, 783 A.2d 1001 (2001) (recognizing that either of plaintiff's alternative claims of highway defect for failure to repair or maintain or design defect legally could sustain verdict). Thus, although the commissioner is not liable for the state's choices regarding its plan of construction for a roadway, the defective implementation of that plan does fall within the ambit of the statute if ''the plan of construction adopted [is] one which was totally inadmissible . . . [so] as to [render the highway] out of repair from the beginning.'' *Hoyt* v. *Danbury*, supra, 352. In other words, a design defect is a type of highway defect distinguishable simply by virtue of the fact that, with a design defect, the defect has existed from the inception of the roadway. Id. Thus, we have not construed the statute so literally as to preclude claims that common sense dictates would be encompassed within its terms.[2]

Consistent with the principle, however, that we narrowly construe statutes waiving sovereign immunity; *Prato* v. *New Haven*, 246 Conn. 638, 647, 717 A.2d 1216 (1998); this court has prescribed certain limits on defective highway claims. First, the state must have actual

or constructive notice of the defective condition. *Ormsby* v. *Frankel*, supra, 255 Conn. 676–77. Second, the danger posed must be specific to travelers on the highways, not to those who similarly might be injured when engaged in acts other than highway travel. See *Hewison* v. *New Haven*, supra, 34 Conn. 143; see also *Hoyt* v. *Danbury*, supra, 69 Conn. 352 ("[f]or consequential damage thus occasioned to members of the general public, the common law never gave a remedy; nor has the statute changed the rule"). Thus, "objects which have no necessary connection with the roadbed or public travel, which expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective." *Comba* v. *Ridgefield*, supra, 177 Conn. 270. Finally, the state will not be liable when the object properly serves its function of facilitating travel and is reasonably safe. See *Donnelly* v. *Ives*, 159 Conn. 163, 167–68, 268 A.2d 406 (1970) (to prove that city had failed "to exercise reasonable care to make and keep [highways] in a reasonably safe condition for the reasonably prudent traveler . . . something more than a mere choice between conflicting opinions of experts" is required [citations omitted; internal quotation marks omitted]); *Aaronson* v. *New Haven*, 94 Conn. 690, 695, 110 A. 872 (1920) (rejecting defect claim for guidepost in road that was "sufficiently conspicuous . . . and . . . serve[d] a useful purpose in directing traffic and promoting obedience to the law").

In my view, all of these elements could be satisfied in the present case, thereby simply permitting the plaintiff to avoid a motion to dismiss and to have an opportunity to meet the burden of proving his allegations. The plaintiff alleges that a highway defect arose when the state constructed the highway dangerously close to the rock ledge, knowing that rocks and debris were likely to fall onto the highway, and made no effort to stabilize the rock ledge, to erect sufficient barriers so as to prevent rocks falling from the ledge into the highway or to post signs warning of the danger, and, as a result of these actions, the plaintiff was injured by such an occurrence when traveling on the highway. It is clear that, because the plaintiff's allegations are consistent with a claim of design defect, the notice requirement is satisfied as the commissioner is deemed to have constructive notice of a condition the state has created.[3] See *Perrotti* v. *Bennett*, supra, 94 Conn. 539–40 (In discussing a municipality's liability for an injury from a municipal improvement on a highway, the court held: "If the plan be defective from the beginning . . . and injury be ultimately necessarily the inevitable or probable result, the municipality will be liable. . . . Upon this assumption the city created the defective improvement and either knew of it or was chargeable with knowledge of it."). The allegations also indicate that the rock ledge is "[an] object . . . *near* the traveled path . . . which, *from its nature and position, would*

be likely to [obstruct or hinder one in the use of the road for the purpose of traveling thereon] . . . .'' (Emphasis added.) *Hewison* v. *New Haven*, supra, 34 Conn. 142. The mere fact that the rock ledge abuts, but is not part of the road, is immaterial. ''To construe the word 'defective' as applying to the road bed only, would partially defeat the purpose which the legislature had in view; for it is obvious that there may be objects off the road bed, yet so near it, either on one side or over it, as seriously to impede the public travel.'' Id. Finally, the plaintiff's allegations suggest that only those traveling on the interstate highway would have been susceptible to the danger. See *Comba* v. *Ridgefield*, supra, 177 Conn. 271. I agree with the Appellate Court, ruling in a companion highway defect case premised on the same incident at issue in the present case brought by a passenger in the plaintiff's vehicle, that it is ''highly improbable . . . that the falling rocks and other debris could have injured anyone other than someone traveling on the highway.'' *Tyson* v. *Sullivan*, 77 Conn. App. 597, 605, 824 A.2d 857 (2003).

