

Liability and Complete Streets



Safety & Liability

Does pursuit of safety expose an agency to liability?

- liability for action
- liability for inaction
- liability for trying something new

Safety – Driven by Profession

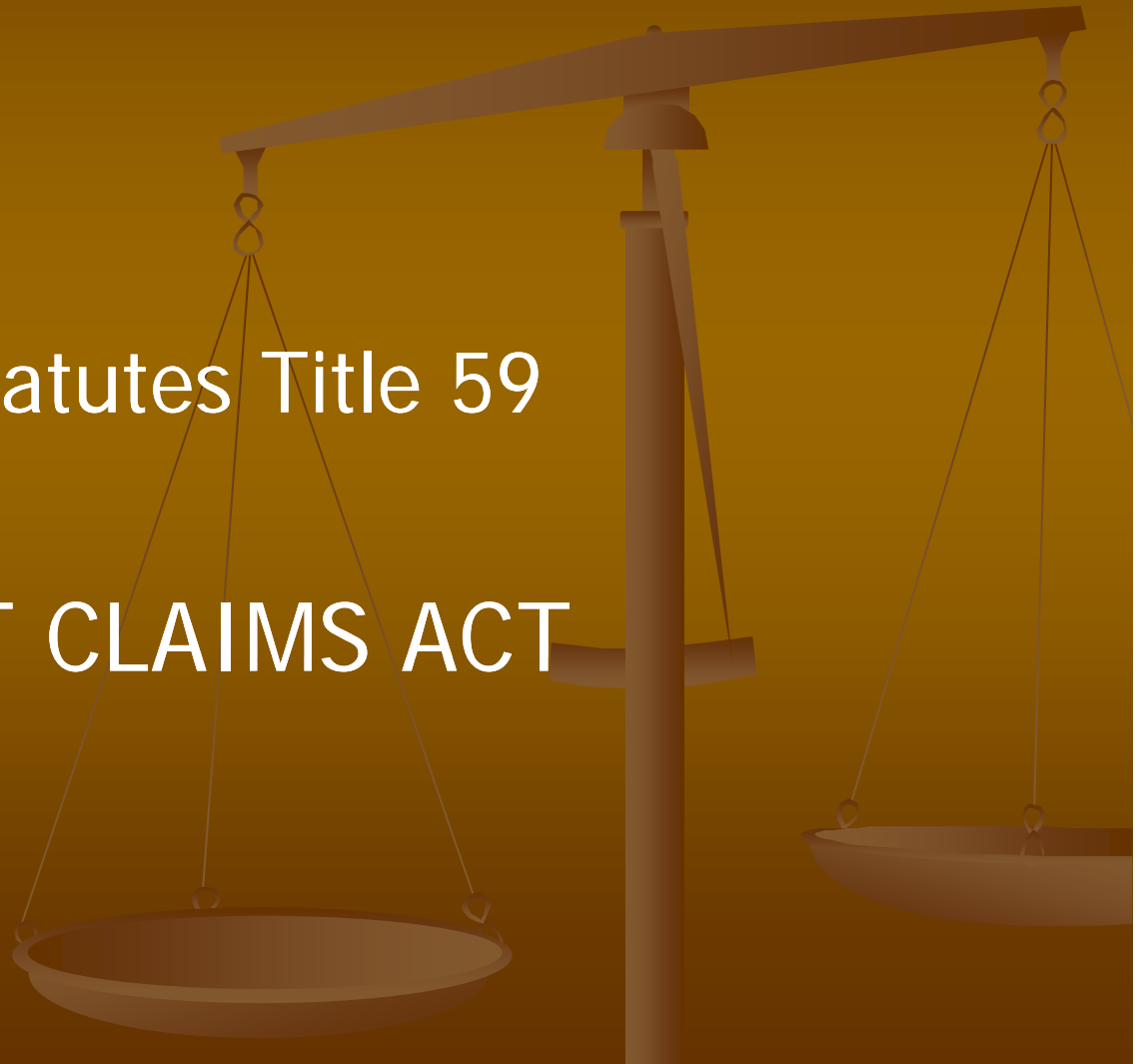
Liability – Imposed by Law



Claims Against Public Entities

NJ Statutes Title 59

TORT CLAIMS ACT

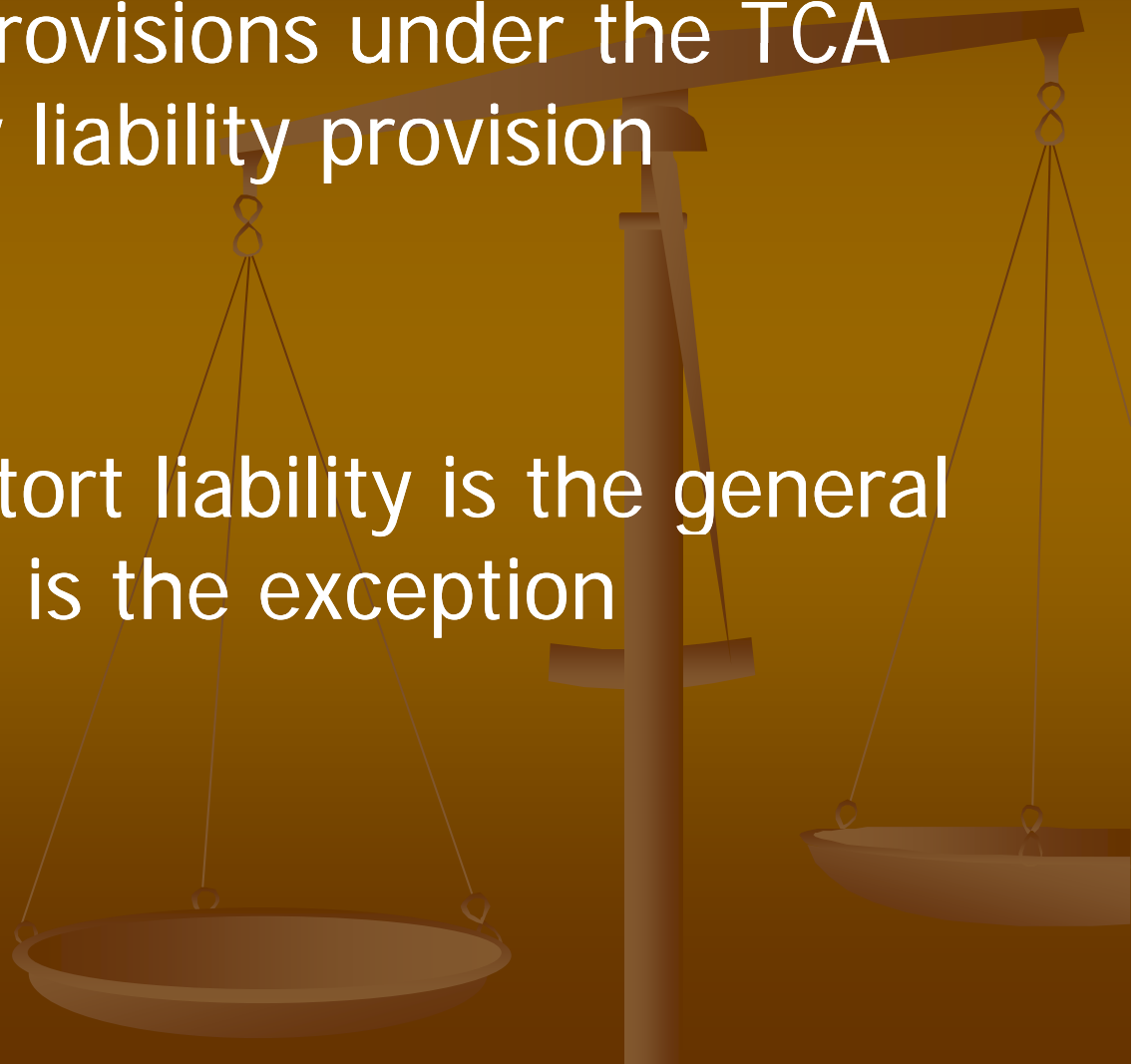


Immunity & Liability of Public Entity

- Any immunity provisions under the TCA prevail over any liability provision

NJSA 59:2-1

