

Liability and Complete Streets

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What Is Liability? What Is Immunity?

- Liability does not mean you or your employer—the public entity--were sued. Liability means after you were sued and a trial was held, you were found negligent and responsible for injury or property damages.
- Immunity means you are not responsible, in fact, or at law.

What law controls?

- The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

What Does the Law Say About Immunity?

- Tort Claims Act, N.J.S.A. 59:2-1a.:
"Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."

There are Exceptions to Immunity

- The phrase “Except as otherwise provided by this act,” means that the Tort Claims Act has EXCEPTIONS to the broad rule of immunity for your actions or omissions.
- But you really have to try hard to be found liable.
- First, let’s focus on how to design your project so that you are not found liable for any injury or property damage.

Liability & Immunity

Q. Does adoption of a Complete Streets policy and infrastructure changes to make it safer for pedestrians and bicyclists expose a public entity or employee to liability, or are they immune from liability?

R.

A. Immune if the changes are made in conformance with the Tort Claims Act.

What is The Most Important Immunity for Complete Streets?

- Plan or Design Immunity, N.J.S.A. 59:4-6
- "Neither the public entity nor a public employee is liable ... 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 ...

Plan or Design Immunity cont'd...

- or by 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.”

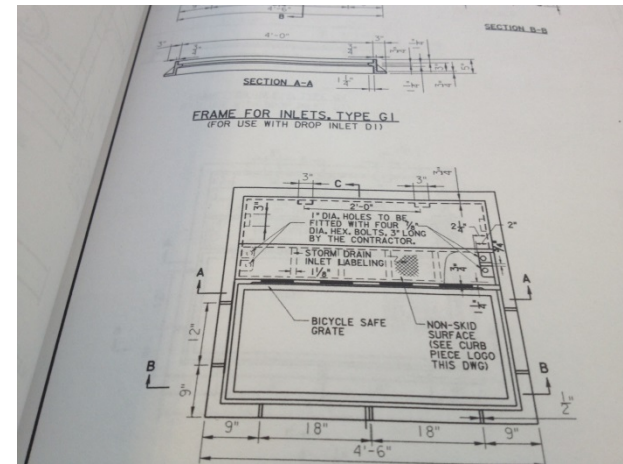
Which Takes Precedence: Immunity or Liability?

- Any immunity provision under the TCA prevails over any liability provision

Kahrar v. Borough of Wallington

Rule #1: Get Your Plan Approved First

- Plan/design or improvement must be approved by a governing body
- Plan/design or improvement must be approved by a public employee exercising discretion (e.g., the engineer)

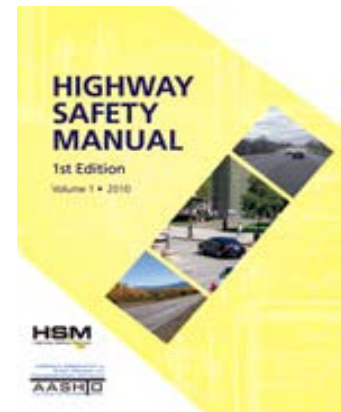
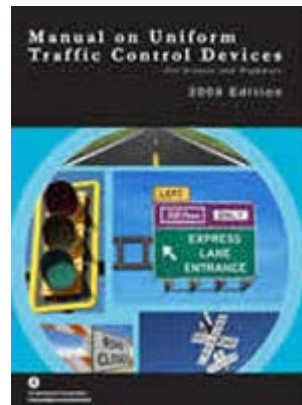


Plan or Design May Also Be Built In Conformity With Standards

- Plan, design or improvement must be built in conformity with standards previously approved by authorized entity or person.
- The approved feature of the plan must sufficiently address the condition that is the subject of the claim to demonstrate the official's discretionary approval.

