Introduction

In response to concerns regarding liability risk in the implementation of Complete Streets designs, and with Complete Streets policies being implemented throughout New York at both the state and municipal level, the Tri-State Transportation Campaign has prepared a primer on "qualified immunity" to address these concerns. Complete Streets is a design concept adopted by municipal governments and departments that seeks to balance the needs of different users of a roadway.

On February 11, 2012, New York State's Complete Streets law went into effect. Over the past few years, several municipalities have passed local policies and resolutions. However, one key impediment to implementation of Complete Streets is the concern that such plans or designs increase the risk of liability. This primer is intended to provide a discussion of a liability exemption called "qualified immunity" that could apply to Complete Streets designs in New York State.

Basic findings

- A governmental entity implementing Complete Streets designs in traffic planning should be entitled to qualified immunity unless its study and determination is plainly inadequate or there is no reasonable basis for its traffic plan.
- Many Complete Streets design resources are available and implementation of Complete Streets designs is encouraged by FHWA.
- Complete Streets design benefits include reduced infrastructure costs and reduced injuries and crash risks for pedestrians, cyclists and automobiles.

What is qualified immunity?

Qualified immunity derives from the concept of sovereign immunity – that governments (sovereigns) cannot be sued for their actions.[1] Historically this protection was absolute, meaning no suits could be brought against the government.[2] This has changed over time, however. Governments are now liable "in differing degrees under differing circumstances."[3]

In the context of highway planning and design in New York State, qualified immunity protects governmental entities from suit for injuries resulting from defective design unless such design determination is found to have no rational basis or to be plainly inadequate. Typically, a plan by government engineers and planners that studies and analyzes the traffic problem in a reasonable manner should be considered adequate. Put differently, a planning decision that is

[1] Cornell University Law School Legal Information Instiute, Sovereign Immunity, *available at*, http://www.law.cornell.edu/wex/sovereign_immunity.

[2] *Id.*

[3] *Id.*

reasonably deemed by government experts as both necessary and preferred, i.e., the "best" alternative, should be protected by qualified immunity. If Complete Streets designs provide this best alternative, they need not be scuttled due to immunity concerns.

When does qualified immunity apply?

In New York State, it has long been held that "a municipality 'owe[s] to the public the absolute duty of keeping its streets in a reasonably safe condition for travel.'"[4] The exercise of this duty involves discretionary decision-making;[5] balancing many factors including allocation of finite budgetary resources and responding to fiscal realities.[6] Accordingly, courts are reluctant to second guess this discretion by planning officials[7] unless that exercise of discretion was plainly inadequate or lacked a reasonable basis.[8] "Thus in the field of traffic design engineering, a municipality is accorded a qualified immunity from liability arising out of a[n adequate and reasonable] highway planning decision."[9]

This is true even after design implementation. Where a dangerous roadway condition has been identified[10] by a governmental entity, there is a duty to act.[11] Similar to the original traffic design planning, decisions made by a governmental entity with respect to reviewing traffic operations will be upheld provided the study and decision is not inadequate or lacking any reasonable basis.[12] Should an entity not address a dangerous traffic condition, liability may apply.[13] In fact, "[m]ore and more lawsuits are being settled against government entities that

[4] *Weiss v. Fote*, 7 N.Y.2d 579, 584 (1960) (citing *Annino v. City of Utica*, 276 N. Y. 192, 196) (alteration added).

[5] "Where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty is quasi judicial or discretionary." *Weiss*, 7 N.Y.2d at 584 (quoting *Urquhart v. City of Ogdensburg*, 91 N.Y. 67, 71 (1883)) (alternation added).

[6] S*ee Edouard v Bonner*, 224 A.D.2d 575, 638 N.Y.S.2d 688 (2d Dep't 1996), *lv. denied* 88 NY2d 811; *Trautman v State of New York*, 179 A.D.2d 635, 578 N.Y.S.2d 245 (2d Dep't 1992), *lv. denied* 79 NY2d 758; *Van De Bogart v State of New York*, 133 A.D.2d 974, 521 N.Y.S.2d 125 (3d Dep't 1987)("the relative costs and fiscal priorities" are to be considered by the State's engineer in deciding whether to implement certain design changes).