- Immunity from tort liability is the general rule and liability is the exception



Immunities



Plan or Design Immunity

Plan or Design Immunity



a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

NJSA 59:4-6

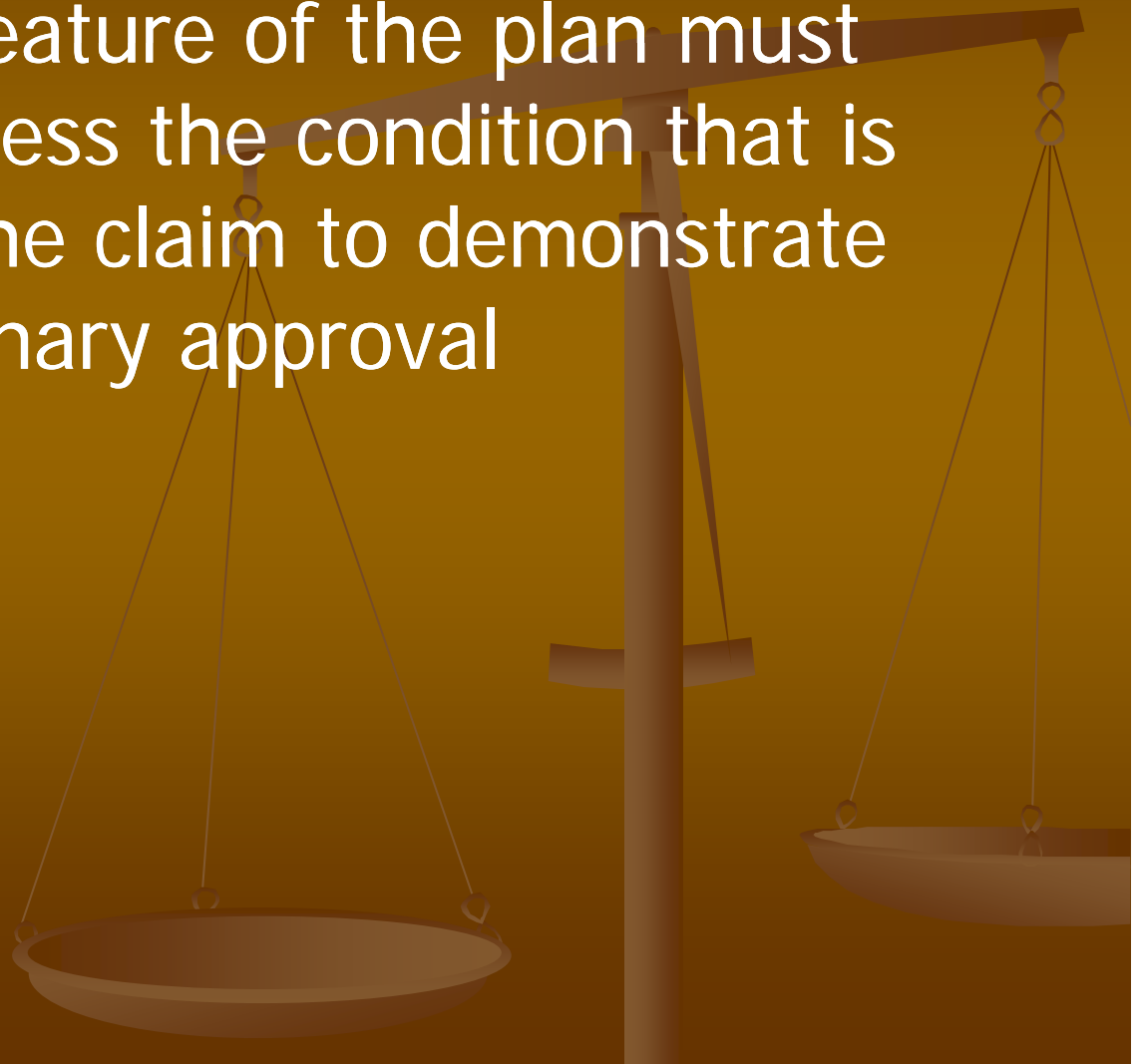
How Does Plan or Design Immunity Attach?

- Plan, design or improvement approved by an official body
- Plan, design or improvement approved by a public employee exercising discretion
- Plan, design or improvement in conformity with standards previously approved by authorized entity or person.

