SECTION 4

SELECTED TRANSPORTATION DEPARTMENT DEFENSES IN TORT ACTIONS

A. DEFENSES BASED ON ALLOCATION OF RESOURCES OR PRIORITY OF PROJECTS

A.1. The Allocation of Funds as a Defense

A.1.a. Decisions Recognizing the Defense

This section discusses whether economic and time sensitive issues are defenses to a transportation department's tort liability. The issue is whether the department may defend against such suits on the basis that it did not correct a particular hazardous location because of its need to allocate scarce resources, be they funds, personnel, or equipment; because of insufficient funds or the cost of a given project; or because of the need to give other areas higher priority for repair or improvement than the one that allegedly caused an accident. The transportation department generally is not liable in cases where it has had to spend "its limited funds [on] those highway projects it believes are most urgently needed."[1] The "absence of the necessary funds and the legal means to procure them" may preclude a finding of liability for the transportation department's failure to keep streets in good repair.[2] It appears that the lack of funds may be used by the defendant to escape liability but not by the plaintiff to establish liability.[3]

In addition to the statutory exception from liability in tort claims acts for the transportation department's exercise of discretionary functions, at least one act contains an exemption from liability for the State's failure to allocate resources or for its negligence in allocating them. In New Jersey,

> c. A public entity is not liable for *the exercise of discretion in determining whether to seek or whether to provide the resources* necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
>
> d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.[4] (Emphasis supplied.)[5]

In *Lopez v. City of Elizabeth*,[6] an appellate court addressed the public policy behind Section 59:2-3(c) and (d), as well as the proof required for the public entity to make the resource allocation defense successfully. The opinion is germane to the allocation defense regardless of whether a specific statutory exemption is involved. According to the court, the allocation defense derives from the fact that

> [a] private person or firm that cannot afford the people and equipment to do a good job can withdraw rather than perform in a dangerous way. Government rarely has that option. It cannot withdraw from law enforcement if its police force is too small, from fire protection if its trucks are in poor repair, or from maintaining streets if it cannot afford to keep them in perfect condition. That is why high level discretionary policy decisions whether to burden the taxpayers to furnish equipment, material, facilities, personnel or services are absolutely immune. That is also why operational governmental decisions to devote existing resources to one activity at the expense of another are immune unless palpably unreasonable.[7]

Under the New Jersey statute, the plaintiff has the burden of proving that the defendant's allocation of resources was palpably unreasonable.[8]

A California statute, Section 835.4 of the California Government Code, applies a reasonableness standard to the public entity and states how reasonableness is to be determined. As explained in the comments to the section, "a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else."[9]

Even without a provision such as the New Jersey one protecting the department's decisions when seeking or allocating resources, other courts recognize the defense, usually on the basis that the allocation of resources involves the exercise of discretion. In *Bodin v. City of Stanwood,*[10] the Supreme Court of Washington agreed that the trial court properly allowed evidence of the defendant's efforts to procure funding for improvements. The court referred to judicial precedents holding that governmental entities may present evi-

---

[1] 65 N.Y. JUR. 2D *Highways, Streets, and Bridges* § 407, at 217–18.

[2] *Id.*

[3] *See, e.g.,* Estate of Arrowwood v. State, 894 P.2d 642, 1995 Alaska LEXIS 43 (Alaska 1995).

[4] N.J. STAT. ANN. § 59:2-3.

[5] It should be noted that under the statute "discretionary operational or less than high level planning decisions made by a public employee charged with a duty to exercise more than a ministerial function may be granted immunity" for allocation decisions. Longo v. Santoro, 195 N.J. Super. 507, 480 A.2d 934, 940 (App. Div. 1984). The decision is consistent with the U.S. Supreme Court's decision in *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991), regarding the exercise of discretion within the meaning of the FTCA.

[6] 245 N.J. Super. 153, 584 A.2d 825 (App. Div. 1991).

[7] Lopez, 584 A.2d at 830 (citations omitted).

[8] *Id.* at 829. *See* Brown v. N.J. Dep't of Transp., 86 N.J. 565, 432 A.2d 493, 500, 1981 N.J. LEXIS 1669 (1981) (State's delay in correcting a swale intended to keep water off the highway was "palpably unreasonable.").

[9] CAL. GOV'T CODE § 835.4.