Undeniably, in maintaining our state highways, the commissioner has placed numerous signs and barriers along the roadside to warn of, and protect travelers from, the potential danger of rocks and debris falling onto passing cars.[4] Moreover, it is common knowledge that on Interstate 84, where the plaintiff was injured, the public can access state highways only while in motor vehicles, not on foot or a bicycle. Therefore, such warning signs and barriers establish both that the danger is specific to highway travelers, and thus there is a necessary connection between the defect and the highway, and that the commissioner should be imputed with notice of such defects. To the extent that there is a question in the present case as to whether the connection to the roadbed is sufficient or whether the design is unreasonably dangerous, that is a question for the trier of fact. *Serrano* v. *Burns*, 248 Conn. 419, 426, 727 A.2d 1276 (1999). In sum, the allegations establish that, through the commissioner's fault, by virtue of the state's decision to construct the road in close proximity to a hazardous condition, there was a danger posed specifically to highway travelers of which the commissioner had notice and that he did not remediate.

The majority relies nonetheless on this court's holdings in *Hewison* v. *New Haven*, supra, 34 Conn. 142–43, *Dyer* v. *Danbury*, 85 Conn. 128, 130, 81 A. 958 (1911) and *Comba* v. *Ridgefield*, supra, 177 Conn. 270, for the proposition that hazards that fall onto the roadway from an object near or suspended above the roadway *never* can be a highway defect. I disagree that these cases compel the majority's conclusion.

A brief discussion of these cases is helpful. The plaintiff in *Hewison* alleged that some unknown persons had suspended over the road a cloth banner, weighed

down insecurely at its ends with iron weights, by affixing the ends of the cloth between buildings on either side of the road. *Hewison* v. *New Haven*, supra, 34 Conn. 136–37. The plaintiff's decedent was injured when a heavy wind knocked down the cloth, and the iron weight fell against his skull with such force that he later died. Id., 137. The court rejected as too broad the plaintiff's theory of liability that the defective highway statute imposed liability for any nuisance that would render the highway as ''unsafe or inconvenient for public travel.'' Id., 141. The court cited numerous examples of nuisances that would be created by third persons that could injure or obstruct one traveling on the road that would not give rise to liability under the statute. Id., 140–41. The court also rejected, however, as too narrow the defendant's construction of the statute that ''a road can only be rendered defective by something in or upon the road bed itself.'' Id., 141–42. Rather, the court determined that the appropriate balance, consistent with the statute's intent, was to impose liability when the objects bear a necessary connection to the road or public travel and create a danger exclusively to highway travelers, not to the public generally. Id., 142. Applying that standard, the court reasoned that ''trees or walls of a building standing beside the road, and liable to fall by reason of age and decay . . . or any object suspended over the highway so high as to be entirely out of the way of travelers . . . may be more or less dangerous, but they do not obstruct travel.'' Id., 143. The court explained that such objects do not obstruct travel, in the sense of triggering liability under the statute, because a person was just as likely to be injured when off the road and not traveling on the road as when traveling on the road. Id. For that reason, the court concluded that the plaintiff could not prevail.

Comba v. *Ridgefield*, supra, 177 Conn. 268, and *Dyer* v. *Danbury*, supra, 85 Conn. 128, both involved injuries sustained when a rotted limb from a tree situated next to the road fell, in the former, onto a passenger in a motor vehicle traveling on the road, and, in the latter, onto a person walking on the sidewalk. In discussing both cases, the court in *Comba* expressly noted that, although the claims had failed, ''[t]he fact that the limb was not a part of the roadbed, or not within the traveled portion of the highway, was not controlling.'' *Comba* v. *Ridgefield*, supra, 271. Rather, those claims failed because the rotted tree ''was a condition that could cause injury, but that injury could result even to one who was not a traveler on the highway.'' Id.

Thus, it is clear that, in the aforementioned cases, the court rejected the claims because the risk of injury was not limited to only those persons traveling on the highway. In the present case, however, for the reasons I already have discussed, the crumbling rock ledge posed a threat to highway travelers only. Indeed, I also surmise that, in light of its rejection of liability for nui-

sances created by persons other than the city, the court in *Hewison* reached its conclusion in part because the plaintiff did not allege that the dangerous condition was created in any way through the fault or neglect of the city. See *Hewison* v. *New Haven*, supra, 34 Conn. 136–37; see also *Aaronson* v. *New Haven*, supra, 94 Conn. 695–96 (rejecting highway defect claim wherein plaintiff was injured when his car struck otherwise conspicuous and properly functioning guidepost knocked into road by third party).

