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What Should Municipalities Do To Defend Roadway Design Claims?

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Introduction

- Designing, and maintaining, safe roadways for the public is one of the most important functions of a municipality
- Legal analysis of roadway design claims
- Today's focus – general principles you can implement today to successfully defend roadway design claims tomorrow

Roadway Maintenance – The Claims

- Refers to repairs to existing elements without calling upon “expert planning”
- Examples
  - Pothole repairs
  - Repairs to signs and traffic signals
  - Repairs to guardrails and barriers

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Roadway Maintenance – The Law

- Notice of a defect
  - In New York, some municipalities have enacted laws requiring prior written notice of a defect
  - Balances the duty to maintain against the reality of notice
- "Cause and Create" liability
  - Holds municipalities accountable for shoddy work
- Contractor indemnification
  - Can be based on
    - Contract
    - Insurance
    - Common law

Something Needs to Change

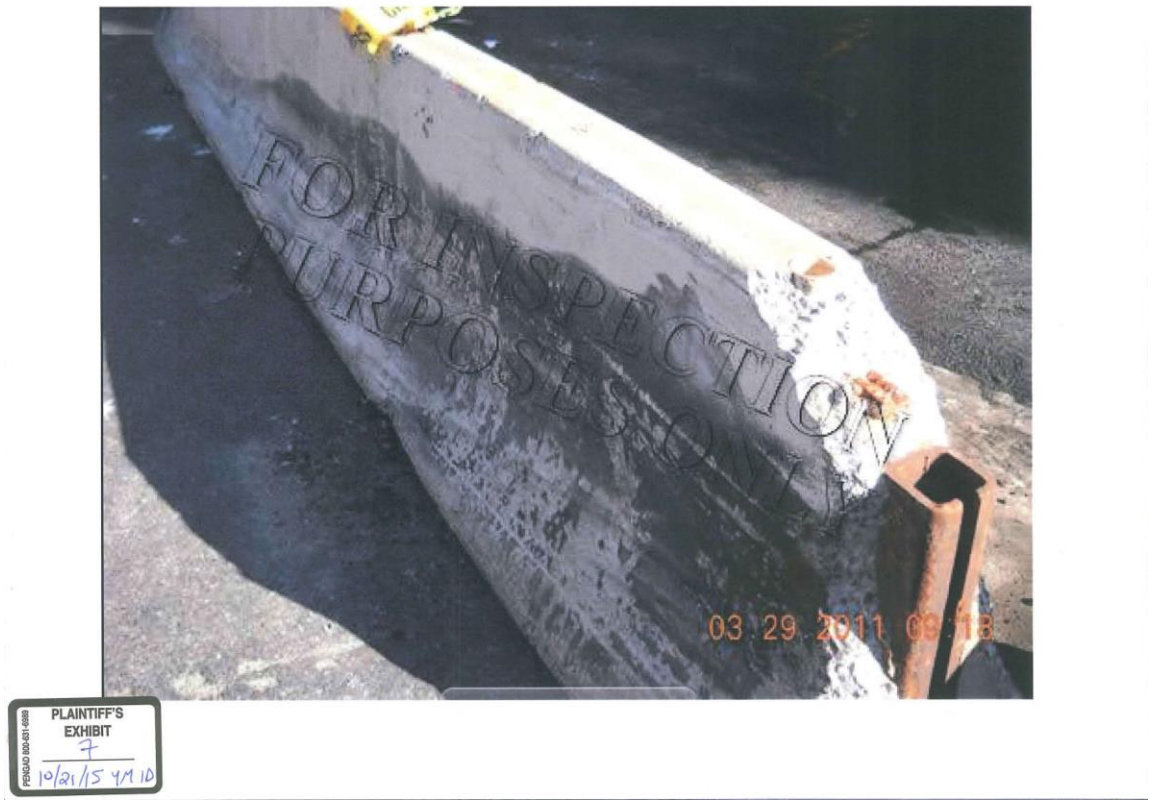


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Something Needs to Change



Something Needs to Change



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Something Needs to Change

- The need for a change has been identified by a municipality through
  - Complaints
  - Municipal employers witnessing a potentially hazardous condition
  - Accidents
- Once an issue is identified, the response should be documented with as much detail as possible

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General Safety Considerations

- A municipality is generally required to build a roadway that is reasonably safe for those who obey the “rules of the road”
- Once built, a municipality may have an ongoing obligation to monitor how the roadway operates
  - If there is a pervasive issue, action may be required

Dangers of Roadway Design Claims

- Roadway design-based claims tend to present catastrophic injuries and, therefore, the potential for large verdicts
  - $40 million jury verdict against City of Tucson, Arizona
  - $35.575 million jury verdict against New York City
  - $14.2 million jury verdict against State of California
  - $13.23 million jury verdict against Washington municipality
  - $13 million jury verdict in Ohio
  - $10.5 million jury verdict in Louisiana

Roadway Design – The Claims

- Refers to decisions made after planning and analysis by professional engineers
  - New roadways
  - Existing roadways
- Such decisions may be based upon:
  - Standards found in the federal/state Manual of Uniform Traffic Control Devices (MUTCD) or the American Association of State Highway and Transportation Officials (AASHTO) Green Book

Roadway Design – The Claims

- Examples
  - Setting the speed limit for a stretch of roadway
  - Permitting passing along a stretch of roadway
  - Setting the clearance interval for a traffic signal
  - Determining the appropriate advance warning signs for a curve, turn, intersection, etc.