[10] 130 Wash. 2d 726, 927 P.2d 240 (1996).

dence of the practicality, cost, or otherwise of guardrails and barriers on roads and bridges and stated that "funding considerations may be relevant in defending the state against a negligence claim that it failed to make highway improvements."[11] In a case where the city claimed immunity for a defective barrier causing an accident, arguing that the failure to replace the barrier was due to funding priorities, the court in overturning a directed verdict for the city held that the city had failed to present evidence of its planning or ordering of priorities or of the limitations on available funding.[12]

In Minnesota, in *Gutbrod v. County of Hennepin*,[13] the court affirmed a summary judgment for the County regarding its decision not to repair a rut in a county road. After considering the risks and costs of changing the schedule, the county engineer adhered to the County's established road repair schedule. The County's decision to adhere to the schedule and not immediately repair a crack or rut in the center of the roadway was entitled to discretionary immunity, because the County had demonstrated that its decision was based upon cost and safety considerations. Moreover, and perhaps very importantly, there was no evidence that the alleged crack constituted an immediate danger.

In *Cruz v. New York*,[14] the court recognized the allocation defense when the City asserted that its decision to defer repair of the surface of a walkway and to make other repairs to a bridge's structure arose from a legitimate ordering of priorities in light of budgetary constraints. The court agreed that the "deferment of remedial action may…be justified by proof that 'the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding.'"[15] As discussed below, the city failed to prove its defense.

In *Estate of Arrowwood v. State*,[16] the plaintiffs argued that the trial court abused its discretion by excluding evidence relating to the effect of reductions in the transportation department's budget upon the level of road maintenance in the region where the accident occurred. However, the appellate court agreed, first, that the State's refusal to close the highway due to icy conditions was a planning level decision, such that it was proper for the lower court to dismiss the action against the State. Second, the court held that the proper focus of the case was not the budgetary decisions of the legislature or the transportation department, but rather what the maintenance district did with the resources that it received.[17] The court agreed that the plaintiff's proffered evidence was inadmissible, because it was not relevant: "budget decisions are discretionary functions immune from judicial inquiry."[18] In a case from Indiana, while affirming summary judgment for the County, the court held that the County's decision concerning the feasibility of installing additional warning devices at railroad crossings was based properly on "the availability of County resources."[19]

In sum, either a statute or judicial precedent may make it quite proper for the state to defend a tort claim based on its allocation of funds. In making the defense, the government may not have to demonstrate that it considered and rejected the specific improvements alleged to have been neglected.[20] It is sufficient for the government "to demonstrate that [it] consciously engaged in decision making regarding the general type of improvements alleged in plaintiff's complaint."[21]

A.1.b. Decisions Not Recognizing the Defense

The allocation defense does not always succeed. The court may believe that there were other, less expensive alternatives that the public authority failed to consider that could have prevented the accident in question.

In *Guilbeau v. St. Landry Parish Police Jury*,[22] in which there was actual notice of the hazard, the defendant argued, unsuccessfully, that it had "no reasonable opportunity" to remedy the defect, because it had insufficient funds to do so. Although the court did not address the insufficient funds defense directly, it held that there were less costly alternatives that were not considered.

A case holding that the lack of funding is not a defense is *Georgia Depart. of Transp. v. Cannady*.[23] The trial court had entered a judgment against the transportation department in the amount of $2,650,000. In reversing and remanding the case, the appeals court noted that in 1989 the highway was resurfaced and that the resurfacing should have had an equal or better slope; "however, due to a lack of funding for the repaving project, the super-elevation and proper cross-slope were not included."[24] The court held that "[i]n

[11] Bodin, 927 P.2d at 247, *citing* Bailey v. Town of Forks, 108 Wash. 2d 262, 271, 737 P.2d 1257, 753 P.2d 523 (1987).

[12] Gregorio v. New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 123, 1998 N.Y. App. Div. LEXIS 8975 (1st Dep't 1998).

[13] 529 N.W.2d 720 (Minn. App. 1995).

[14] 201 A.D.2d 606, 607 N.Y.S.2d 969 (App. Div. 2d Dep't 1994).

[15] Cruz, 607 N.Y.S.2d at 971. *Citing* Friedman v. State of New York, 502 N.Y.S.2d 669, 493, N.E.2d 893.