Examples of Standards Previously Approved

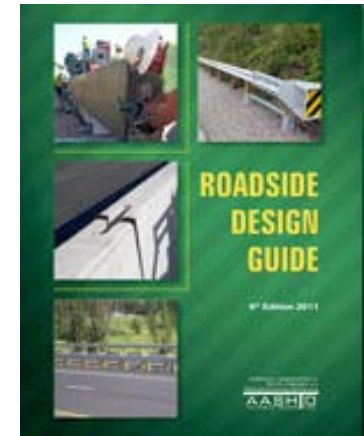
- Institute of Transportation Engineers (ITE)
- Manual on Uniform Traffic Control Devices (MUTCD)



- A Policy on Geometric Design of Highways and Streets (FHWA, The Green Book)
- Older Driver Highway Design Book
- Highway Capacity Manual

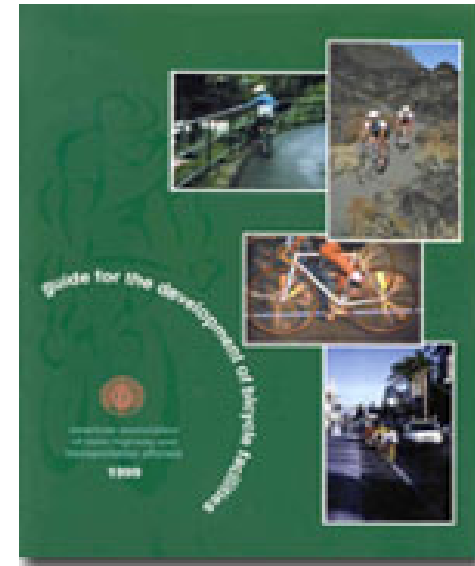
Examples of Standards, cont'd...

- ADAAG Guidelines
- Guide for the Planning, Design and Operation of Pedestrian Facilities Designing Sidewalks and Trails (FHWA)
- Building a True Community (PROWAAC)
- Accessible Rights of Way: A Design Guide (U.S. Access Board)



cont'd

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



- Designing Walkable Urban Thorofares (ITE)

If Project Is Built in Conformity with Previously Approved Plan / Design

- A public employee exercising discretionary authority to give such approval of plan or design will be protected from liability, i.e. immune.
- A public entity will be protected from liability (immune) where plan or design prepared in conformity with standards previously approved, or approved by the governing body or Legislature.

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? By adopting a policy? Share the road sign? Stripe a bicycle lane into the roadway that is too narrow? Or which has potholes and is not maintained?
- Adopting a policy will not impose liability. Installing a share the road sign will not impose liability. Striping a lane that does not meet AASHTO or other previously approved standards may result in a dangerous condition.



Mode of Travel is Irrelevant to Liability and Immunity

- If the 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

**Q. What Causes Liability
to be Imposed?**

**A. Plaintiff Must Prove Five
Things Before Liability will be
Imposed on a Public Entity**

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 negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
- 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; and
- Public entity's behavior was palpably unreasonable.

Important Elements of Liability

- Public property – property owned or controlled by the public entity. *59:4-1*
- Dangerous condition – creates substantial risk of injury when used with due care and in manner reasonably foreseeable. *59:4-1*
- Reasonably foreseeable or substantial risk – “one that is not minor, trivial or insignificant.” *Polyard v. Terry, 160 N.J. Super. 497 (1978)*
- Dangerous condition is the cause of injury.

Additionally,

- Action or inaction of public entity must be **palpably unreasonable**.

Palpably unreasonable – usually a fact Q for the jury

Case Study: Polzo v. County of Essex

- Fatal cycling accident; cyclist hit 1.5" depression in road shoulder
- County initially won motion for Summary Judgment, based on no actual or constructive notice 59:4-2(b) of the depression
- Appellate Division 8/2010 reversed Summary Judgment and remanded back to trial court
- 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 the cyclist hit highlights the significant role of maintenance has in preventing unsafe conditions for bicyclists and pedestrians.
- Many accidents are caused by faulty roadway or sidewalk conditions that could have been spotted and repaired through maintenance program.
- Prepare your maintenance personnel for their depositions!

Polzo Outcome

- Supreme Court (Jan. 2012): unanimous decision.
- County did not create a dangerous condition by failing to notice a 1.5" depression in the shoulder.
- Plaintiff offered no evidence that the shoulder was routinely used as bicycle lane, "which might implicate a different standard of care. The generally intended purpose of the shoulder is for emergency use." Plaintiff cannot show that the depression on the shoulder "was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

Polzo Outcome

- County did not act in a palpably unreasonable manner by failing to fill the depression, even if County noticed it.
- “Liability attaches to a public entity only when a pothole or depression on a roadway constitutes a dangerous condition; the public entity either causes the condition or is on actual or constructive notice of it; and, if so, the public entity’s failure to protect against the roadway defect is palpably unreasonable. See N.J.S.A. 59:4-2.”

Questions on Liability or Immunity Defenses?