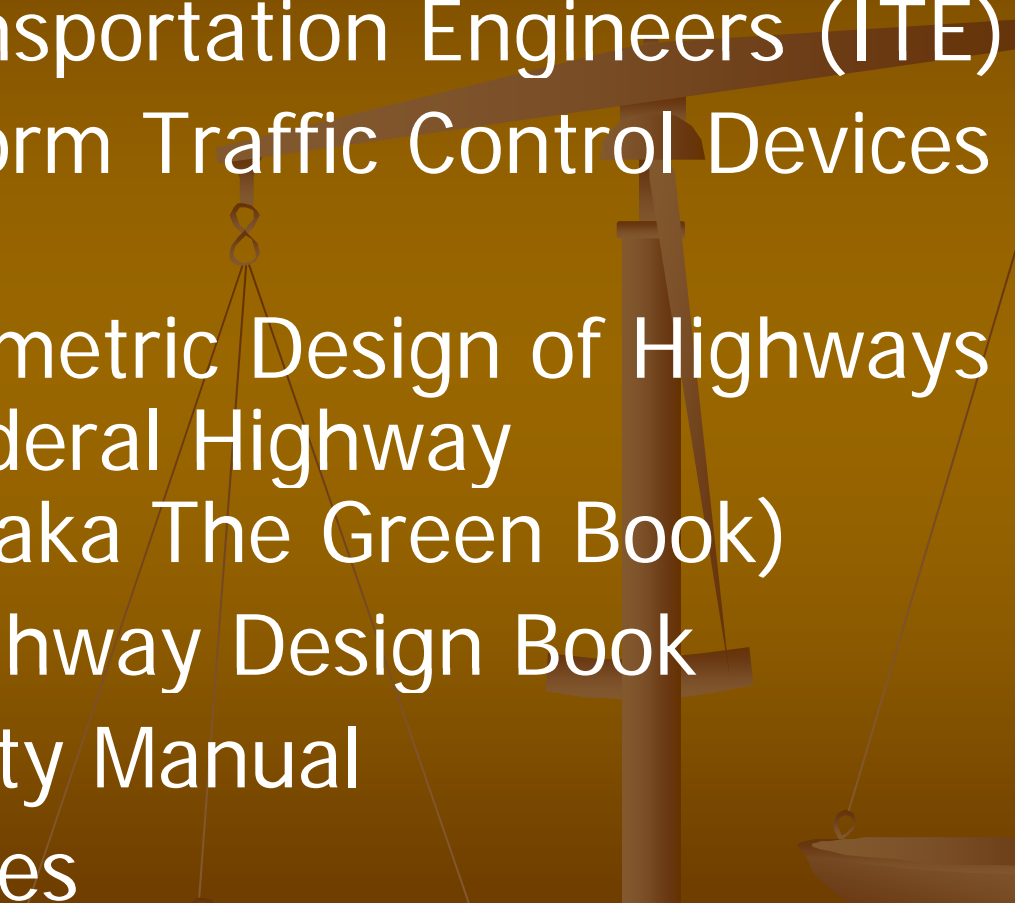


Approved Feature

- The approved feature of the plan must sufficiently address the condition that is the subject of the claim to demonstrate official discretionary approval



Standards Previously Approved (include some bicycle, pedestrian and traffic calming measures)

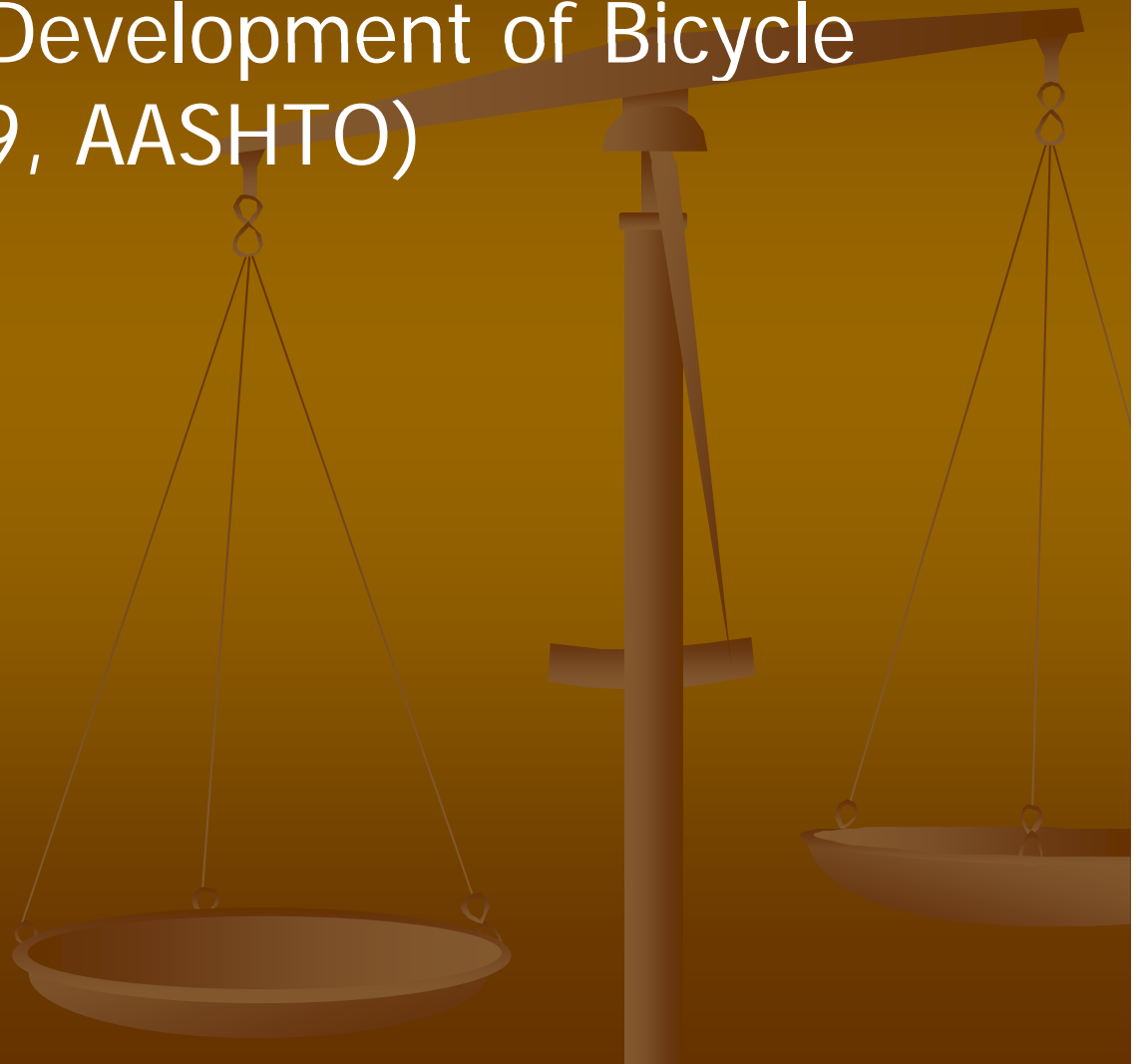
- Institute of Transportation Engineers (ITE)
 - Manual on Uniform Traffic Control Devices (MUTCD)
 - A Policy on Geometric Design of Highways and Streets (Federal Highway Administration, aka The Green Book)
 - Older Driver Highway Design Book
 - Highway Capacity Manual
 - ADAAG Guidelines
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Additional Pedestrian Standards