[16] 894 P.2d 642, 1995 Alaska LEXIS 43 (Alaska 1995).

[17] Estate of Arrowwood, 894 P.2d at 646.

[18] *Id.*

[19] Streiler v. Norfolk & Western Ry., 642 N.E.2d 1019, 1022 (Ind. App. 5th Dist. 1994).

[20] Wade v. Norfolk & Western Ry., 694 N.E.2d 298, 303 (Ind. App. 1998). (Affirming summary judgment for the county.)

[21] *Id.*

[22] 600 So. 2d 859, *writ denied,* 606 So. 2d 544 (1992).

[23] 230 Ga. App. 585, 497 S.E.2d 72, 1998 Ga. App. LEXIS 234, 98 Fulton County D. Rep. 927 (1998), *cert. granted*, 1998 Ga. LEXIS 754 (Ga. June 25, 1998).

[24] 497 S.E.2d at 74.

this case, there was a substantial passage of time between the elimination and restoration of the superelevation and proper cross-slope, but it had been knowingly and consciously done for lack of funding...."[25] The court ruled that lack of funds cannot be a defense to improper maintenance, because such a defense would deter the making of proper repairs to eliminate the risk of danger just as surely as the admissibility of subsequent remedial repairs would.[26]

A.2. Evidence Required to Prove the Allocation Defense

As suggested in *Cruz v. New York*,[27] *supra*, it is crucial for the State to offer evidence and request an instruction regarding its available resources and/or its resource-allocation policy. In fact, at any time the defendant seeks immunity for a discretionary function, the State should offer proof that the "challenged conduct or omission was a policy decision made by consciously balancing risks and benefits. This proof may come in the form of meeting minutes, testimony by the decision makers regarding the process involved, or other documents showing that the governmental entity made an affirmative policy decision."[28]

In *McCluskey v. Handorff-Sherman,*[29] the appellate court approved the trial court's decision to allow the state to present evidence regarding the careful scrutiny it gave potential projects and the process it used to determine the allocation of funds. "The trial court properly allowed evidence demonstrating the benefits and burdens of improving that piece of road."[30] The court also agreed with the trial court that the State could not offer "evidence comparing the relative safety of this road to every other highway in the State," a tactic it thought "would, in effect, permit the State to mount a poverty defense using alternative rhetoric."[31]

In *Cruz*, *supra*, the court held that there was no evidence explaining the precise budgetary limitations under which the City was operating, "nor was [there] any evidence adduced to explain why the expense budget for 'critical maintenance contracts' was only $2,000,000 when the Department of Transportation capital budget for bridges for 1985 was $244,000,000."[32] Thus, on the basis of the record, the court found that the City failed to show that its inaction was pursuant to a plan.

In the *Lopez* case, *supra*, from New Jersey construing New Jersey Statutes Annotated Section 59:2-3(c) and (d), the court found the defendant's evidence to be wanting; testimony that "'you only have funds for one' [was] insufficient evidence to permit a jury to conclude that the city faced competing demands and decided to use its manpower for something more pressing than inspecting potholes."[33] Regardless of whether the State's tort claims act has a resource allocation exemption, as in New Jersey, the *Lopez* decision is worthwhile reading regarding how to present and make a defense based on allocation of resources.

The absence of sufficient evidence to establish the defense is illustrated also by *Lake City Juvenile Court v. Swanson.*[34] The County argued that its funding decisions were discretionary, but the court ruled that the County presented no evidence on which the court could evaluate the nature of the County's conduct in failing to provide additional funds. The opinion noted that in *Voit v. Allen County*[35] there was evidence that the County engaged in a systematic process for determining highway improvements. In *Voit*, the County Board had considered several written recommendations, the changed condition of the county roads, and the allocation of available resources. Likewise, in *City of Crown Point v. Rutherford*,[36] the "key decision makers contemplated and balanced public policy factors and weighed budgetary considerations in the allocation of resources," leading the court to find that there was governmental immunity.

Lack of evidence regarding the defendant's decision-making has been a problem elsewhere. If there is no record concerning the government's "policy decision" to postpone resurfacing of affected streets, e.g., no "contemporaneous public record of Board action," then it has been held that there was no competent evidence that there was a systematic decision-making process.[37]

In sum, decisions regarding the allocation of resources generally are discretionary functions that are immune from judicial inquiry. Many courts allow the jury to consider how resources were allocated or whether there were funds available to cure the alleged highway deficiency. However, as seen, there is contrary authority.