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Roadway Design – The Claims





Roadway Design – The Claims

- When think of roadway design, keep in mind the following
  - Geometry of the roadway, including
    - Horizontal curvature
    - Vertical pitch
    - Sightlines
  - Density and volume
    - Traffic counts at relevant times are important
  - Modeling
    - Domino effect

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Roadway Design – The Law

- For a municipality, the primary concern is whether the municipality is entitled to immunity for its design-related decisions
- In theory, the purpose of design-related immunity is to prevent the courts and juries from second-guessing the decisions of expert engineers
  - Municipal planners see the big picture
  - Conserve municipal resources

Roadway Design – The Law

- Statutory vs. Common Law
  - Examples
    - In New York, immunity for roadway design-related decisions is found exclusively in the common law
    - In Ohio, immunity for roadway design-related decisions is found in statute
    - In California, immunity for roadway design-related decisions is found in statutes but those statutes relied upon the New York common law

Roadway Design – The Law

- Did the municipality act in a governmental or a proprietary function?
  - Generally, immunity will only be available where the municipality performed a “governmental” function
  - There are limited exceptions where a municipality may be entitled to immunity for proprietary functions
    - In New York, municipalities may claim a qualified immunity in the proprietary field of roadway safety

Roadway Design – The Law

- Even if a municipality acted in a governmental capacity, immunity is generally only available if the municipality's actions involved discretion
  - Examples of discretionary decisions include
    - Whether to widen a roadway
    - Whether to install traffic control devices, and the traffic control devices to install
    - Not improving a roadway, intersection, etc.
  - A non-discretionary decision is one that is required (i.e., by the MUTCD, AAHSTO "Green Book")

What Should Municipalities Do?

- Prepare to litigate the claim before the claims arises by
  - Documenting the plan
  - Keeping the documents
  - Staying informed
  - Insurance

Document The Plan

- What is the reason for the project?
  - In some cases, the reason for the project could affect a municipality's defenses
- How is safety a consideration?
  - Isn't it always a consideration?
- Identify the hazards the project is intended to address?
  - Again, the hazards the project is intended to address could affect a municipality's defenses

Document the Plan

- Examples of documentation
  - Studies of the area
    - A study can be useful to show what the project was intended to achieve, what was considered, and to obtain federal funding
  - Simulate the project
    - Traffic flow through a new design
    - Impact of the project on surrounding areas

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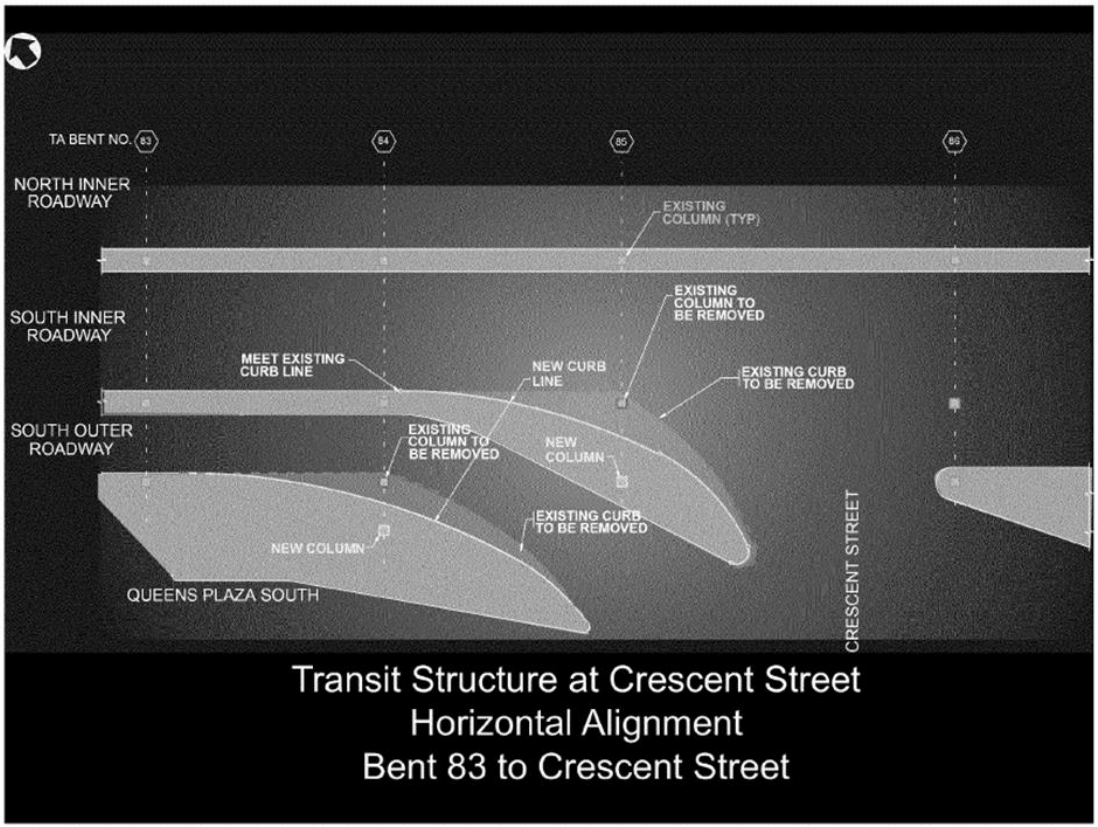
Document The Plan