[7] *Weiss*, 7 N.Y.2d at 584 ("We have long and consistently held that the courts would not go behind the ordinary performance of planning functions by the officials to whom those functions were entrusted.").

[8] *Affleck v. Buckley*, 96 N.Y.2d 553, 556 (2001) (citing *Friedman v. State of New York*, 67 N.Y.2d 271, 283-84 (1986)) ("A governmental body may be liable for a traffic planning decision only when its study is "plainly inadequate or there is no reasonable basis for its plan.").

[9] *Kuhland v. City of New York*, 81 A.D.3d 786, 787, 916 N.Y.S.2d 637, 638 (2d Dep't 2011) (citing *Turturro v. City of New York*, 77 A.D.3d 732 , 908 N.Y.S.2d 738 (2d Dep't 2010)) (alteration added).

[10] This notice of a hazardous condition can be actual or constructive. *See Lucchese v. Silverman*, 25 A.D.3d 589, 590-91, N.Y.S.2d 642, 643 (2006) (citing *Friedman* at 285-86; *Weiss* at 587-88).

[11] *Friedman* at 284 (citing *Heffler v. New York*, 96 A.D.2d 926, 466 N.Y.S.2d 370 (2d Dep't 1983); *Sanford v. State of New York*, 94 A.D.2d 857, 463 N.Y.S.2d 595 (3d Dep't 1983); *Atkinson*, 77 A.D.2d 257, 432 N.Y.S.2d 970) ("Once the State is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger.").

[12] *Spanbock v. Trzaska*, 287 A.D.2d 496, 497, 731 N.Y.S.2d 229, 230 (2d Dep't 2001) (citing *Friedman*, 67 N.Y.2d 271; *Alexander v. Eldred*, 63 N.Y.2d 460 (1984)).

[13] *See Lucchese v. Silverman*, 25 A.D.3d 589, 590-91, N.Y.S.2d 642, 643 (2006) (citing *Friedman* at 285-86; *Weiss* at 587-88).

adopt a do–nothing posture. Identifying potential risks, doing something, and then evaluating the results as part of a systematic program is proving to be a more defensible approach."[14] Thus, where a problem has been identified, it is better to act on well thought out and planned projects than to do nothing at all. More and more governmental entities are relying on Complete Streets designs to remedy these dangerous conditions.

Complete Streets Designs

In sum, the cases reviewed[15] stand for the following: 1) a rational decision-making process and exercise of discretion by a governmental entity will protect that governmental entity from liability but 2) where the study of a traffic condition is plainly inadequate or there is no reasonable basis for the traffic plan liability will attach. Accordingly, Complete Streets designs, much like any other traffic planning decision, should be entitled to immunity if there is a rational basis for the plan. In fact, FHWA has stated that "[h]ighway and recreational facilities that fail to fully incorporate the needs of all users increase the likelihood of potential court settlements in favor of those who are excluded." [16]

FHWA has been particularly vocal about advocating for accommodating all users though implementation of Complete Streets designs. For example, it has said, the "United States Department of Transportation encourages States, local governments, professional associations, other government agencies and community organizations to adopt this Policy Statement as an indication of their commitment to accommodating bicyclists and pedestrians as an integral element of the transportation system"[17] and an "FHWA-backed approach [to traffic planning] is applying context sensitive solutions (CSS) to help ensure that streets are indeed '*complete*' in the sense of being appropriate for the area in which a project is implemented."[18]

There are ample Complete Streets planning resources available to governmental entities that can be relied on in formulating planning decisions. "Approved Complete Streets design standards include those from the American Association of State Highway and Transportation Officials (AASHTO Green Book), the Manual on Uniform Traffic Control Devices from the Federal Highway Administration (FHWA), and the Institute of Transportation Engineers."[19] In

[14] Federal Highway Administration, Federal Highway Administration University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *available at*, http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt22.cfm.

[15] Some of which are summarized below in the Appendix.

[16] Federal Highway Administration, Federal Highway Administration University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *available at*, http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt22.cfm.