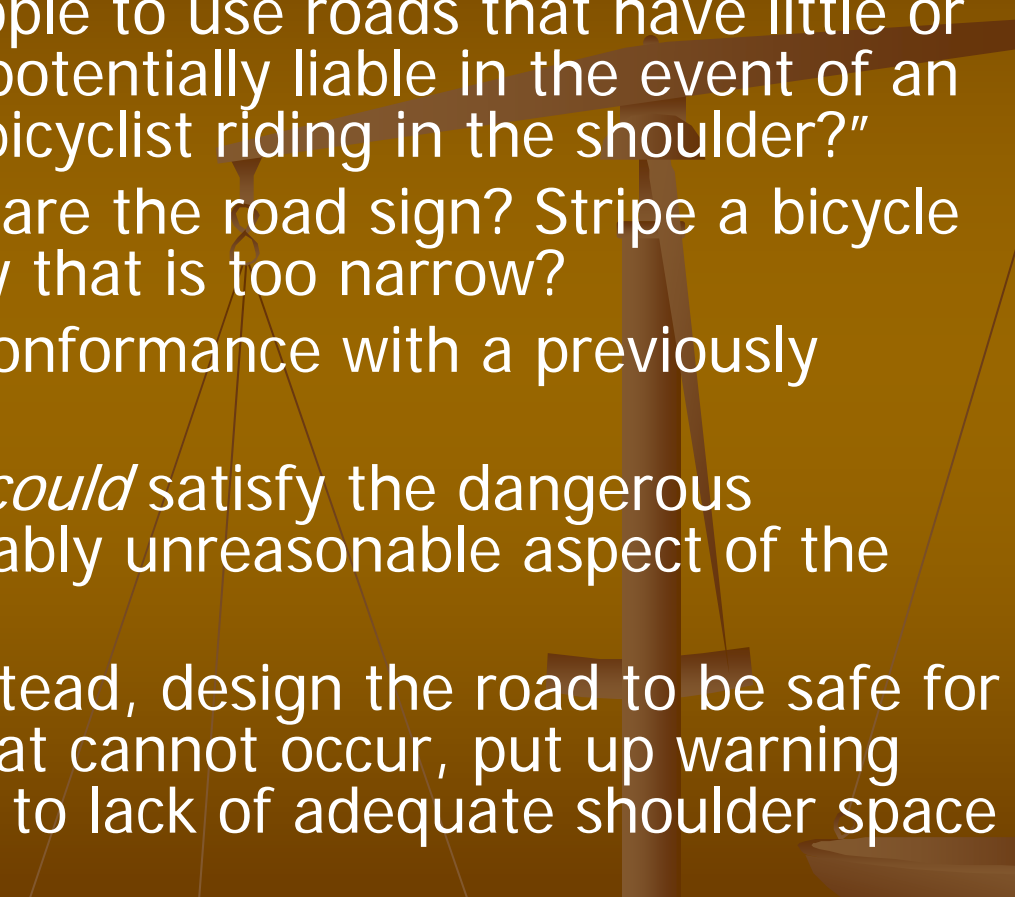
- Guide for the Planning, design and Operation of Pedestrian Facilities (AASHTO, forthcoming)
 - Designing Sidewalks and Trails (FHWA)
 - Building a True Community (PROWAAC)
 - Accessible Rights of Way: A Design Guide (U.S. Access Board)
 - Designing Walkable Urban Thorofares (ITE)
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Additional Bicycle Standards


- Guide for the Development of Bicycle Facilities (1999, AASHTO)



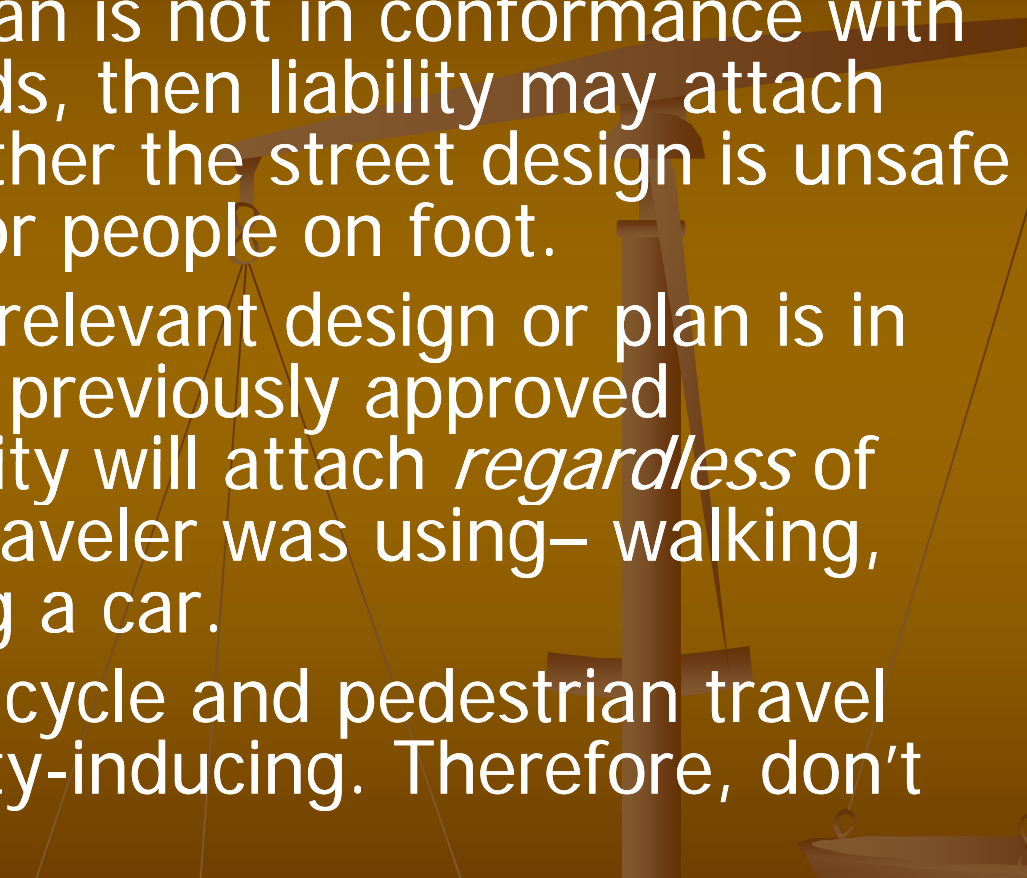
Question from an engineer:

- “If we encourage people to use roads that have little or no shoulder, are we potentially liable in the event of an accident involving a bicyclist riding in the shoulder?”
 - Encourage --how? Share the road sign? Stripe a bicycle lane into the roadway that is too narrow?
 - Both may not be in conformance with a previously approved standard.
 - Therefore, yes, that *could* satisfy the dangerous condition that is palpably unreasonable aspect of the Tort Claims Act.
 - So, don't do that. Instead, design the road to be safe for bicycle travel, or if that cannot occur, put up warning signs alerting cyclists to lack of adequate shoulder space for travel.
- 