A.3. The Financial Feasibility Defense

The transportation department may contend that it is not liable, because the department lacked the funds to correct a hazardous condition, or because it was not financially feasible or practicable to do so. Although a defense founded on allocation of resources may be suc-

[25] *Id.* at 75.

[26] *Id.*

[27] 607 N.Y.S.2d 969.

[28] Serviss v. Department of Natural Resources, 711 N.E.2d 95, 98 (Ind. Ct. App. 1999) (citations omitted; case involved a sledding accident).

[29] 68 Wash. App. 96, 841 P.2d 1300 (Wash. App. Div. 2 1992), *aff'd* 125 Wash. 2d 1, 882 P.2d 157.

[30] 841 P.2d at 1307.

[31] *Id.*

[32] 607 N.Y.S.2d at 971.

[33] Lopez, 584 A.2d at 827.

[34] 671 N.E.2d 429 (Ind. App. 1996).

[35] 634 N.E.2d 767, 1994 Ind. App. LEXIS 514 (Ind. Ct. App. 1994), *transfer denied*, (Feb. 24, 1995).

[36] 640 N.E.2d 750, 754 (Ind. App. 4th Dist. 1994).

[37] Scott v. City of Seymour, 659 N.E.2d 585, 590–91 (Ind. App. 1995). Summary judgment for City reversed.

cessful, if made and presented properly, the mere contention that the state is not liable because of cost may not be a successful defense. In Montana, in *Townsend v. State,*[38] the court observed that

> *[t]he financial feasibility defense has been soundly rejected by our Court when cost is the State's sole excuse* for its failure to construct or maintain properly. State ex rel. *State ex rel. Byorth v. District Court* (1977), 175 Mont. 63, 572 P.2d 201. "However, where cost is but one among many factors affecting the State's choice of a particular method of construction or maintenance, it is relevant evidence on the reasonableness of the alternative taken." *Modrell v. State* (1978) 179 Mont. 498, 501, 587 P.2d 405, 406. (Emphasis supplied.)

Thus, the court held that the State could properly consider the cost to the State of making the repair when making a determination on the need for repair. In giving limited approval to such defense and reinstating the jury's finding in favor of the State, the court held:

> Here, cost is not the State's sole defense. There is a limit to how many potholes can be repaired in any given time period. The Department's supervisory employees made a decision based on the severity of the potholes, as well as the frequency and type of traffic on the road in determining whether repair of the potholes was immediately necessary. They took a calculated risk that the potholes were small enough and the traffic light enough that repair of the potholes could wait without endangering the safety of the traveling public. The jury agreed with the employees' decision. There is substantial credible evidence to support the jury's decision.[39]

Thus, according to the *Townsend* case, financial feasibility may be taken into account when it is but one of several factors considered, but financial feasibility is an impermissible defense when it is asserted as the sole reason or excuse for failing to take corrective action to protect public safety.

Furthermore, the mere argument that there were no funds, or that there were insufficient funds, may not be enough to mount a defense. As the court held in *McCluskey v. Handorff-Sherman,*[40] the lack of funds to repair an allegedly dangerous highway is an improper defense, even though the State followed the law governing allocation of resources concerning highway maintenance. The law governing priority of highway projects did not grant the State immunity from liability for negligent design or maintenance of unfunded projects. The State was responsible for the maintenance of its own network of roads. The State, unlike a municipality, was in control of the allocation of funds; if resources were insufficient, and if the road were unreasonably hazardous, the State had several options, including signing or closing the highway: "The State cannot avoid responsibilities for its fiscal decisions by stating that those decisions have assumed the status of law and thus are unassailable."[41]

A.4. Priority of Highway Projects or Programs as a Defense

Closely related to the allocation of funds defense is the defense that the department's inaction stemmed from a legitimate ordering of priorities with other projects based on the availability of funding; courts have held that a transportation department's "priority system" is itself a policy or planning operation of the state that is entitled to discretionary immunity.[42]

In *Trautman v. State*,[43] a claim arose out of the State's failure to install median barriers at an interchange. The court held that the case was properly dismissed, because the State's delay in implementing the project to correct the road's deficiencies stemmed from its legitimate ordering of funding priorities. Moreover, there was a reasonable basis for the State's subsequent amendment of the project to exclude the interchange because of an insufficient budgetary allocation. The State demonstrated that the failure to act was due to a recessionary period, which forced the transportation department to redirect its priorities to low cost, high return projects, and to cancel 54 consultant design projects outright.[44] In addition, there was evidence that during this time the design standards for guide rails and barriers were in flux, with extensive testing of alternative designs, and that improperly designed barriers likewise posed serious safety concerns.