[17] FHWA, Design Guidance, Accommodating Bicycle and Pedestrian Travel: A Recommended Approach, *available at*, http://www.fhwa.dot.gov/environment/bikeped/design.htm.

[18] Robin Smith, Sharlene Reed, and Shana Baker, Public Roads, Street Design: Part 1—Complete Streets, Vol. 74, No. 1, (July/August 2010), *available at*, http://www.fhwa.dot.gov/publications/publicroads/10julaug/03.cfm (emphasis added).

[19] Alan M. Voorhees Transportation Center, NJ Complete Streets Summit Summary Report, pg. 9, *available at*, http://policy.rutgers.edu/vtc/bikeped/completestreets/Final%20Complete%20Streets%20Summary%20Report.pdf.

addition, FHWA maintains a Bicycle & Pedestrian Program resource website[20] and the National Complete Streets Coalition provides a particularly helpful Resources page[21] for learning more about the benefits of and design guidance specifically related to Complete Streets designs.

Complete Streets Designs Exceptions

There will be occasions where Complete Streets designs will not be the best design available. Reasonable analysis of a traffic situation may result in a judgment by planners that a non-Complete Streets design is best, and documenting that analysis can provide evidence of a rational basis for the agency's decision. For example, where there was a fair balancing of advantages and drawbacks of installing safety features, review of data and traffic operations or thorough study of intersection design, courts found qualified immunity attached and determined to not overturn the reasoned judgment of expert decision-makers, even in the face of conflicting expert opinions. If a governmental entity decides to not use Complete Streets designs, these types of rational decision making processes, including adequate study and analysis, could support that decision.

Benefits of Complete Streets Design

Despite the possibility that certain circumstances will not warrant Complete Streets designs, there is a significant body of evidence detailing the ample benefits of Complete Streets designs. Complete Streets designs can reduce infrastructure costs 35-40%[22] and reduce injury and crash risks for pedestrians by 28% and bicyclists by 50%.[23] In addition, studies in both the United States[24]and United Kingdom[25] found traffic calming measures resulted in over 20% fewer accidents. More specifically, within two years of implementing Complete Streets designs on Eighth and Ninth Avenues, New York City saw 13-23% fewer crashes, 15-56% fewer crashes that cause injuries and 18-58% fewer injuries to all street users.[26] For these reasons, FHWA has clearly stated: "It is no longer acceptable to plan, design, or build roadways that do not fully accommodate use by bicyclists and pedestrians. With every passing year, the courts become less and less sympathetic to agencies that have not understood the message: bicyclists and pedestrians

[20] FHWA, Bicycle & Pedestrian Program, *available at,* http://www.fhwa.dot.gov/environment/bicycle_pedestrian/index.cfm.

[21] National Complete Streets Coalition, Resources, *available at*, http://www.completestreets.org/complete-streets-fundamentals/resources.

[22] National Complete Streets Coalition, The Benefits of Complete Streets 1, Costs of Complete Streets, *available at,* http://www.completestreets.org/complete-streets-fundamentals/factsheets/costs/.

[23] National Complete Streets Coalition, The Benefits of Complete Streets 9, Safety of Complete Streets, *available at,* http://www.completestreets.org/complete-streets-fundamentals/factsheets/safety/.

[24] Mayor Mike McGinn, Nickerson Street project improves safety, *available at*, http://mayormcginn.seattle.gov/nickerson-street-project-improves-safety/.

[25] United Kingdom Department of Transport, Traffic Advisory Leaflet 11/00, Village traffic calming - reducing accidents, December 2000, *available at*, http://assets.dft.gov.uk/publications/tal-11-00/tal-11-00.pdf.

[26] New York City Department of Transportation, Community Board 4 Presentation: Eighth and Ninth Avenues Complete Street Extension, September 21, 2011, *available at,* http://www.nyc.gov/html/dot/downloads/pdf/201109_8th_9th_cb4_slides.pdf.

are intended users of the roadway. Transportation staff must be knowledgeable about planning, design, and other aspects of nonmotorized travel. All modes must be taken into account."[27]

Conclusion

Liability should not be an impediment nor is a justifiable excuse for not implementing a Complete Streets plan or improvement. Governmental entities are accorded a "qualified immunity" for highway planning and design decisions – both initially and when correcting subsequently discovered design defects – provided those decisions are not plainly inadequate or lacking a reasonable basis. In both situations, however, where a rational government decision-making process determines that Complete Streets designs provide the best solution, qualified immunity for the governmental entity should apply.