I agree with the majority that these cases *could* be read so as to bar the plaintiff's claim. I disagree, however, that these cases *compel* us to conclude, in the absence of such a limitation in § 13a-144, that a highway defect is limited to objects that actually are in the roadway and necessarily obstructing or impeding travel. As support for this proposition, the majority relies in large measure on an example of a potential highway defect in *Hewison*, wherein the court states: "For example, branches of a tree hanging over the roadbed near the ground, necessarily obstruct the use of the way, and should be removed by the town . . . ." *Hewison* v. *New Haven*, supra, 34 Conn. 142. In my view, this dicta does not compel the conclusion that this example sets the ceiling on recovery under the statute. Indeed, it is not surprising that the *Hewison* court would cite an off road defect that obviously would fall within the ambit of the statute rather than ruminate as to a defect that was closer to the outer parameters of liability under the statute. I also note that, in one of the earliest highway defect cases, this court cited as an example of a design defect the failure to put a proper railing on steps between sidewalks of different grade. *Hoyt* v. *Danbury*, supra, 69 Conn. 352. Surely, not everyone would be impeded from traveling, but rather it would take the confluence of certain events for injury to occur—icy conditions, an elderly or disabled person needing additional support or people jostling each other. Similarly, in *Perrotti* v. *Bennett*, supra, 94 Conn. 539–40, this court recognized a design defect that had created a dangerous condition only by virtue of the confluence of two circumstances—a truck near the legal weight limit driving off the paved portion of the road and a drain located in that portion of the road that could not sustain such a great weight. See also *Bovat* v. *Waterbury*, supra, 258 Conn. 585–86 (affirming judgment in favor of plaintiff on design defect claim alleging that curve and grade of road produced dangerous condition when drivers approached from opposite directions at night with lights on, creating illusion that oncoming car was entering plaintiff's lane).

Thus, in my view, the majority reaches its conclusion based on an unduly narrow construction of the statute, one that our case law does not compel and one that is contrary to sound public policy.[5] This court previously has established that, "if there is a defective condition

that is not in the roadway, it must be so direct a menace to travel over the way and so susceptible to protection and remedial measures which could be reasonably applied within the way that the failure to employ such measures would be regarded as a lack of reasonable repair.'' *Comba* v. *Ridgefield*, supra, 177 Conn. 271. The common presence of warning signs and barriers along our state highways lends support to the conclusion that rock ledges are such a menace and establish the relative ease with which the danger posed by the rock ledges could have been alleviated. I also am mindful of the severity of physical injury that could be sustained from a large rock falling from high above onto a passing car. Because of the availability of reasonable remedial measures and the nature of the risk of harm, I would agree with the Appellate Court in that ''as a matter of public policy, the state should have a duty to employ such measures.''[6] *Tyson* v. *Sullivan*, supra, 77 Conn. App. 605.

Additionally, the implications of the majority's conclusion that the plaintiff could not state a defective highway claim consistent with his allegations under any circumstances strongly suggest that sound public policy would counsel against such a construction of the statute. Under its approach, if a ten ton boulder were to fall onto the roadway from a rock ledge situated next to the roadway and injure a traveler on the roadway, the state would not be liable unless the boulder had been in the roadway for a sufficient period of time before causing an injury. If the state were to remove that boulder after it fell onto a victim, but did nothing to protect the road from future falling debris, the state still would not be liable for the next boulder that fell onto the road and injured a second victim, and so on. The majority's reasoning would protect the state from liability even if the state were to blast the rock ledge to make way for the road, and in doing so knowingly left a boulder precariously perched at the edge of the ledge. Similarly, the majority's decision would bar claims against the commissioner for falling bricks or stones from a tunnel or overpass through which the state constructs a road. Such a result defies reason when the state has waived liability for highway injuries sustained from dangerous conditions of which it has notice.

Finally, it is important to remember the procedural posture in which this case comes before us, specifically a motion to dismiss on grounds of sovereign immunity. In the present case, reading *the facts as alleged* in the light most favorable to the plaintiff; see *Miller* v. *Egan*, 265 Conn. 301, 305, 828 A.2d 549 (2003); the state is charged with being able both to foresee and to alleviate the harm. The plaintiff, therefore, should at least be given the opportunity to prove these elements at trial. See *Donnelly* v. *Ives*, supra, 159 Conn. 169 (rejecting design defect claim as legally insufficient ''on the basis