- The importance of documentation
  - *Turturro v. City of New York*, 28 NY3d 469 (2016)
    - Qualified immunity only available for decisions
      - Related to roadway safety AND
      - That address the “very same question of risk as would ordinarily go to the jury”

Document The Plan

- A municipality altered the placement of a column supporting an overpass to improve the traffic flow and "safety" on the lower roadway as the result of cars crashing into the column. This work altered the geometry of the lower roadway and increased sight distances on the lower roadway.
  - If a claim is brought based upon the altered geometry of the lower roadway, is there documentation of the plan to support an immunity argument?

Document The Plan



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Keep The Documents

- You are only as good as the evidence you can present
  - Remember, you will be required to show that the claimed hazard was recognized and that steps were taken to address it
- Risk management

Keep The Documents

- Time is your enemy
  - Documents get lost
  - Paper deteriorates
  - Computer storage devices deteriorate
  - Technology changes
  - Routine destruction per document retention guidelines
  - Fires and floods
  - Personnel changes

Stay Informed

- Notice of a hazard typically plays into a roadway design claim
- After a change in design, it may be beneficial to stay informed of any issues that arise with the new design

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Protect Your Municipality – Insurance

- When retaining design/engineering consultants and/or construction contractors, require those entities to have insurance
- Make sure to request copies of the consultant's or construction contractor's insurance certificates before allowing work to proceed

Protect Your Municipality – Insurance

- The required insurance should
  - Cover all claims arising from the consultant's or contractor's work
  - Name the municipality as an additional insured
  - Obligate the consultant or contractor to defend the municipality against all claims arising from the consultant's or contractor's work
  - If the carrier reserves rights, get your own counsel

Reservation of Rights

- Review the complaint
  - The allegations in the complaint will guide you as to whether or not there may be coverage
- Put the insurer on notice of the claim
  - Once the tender is made, the burden shifts to the insurer to investigate the claim and determine whether coverage exists

Reservation of Rights

- The duty to defend is generally broader than the duty to indemnify
- Be aware that the interests of the insurance company could differ from those of the municipality
- Assert the municipality's right to loyal counsel and the right to control/direct its defense

What Should Municipalities Do?

- Once notice of a claim is received, be proactive in responding to the claim
  - Collect the documents
  - Interview custodians
  - Fill in the gaps

Defend The Claim

- Gather the history of the roadway
  - Why was it designed and constructed as it was?
  - Who was involved in the design, planning, and construction?
  - What was involved in the design, planning, and construction?
  - How was the roadway operated since it was designed and constructed?

Defend The Claim

- As you begin to gather relevant documents and identify potential witnesses, implement document/litigation holds
  - Preserve the documents
  - Signify the importance of maintaining documents
  - Signify the importance of your role

Collect The Documents

- Collect documents from relevant municipal agencies
  - Department of Transportation/Public Works
  - Department of City Planning
  - Office of City Engineer
  - Police/Sheriff Department
  - Office of the District Attorney
  - Fire Department
  - Comptroller/City Clerk

Interview Custodians

- The earlier the better
  - Understanding the documents
  - Identify additional
    - Documents
    - Sources of documents
    - Custodians
  - Build a relationship with your witnesses

Fill In The Gaps

- Collect documents from relevant state agencies
  - Department of Transportation/Public Works
  - Police Department
  - Department of Motor Vehicles
  - Office of the Attorney General

Fill In The Gaps

- Collect documents from relevant federal agencies
  - Federal Highway Administration
    - https://www.fhwa.dot.gov/
    - The FHWA administers federal funding for certain roadway projects
    - To obtain federal funding, certain planning and design phases must be addressed and satisfied

Fill In The Gaps

- Collect documents from relevant quasi-governmental agencies
  - Economic Development Corporations
  - Public libraries
- Collect documents from relevant private companies
  - Design Consultants and Construction Contractors

Fill In the Gaps

- Retain experts in the fields of
  - Roadway design/traffic engineering
    - Help establish that the design of the roadway was appropriate based on design/engineering standards and for the operation of the roadway
  - Accident reconstruction
    - Help establish that the accident was not due to the design of the roadway

Questions?

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