The Project MUST Be Built in Conformance with Previously Approved Plan / Design

- A public employee exercising discretionary authority to give such approval of plan or design will be protected from liability.
 - A public entity will be protected from liability where such plan or design is prepared in conformity with standards previously so approved.
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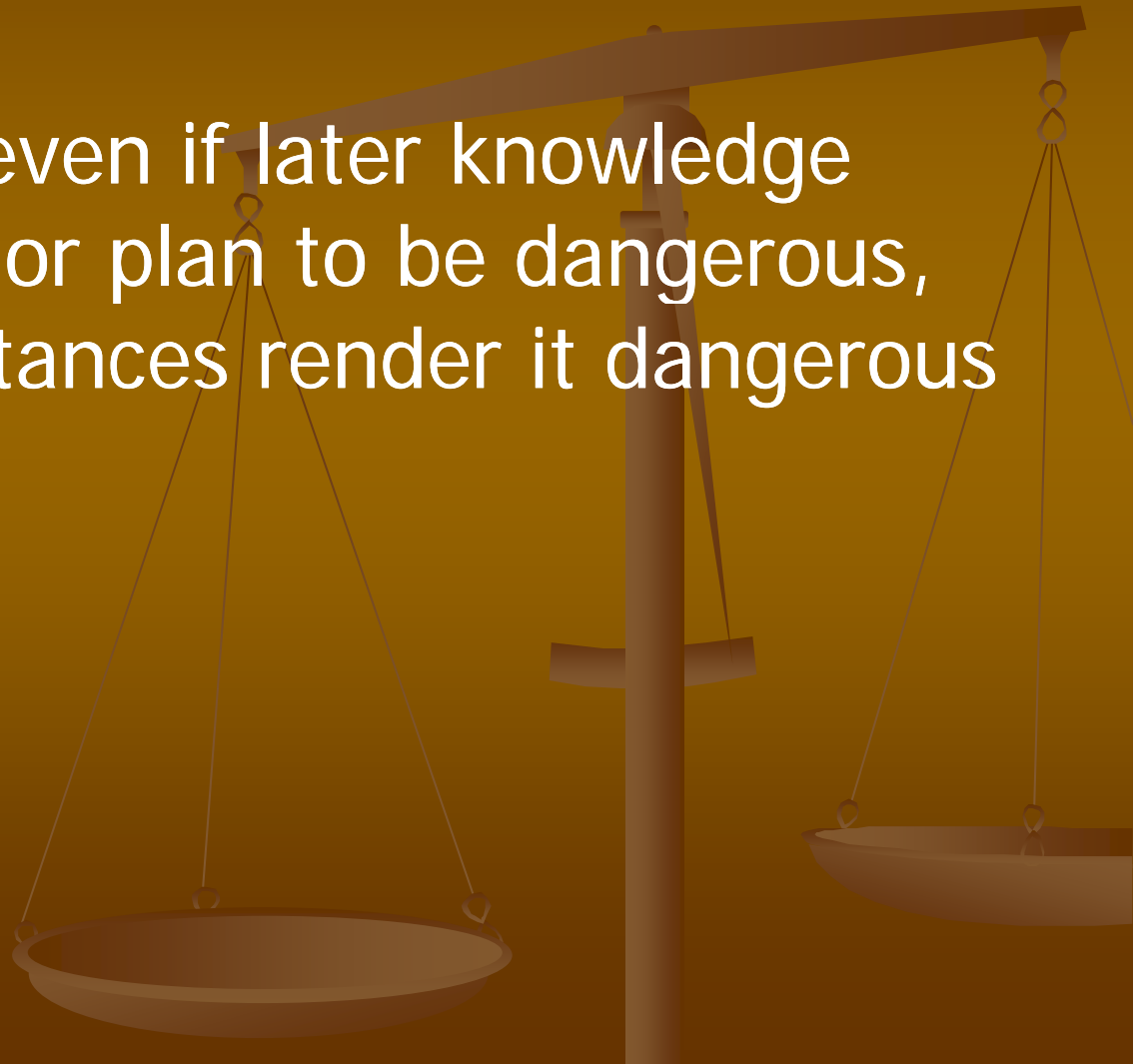
Mode of Travel is Irrelevant to Liability or Immunity

- If the design or plan is not in conformance with approved standards, then liability may attach *regardless* of whether the street design is unsafe for bicycles, cars or people on foot.
 - Conversely, if the relevant design or plan is in conformance with previously approved standards, immunity will attach *regardless* of which mode the traveler was using— walking, bicycling or driving a car.
 - Accommodating bicycle and pedestrian travel safely is *not* liability-inducing. Therefore, don't "do nothing."
- 

How Long Does Plan/Design Immunity Last

- Perpetual
- Cannot be lost even if later knowledge shows a design or plan to be dangerous, or later circumstances render it dangerous

Manna v. State



Who is Covered by the Plan/Design Immunity?

- Public Entity
- Public Employee
- Derivative Immunity



Some Additional Immunities

- 59:2-3/59:3-2 Discretionary activities
- 59:4-5 Failure to provide ordinary traffic signals – immunity



Liability

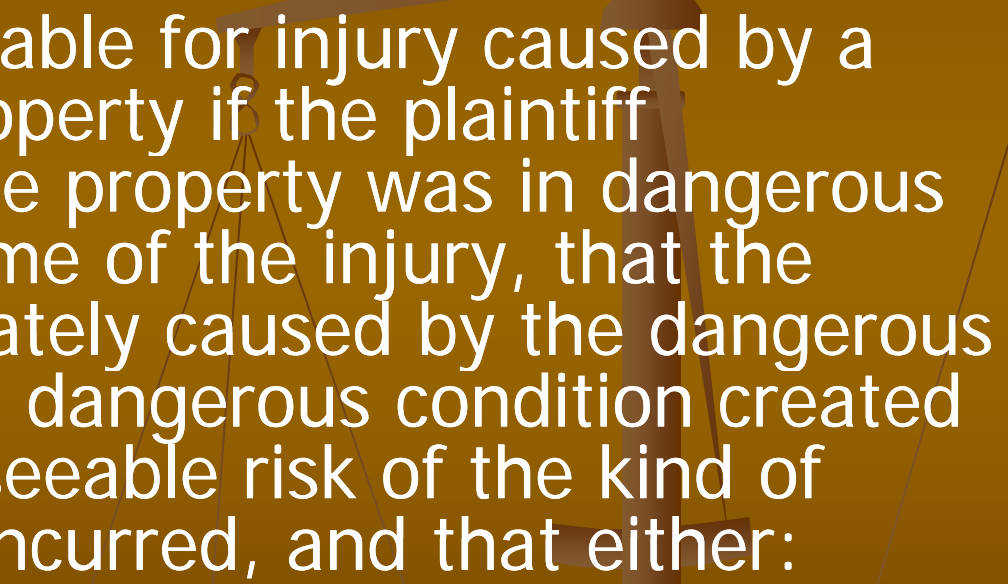


Dangerous Condition of
Public Property

Liability generally

NJSA 59:4-2

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:



a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

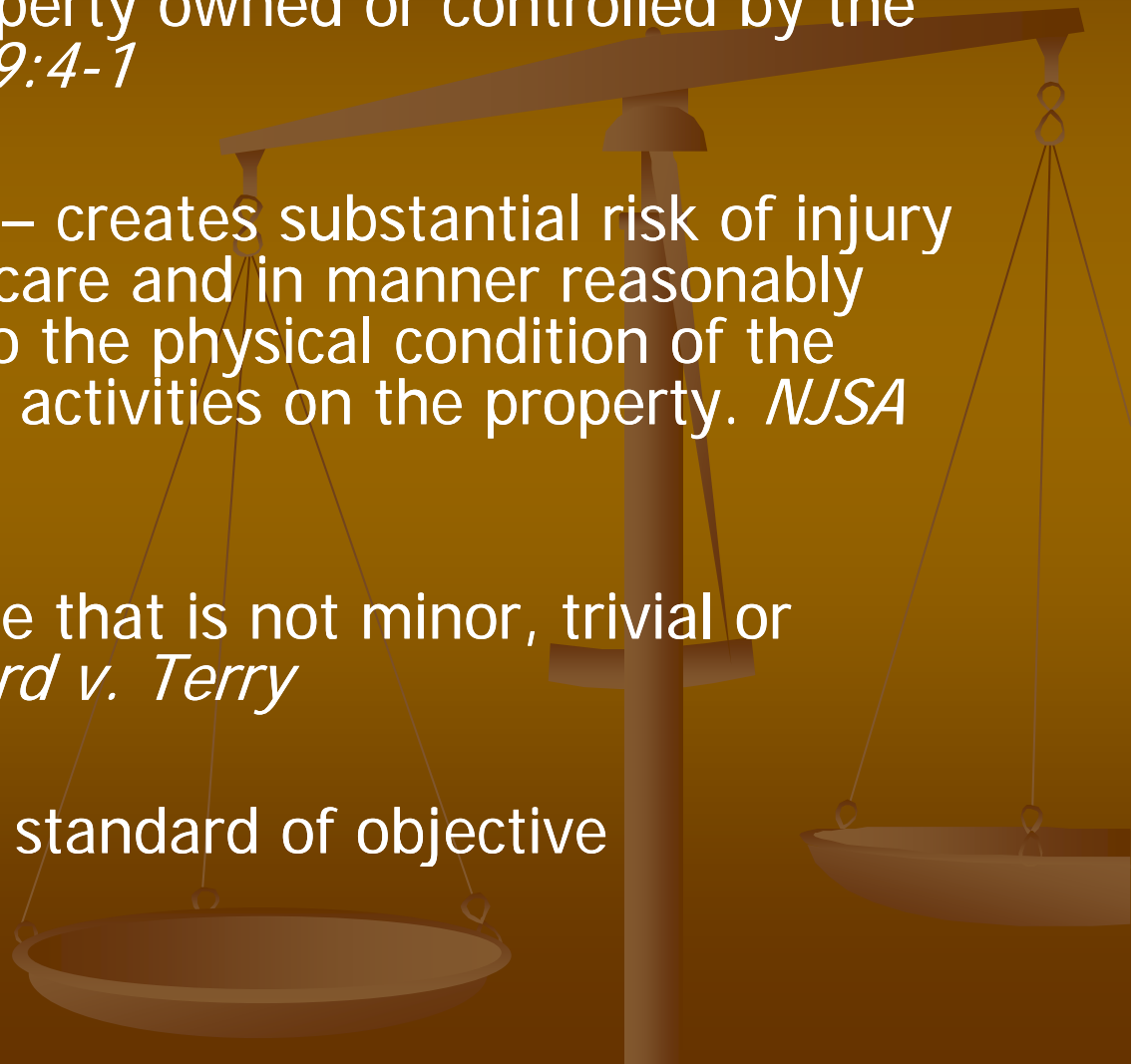
b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

Liability Break Down

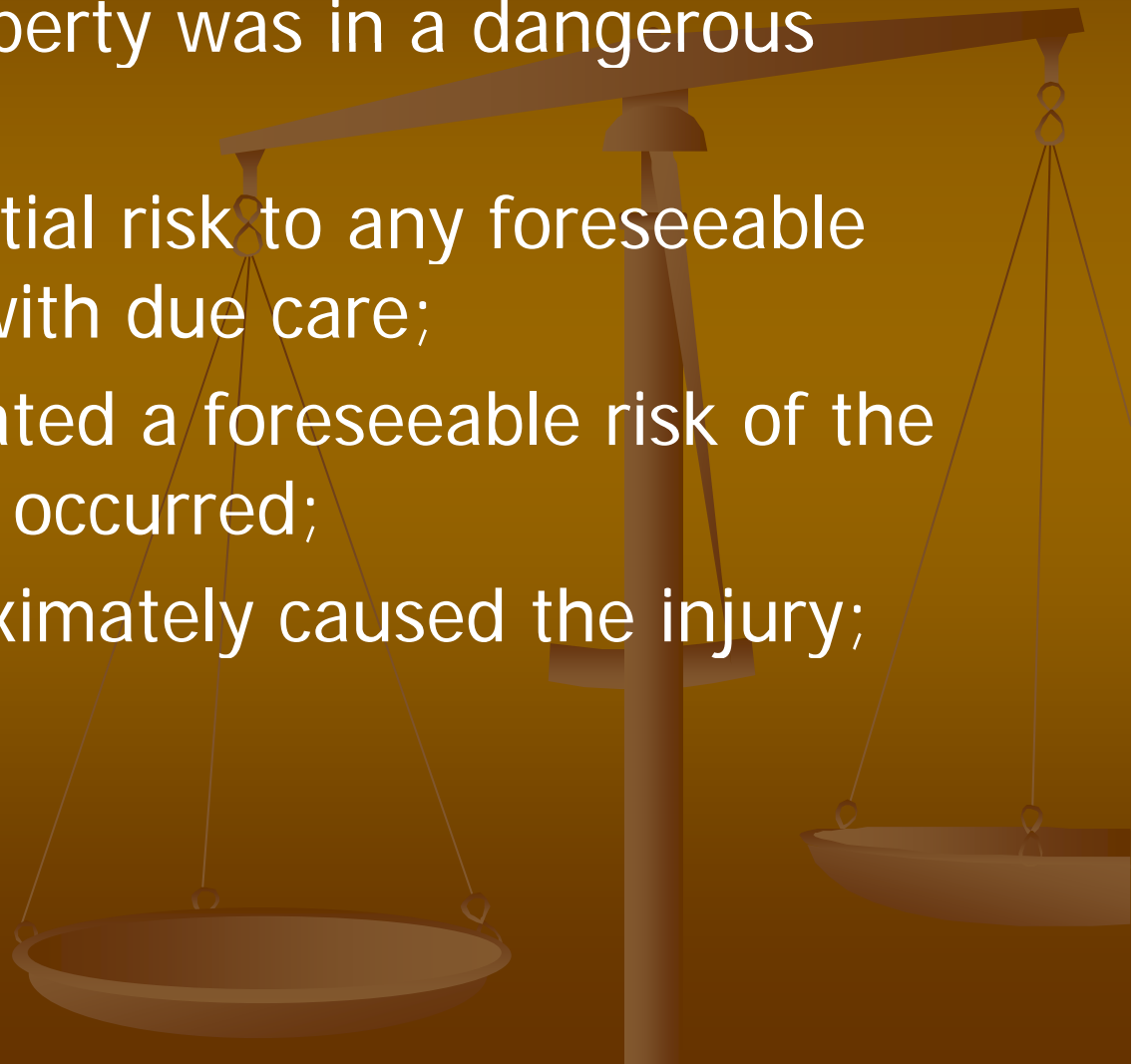
Definitions

- Public property – property owned or controlled by the public entity. *NJSA 59:4-1*
- Dangerous condition – creates substantial risk of injury when used with due care and in manner reasonably foreseeable. Refers to the physical condition of the property itself, not to activities on the property. *NJSA 59:4-1*
- Substantial risk – “one that is not minor, trivial or insignificant.” *Polyard v. Terry*
- Due Care - implies a standard of objective reasonableness