of the plaintiff's complaint *and on the evidence submitted in support of the allegations of the complaint*'' [emphasis added]); see also *Pluhowsky* v. *New Haven*, 151 Conn. 337, 345–46, 197 A.2d 645 (1964) (affirming judgment in favor of defendant city on claim of design defect in light of expert testimony as to adequacy of design and evidence that dangerous condition not created by city); *Trotta* v. *Branford*, 26 Conn. App. 407, 413, 601 A.2d 1036 (1992) (affirming summary judgment rendered in defendant town's favor because plaintiff's complaint did not allege, as required, that defect was part of design and hence existed from inception of roadway); *Roy* v. *Michaud*, 5 Conn. App. 695, 700–701, 501 A.2d 1231 (1985) (directed verdict in favor of defendant commissioner of transportation upheld where plaintiff administrator failed to prove at trial that alleged highway defect was sole proximate cause of injury to decedent), cert. denied, 198 Conn. 806, 504 A.2d 1060 (1986). Therefore, I would conclude that the plaintiff's allegations state a colorable claim within the scope of § 13a-144.

Accordingly, I respectfully dissent.

[1] General Statutes § 13a-144 provides in relevant part: ''Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair, or by reason of the lack of any railing or fence on the side of such bridge or part of such road which may be raised above the adjoining ground so as to be unsafe for travel or, in case of the death of any person by reason of any such neglect or default, the executor or administrator of such person, may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . . The commissioner and the state shall not be liable in damages for injury to person or property when such injury occurred on any highway or part thereof abandoned by the state or on any portion of a highway not a state highway but connecting with or crossing a state highway, which portion is not within the traveled portion of such state highway. . . .''

[2] The plain meaning of the term ''repair'' would suggest a defective condition that arises subsequent to construction; yet, this court has recognized that liability could arise from a claim for a defect from the highway's inception. See, e.g., *Hoyt* v. *Danbury*, supra, 69 Conn. 352. Similarly, we have construed the statute to imply a cognizable action for the commissioner's failure to ''maintain'' a highway, although that term is not stated expressly in the statute. See, e.g., *Amore* v. *Frankel*, 228 Conn. 358, 367, 636 A.2d 786 (1994) (discussing commissioner's duty under statute ''to repair or maintain'').

[3] If the state builds a highway next to a rock ledge, it is almost certain that the architect of the highway must have been aware of the rock ledge and its proximity to the planned highway. Indeed, it is common knowledge that, in many instances, the state actually creates rock ledges by blasting hillsides during the course of constructing highways. In the present case, the deliberate positioning of the roadway near the rock ledges, such that loose rocks and other debris situated thereon—objects that, by their very nature and position, reasonably were at risk of dislodging and rolling onto the highway thereby obstructing or hindering travel—could fall, constitutes a defect that existed from the roadway's inception and thus gave rise to constructive notice.

[4] The commissioner claims that, because the plaintiff specifically alleged that there were no warning signs present at the accident site; see *McIntosh* v. *Sullivan*, 77 Conn. App. 641, 642 n.3, 825 A.2d 207 (2003); the Appellate Court improperly considered the presence of warning signs and barriers along the highway in concluding that rockslides are a likely occurrence. See *Tyson* v. *Sullivan*, supra, 77 Conn. App. 604–605. This allegation has no bearing on the fact that it is common knowledge that such warning signs and barriers exist along Interstate 84, the site of the plaintiff's accident, and

many other state roadways.

[5] Indeed, although the commissioner's obligation does not sound in general negligence, such negligence principles are nonetheless relevant to the defective highway statute; see *Prato* v. *New Haven*, supra, 246 Conn. 645; and public policy concerns have influenced the limits of recovery under the statute. See *Hall* v. *Burns*, supra, 213 Conn. 460–61 (discussing policy underlying § 13a-144); *Prato* v. *New Haven*, supra, 646–47 (discussing policy underlying municipal defective highway statute, General Statutes § 13a-149); *Prato* v. *New Haven*, supra, 651 (*Berdon, J.*, dissenting) (asserting that ''finding that constructive notice existed in this situation would advance the public policy underlying § 13a-149 of encouraging municipalities to use reasonable care in maintaining safe conditions on their highways'').

[6] Thus, the present case presents different public policy concerns underlying the cases relied on by the majority, as discussed further in this dissenting opinion, in which this court has rejected highway defect claims for injuries sustained when tree branches fell onto pedestrians and automobiles. There are critical differences between trees that grow alongside the roadway and rock ledges next to which a roadway is laid. It is axiomatic that rock ledges do not grow spontaneously, nor are they planted, or placed there by a third party. Whereas trees are numerous and have an ever changing condition, there are far fewer rock ledges and their condition is far less mutable, thus making it easier for the commissioner to monitor their condition and remediate any hazards.