[27] Federal Highway Administration, Federal Highway Administration University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *available at* http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt22.cfm.

DISCLAIMER:

This document is intended to provide a brief and simple overview of transportation planning law in the state of New York. **It is not intended to be legal advice, does not constitute legal advice and should not be used as a substitute for qualified legal advice from a competent, experienced attorney licensed to practice law in the state of New York. Any person or entity reading this document should retain a lawyer to seek his or her advice with respect to any information or legal issues discussed in this document**.

While every effort is made to ensure accuracy and to keep it current, agency details, law and procedure outlined herein can change constantly. No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person or organization acting or relying on this information or anything omitted from it.

Appendix: Selected Case Law Case Summaries

Cases finding no liability:

In ***Weiss v. Fote,* 7 N.Y.2d 579 (1960)**, the court overturned a jury verdict finding Buffalo "negligent in failing to provide a sufficient 'clearance interval'" for an intersection signal. A clearance interval is the interval between the time the green light ends and the green light begins for the perpendicular directions. The intersection in question had a clearance interval of four seconds. In finding the city immune from liability, the court stated that "the Board of Safety[] made extensive studies of traffic conditions at the intersection," and determined "that four seconds represented a reasonably safe 'clearance interval' and there is nothing to suggest that its decision was either arbitrary or unreasonable. To state the matter briefly, absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it -- and there is no indication of either here -- we perceive no basis for preferring the jury verdict, as to the reasonableness of the 'clearance interval', to that of the legally authorized body which made the determination in the first instance."

***Cataldo v. New York State Thruway Auth.,* 67 N.Y.2d 271 (1986)**,[28] involved a 1973 accident where Cataldo collided with a car that came across the median of the Tappan Zee Bridge from the opposite direction. Cataldo asserted that the Thruway Authority was negligent in not installing a median barrier at the location of the accident. The court, however, found no liability. The court's rationale being the Authority completed two studies in 1962 and 1972 that fully analyzed the situation and determined that although median barriers would prevent crossover accidents, in the Authority's judgment, the resulting conditions of bounce-back accidents (hitting the median and bouncing back into traffic) as well as other advantages and drawbacks of a median barrier mitigated against installation. The court found it would not substitute its or a jury's opinion for the Authority.

In ***Affleck v. Buckley,* 96 N.Y.2d 553 (2001)**, the Court of Appeals upheld a motion for summary judgment based on qualified immunity where the state, after receiving notice of a potentially unsafe intersection, studied the intersection and determined the intersection was not unsafe. The court pointed out that the "County reviewed data and made observations of traffic moving in every direction at that location." It went on to note that a private entity's report on the same intersection but with a different conclusion was merely a difference of opinion between experts on the need for a traffic control device and was not enough to trigger liability.

In ***Spanbock v. Trzaska,* 731 N.Y.S.2d 229 (2d Dep't 2001)**, the court overturned a lower jury verdict finding Suffolk County 50% at fault for the death of a pedestrian who was killed when he was hit by a car while attempting to cross an intersection. In finding for the county, the court stated: "Here, according to the testimony of a traffic engineer employed by the defendant County, a study of the subject intersection was conducted in the spring of 1990, about three years

[28] *Cataldo v. New York State Thruway Auth.*, is one of three cases, all consolidated under *Friedman v. New York*, 67 N.Y.2d 271 - also including *Muller v. New York*. Each of these cases involved a car accident resulting from a car crossing the median of a roadway. The court found no liability only in the Cataldo case (see below for Friedman and Muller).

before the accident. The study found that no pedestrian accidents had occurred at the intersection between 1985 and 1989, and consequently made no recommendation regarding what measures were needed to improve pedestrian safety. Although the plaintiff's expert witness testified that the County's traffic study lacked a reasonable basis because it failed to adequately consider pedestrian activity at the intersection, something more than a mere choice between conflicting opinions of experts is required before the State may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public. Under these circumstances, we find that the County is immune from liability for its alleged negligence." (internal citations omitted).