There is other authority, however, holding that the timing of projects may not be protected by the discretionary function exception, particularly where the department has delayed unreasonably in undertaking projects that, by virtue of its own policy, should have been addressed urgently. Thus, in *Semadeni v. Ohio Dept. of Transportation,*[45] in May 1985, the department had proposed a new policy addressing installation of protective fencing on existing bridges, a policy that was approved by the Federal Highway Administration (FHWA) in July 1985. The purpose of the policy, in

---

[38] 227 Mont. 206, 738 P.2d 1274, 1277, 1987 Mont. LEXIS 904 (1987).

[39] Townsend, 738 P.2d at 1277.

[40] 68 Wash. App. 96, 841 P.2d 1300 (Wash. App. Div. 2 1992), *aff'd* 125 Wash. 2d 1, 882 P.2d 157.

[41] McCluskey, 841 P.2d at 1307.

[42] Schroeder v. Minn., 1998 Minn. App. LEXIS 1436 (1998); Wornson v. Chrysler Corp., 436 N.W.2d 472, 474–75 (Minn. App. 1989) (installation of traffic signals based on prioritization system was immune from liability); Friedman v. N.Y., 67 N.Y.2d 271, 287, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986); and Gutelle v. N.Y., 55 N.Y.2d 794, 795, 447 N.Y.S.2d 422, 432 N.E.2d 124, 1981 N.Y. LEXIS 3312 (1981).

[43] 179 A.D.2d 635, 578 N.Y.S.2d 245 (App. Div. 2d Dep't 1992), *appeal denied,* 79 N.Y.S.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940.

[44] Trautman, 578 N.Y.S.2d at 246.

[45] 75 Ohio St. 3d 128, 661 N.E.2d 1013 (1996). The decedent was killed in March 1990, when a chunk of concrete was thrown from an overpass through an automobile windshield.

part, was to discourage the throwing or dropping of objects from bridges onto lower roadways and other properties. By the date of Semadeni's accident, (2 years after the formulation of the initial funding program and nearly 5 years from the date of the policy's adoption), the transportation department had entered into contracts for only two projects, which were solely for the purpose of retrofitting existing bridges with protective fencing.

The court stated that it had previously held that once a governmental entity has made a discretionary decision, it has a reasonable time to implement that decision without incurring liability.[46] Here, the court noted that despite city and state transportation officials' concern about the problem of dropped objects, it was over 2 years from the time that the fencing policy was adopted and approved that the transportation department established funding for any protective fencing anywhere in the state: "Even then, the program established funding for only ten percent of the qualifying bridges in Ohio."[47]

The accident location in question was one of more than 400 bridges scoring 10 index points or more that were not approved for funding: "The Blair Avenue bridge justified a score of twelve index points by ODOT's own criteria, and pursuant to Policy 1005.1, ODOT's agents and employees were under a mandatory duty to complete its fencing within a reasonable time."[48] The court, reversing a judgment for the transportation department, held that "reasonable minds could only find that ODOT was negligent in failing to timely implement Policy 1005.1...."[49] Relying on *Anderson v. Ohio Dept. of Ins.,*[50] the court rejected the State's argument that "decisions as to the *manner* in which a basic policy decision is implemented fall within the scope of the State's reserved sovereign immunity, even if implementation decisions require State employees to exercise some degree of discretion."[51] In a decision that is post-*United States v. Gaubert*,[52] which ruled that discretion, at least under the FTCA, can be exercised at all levels of employment, the Supreme Court of Ohio in *Semandeni* ruled that time and manner decisions needed to implement a policy decision are not entitled to immunity.[53] The *Semandeni* case illustrates that, if a dangerous location was not corrected, a departmental policy pursuant to which hazardous sites have been noted as particularly severe and needing attention may be quite relevant in a later negligence action. (In an effort to establish priorities, the highway department, as in *Semandeni,* may cause certain reports to be generated. Pursuant to 23 U.S.C. § 409, certain data required to be collected by federal statute may not be discoverable or admissible into evidence.)[54]