For Liability to Attach Must Prove:

- Public entity's property was in a dangerous condition;
 - Created a substantial risk to any foreseeable user who uses it with due care;
 - The condition created a foreseeable risk of the kind of injury that occurred;
 - The condition proximately caused the injury;
- AND



AND



Either:

- Negligent or wrongful act or omission of employee within scope of employment **created** the dangerous condition

Ex: employee installed sewer extension, did not follow proper construction standards, resulted in settlement and a depression of $\frac{3}{4}$ inch over entire block

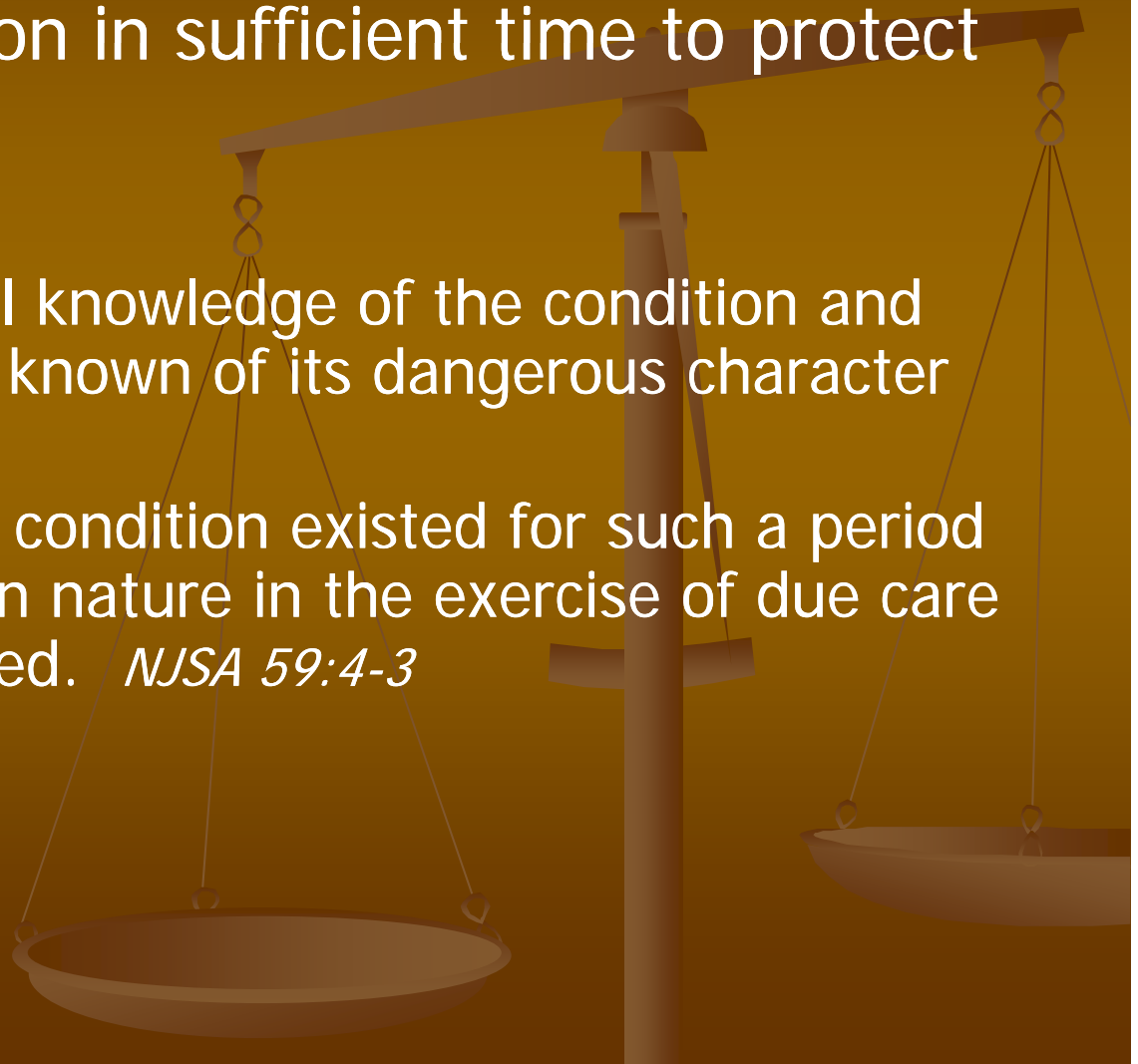
Or

Or

- Public entity had actual or constructive notice of dangerous condition in sufficient time to protect against it
- *Actual notice* - actual knowledge of the condition and knew or should have known of its dangerous character

Constructive notice – condition existed for such a period of time and obvious in nature in the exercise of due care should have discovered. *NJSA 59:4-3*