***Hannon v. State of New York*, 786 N.Y.S.2d 613 (3d Dep't 2004)**, like *Spanbock*, involved a pedestrian struck while attempting to cross a road. The court upheld the Court of Claims dismissal of the claim against the state, finding not only that the state had no actual or constructive notice of a dangerous condition but also the state was entitled to qualified immunity from suit. On the issue of qualified immunity, the court stated: "The record makes plain that defendant conducted numerous studies regarding the intersection in question and determined that its design was desirable and safe for pedestrian traffic. Such a discretionary determination gives rise to qualified immunity unless the study underlying it is plainly inadequate or there is no reasonable basis for such determination. While it is true that claimants produced an expert who opined that certain additional safety precautions were necessary at and around the intersection in question, something more than a mere choice between conflicting opinions of experts is required before defendant or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public." (internal citations omitted).

***Kane v. State of New York*, 2005 WL 3872975 (N.Y. Ct. Cl. 2005)**, is another case involving a pedestrian who was struck while crossing a road. The pedestrian was struck on April 21, 2000, exactly four years to the day after the state decided a pedestrian signal should be installed at the intersection and three months before the signal was ultimately installed. Despite this four year gap, the court still found the state was protected by qualified immunity because the state implemented a reasonable process in deciding when to install the signal. The state showed that 1) it maintained a rolling list of signals that needed to be installed, 2) the intersection was not found to be so dangerous that it merited higher priority than to be installed on a rolling basis and 3) four years from determination of need to installation was within the state's standard three to five year period needed to install signals.

Cases finding liability:

In ***Kuhland v. City of New York*, 916 N.Y.S.2d 637 (2011)**, the court entered an order denying a motion to set aside a jury verdict finding the city 50% liable for a pedestrian accident. The court upheld the jury verdict **because qualified immunity "will not apply where the municipality has not conducted a study which entertained and passed on the very same question of risk."** The evidence was undisputed that the city had not performed any pedestrian safety studies at the intersection, therefore the city was not entitled to judgment as a matter of law and the jury could have found "that the intersection was unreasonably dangerous for pedestrians, that the City had notice of the dangerous condition, and that the City's negligence was a proximate cause of the accident." The court distinguished an earlier case finding qualified immunity where the city made improvements in accordance with an adequate study and a reasonable traffic plan.

***Muller v. New York*, 67 N.Y.2d 271 (1986)** involved a 1977 accident where Muller collided with a car that came across the median of the Tappan Zee Bridge from the opposite direction. This case, in addition to the studies in Cataldo above, included an added development that in 1974 the Authority had decided that it would install a median barrier but only after studying the alignment of the median barrier as well as concurrent installation of a traffic control system. The court found liability because despite this clear decision, the period between the 1974 decision and the 1977 accident "was marked by only intermittent spurts of study and evaluation and long gaps of inactivity, wholly inconsistent with the project's designation" as high priority. The court noted that although this delay was not justifiable a "reasonable delay justified by design considerations, as with one resulting from a legitimate claim of funding priorities, would not be actionable."

***Friedman v. New York*, 67 N.Y.2d 271 (1986)**, involved a 1978 accident where Friedman was struck by a car trying to pass her, causing her car to cross the median and the lanes on the other side and fall into a ravine below the roadway. The court found the state liable based on a 1973 study finding a proliferation of crossover accidents necessitated a median barrier, a 1974 proposal by the DOT stating the project could be done in 18 months (before the 1978 accident) and the state's expert's assertion that the project would have started before the accident and temporary barriers could have been installed before the accident if the project had been made a priority. Although the state argued that the delay was reasonable because 1) the project scope had been continually expanded, 2) funding was never made available and 3) other projects had been given priority resulting from similar safety concerns, the state presented little to no evidence thereby "fail[ing] to show that the delay in remedying the known hazardous condition resulted from a discretionary decision concerning funding priorities." Put differently, the state could not be afforded qualified immunity because it did not actually present evidence that its decision was reasonable – the exact opposite result from *Kane* above, where evidence was presented and qualified immunity was applied.