AND



Additionally

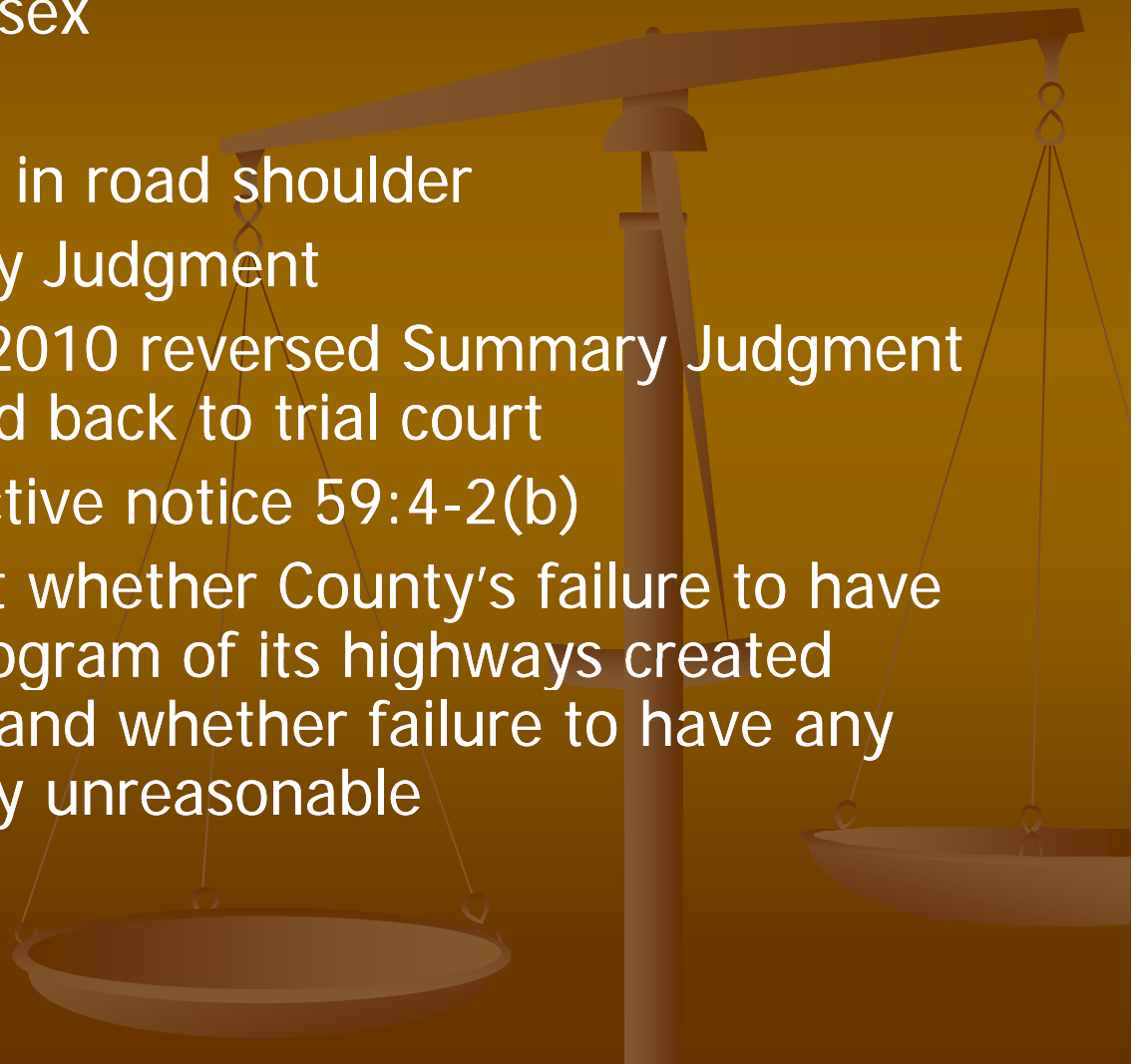


- Action or inaction of public entity must be **palpably unreasonable**.
- Palpably unreasonable - "behavior that is patently unacceptable under any circumstance ... no prudent person would approve of the public entity's course of action or inaction."

Kolitch v. Lindedahl, 100 N.J. 485 (1985)

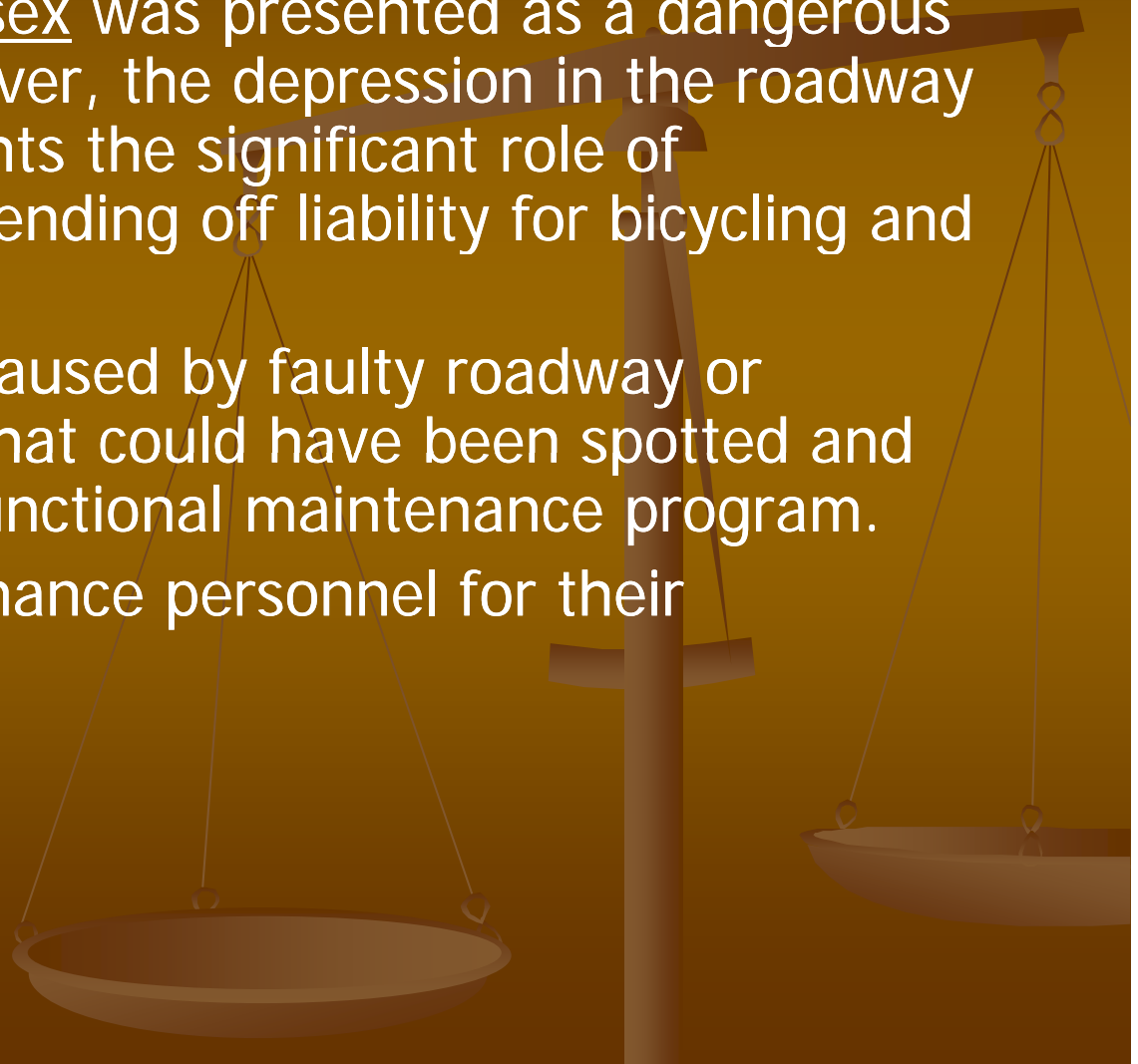
Case Study

- Polzo v. County of Essex
- Fatal cycling accident
- Cyclist hit depression in road shoulder
- County won Summary Judgment
- Appellate Division 8/2010 reversed Summary Judgment County and remanded back to trial court
- No actual or constructive notice 59:4-2(b)
- But... question of fact whether County's failure to have routine inspection program of its highways created dangerous condition and whether failure to have any program was palpably unreasonable



Maintenance

- Polzo v County of Essex was presented as a dangerous condition case, however, the depression in the roadway the cyclist hit highlights the significant role of maintenance has in fending off liability for bicycling and pedestrian accidents.
- Many accidents are caused by faulty roadway or sidewalk conditions that could have been spotted and repaired through a functional maintenance program.
- Prepare your maintenance personnel for their depositions!
- Resource defense.



Questions During Break out Sessions

- Dorothy Kowal, Esq.
- Tracey Hinson, Esq.