In sum, the highway department may be able to establish that it had to prioritize either because of funding or because of safety concerns arising out of changing standards for highway design.[55] On the other hand, if the transportation department's policy requires that a high priority location must be addressed, any unintended delay by the state in funding the location's improvement or correction may fail to absolve the state of tort liability.[56]

A.5. The Department's Workload as a Defense

The department's staffing and workload priorities may be defenses. In making staffing decisions, the transportation department is engaging in the exercise of its discretionary functions. As held in *Adams v. City of Tenakee Springs*,[57] a city has discretionary immunity regarding the staffing of its fire department. The court's opinion in the *Adams* case, affirming a jury verdict, may be relevant to similar actions against a transportation department:

> Staffing a fire department, as the superior court concluded, is fundamentally a matter of resource allocation.... Decisions about how to allocate scarce resources are matters of policy immune from judicial review.... Thus, in *Freeman v. State*, 705 P.2d 918 (Alaska 1985), for example, we held the State immune from liability for not allocating adequate funds to provide highway dust control....[58]

It may be proper, moreover, for a jury to consider the defendant's workload in determining whether a defect existed and whether the defendant had a reasonable opportunity to correct it. As the court stated in *Hall v. Burns*,[59] the existence of a defect must be considered in context. Thus, it is fair that the jury be made aware of all of the circumstances, including: "(1) the miles of highway the [defendant] is responsible to repair and maintain; (2) the number of employees and equipment available; (3) the locations of the highway; (4) the ex-

[46] Semadeni, 661 N.E.2d at 1016–17.

[47] *Id*. at 1017.

[48] *Id*.

[49] *Id*. at 1018.

[50] 58 Ohio St. 3d 215, 569 N.E.2d 1042 (1991), *reh'g denied*, 59 Ohio St. 3d 720, 572 N.E.2d 697 (1991).

[51] Semadeni, 661 N.E.2d at 1017.

[52] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[53] Semadeni, 661 N.E.2d at 1016–17.

[54] Claspill v. Mo. Pacific R.R., 793 S.W.2d 139, 140 (Mo. 1990), *cert. denied*, 498 U.S. 984, 111 S. Ct. 517, 112 L. Ed. 2d 529, 1990 U.S. LEXIS 5897 (1990). ("The plain language of section 409 provides that certain information shall not be admitted into evidence if it was compiled 'for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds.'") 793 S.W.2d at 140.

[55] *Id*.

[56] When data have been collected for the purpose of federally-aided improvements, 23 U.S.C. § 409 may be available for the purpose of keeping the data out of evidence.

[57] 963 P.2d 1047 (Alaska 1998).

[58] Adams, 963 P.2d at 1051 (citations omitted).

[59] 213 Conn. 446, 569 A.2d 10 (1990).

tent of its use as compared to other highways; (5) the amount of money available; and (6) any other relevant factors, including other needs in the highway system."[60]

In essence, it is not proper to second-guess the defendant's decisions on staffing, as they are discretionary, and it is permissible in a negligence action against the transportation department for the trier of fact to consider the burdens on the department in responding to an alleged hazardous location.

In sum, there are precedents holding that the transportation department is exercising immune discretion when making decisions regarding the allocation of resources, including funds, personnel, or equipment. The department may be immune also for decisions concerning the priority of projects, as long as it does not unreasonably delay taking needed action. The cost of a project or the absence of funds for an improvement or repair, standing alone, may not serve necessarily as the basis of a successful defense. When relying on the allocation-of-funds or similar defenses, the department must be careful to introduce evidence demonstrating that its decision to act or not act was thoughtful, premeditated, and deliberate.

B. THE PUBLIC DUTY DEFENSE TO TORT LIABILITY

B.1. Origin and Nature of the Public Duty Doctrine

The public duty doctrine provides that before an injured person may recover in tort against a public entity or an officer or employee thereof, he or she must show that the defendant breached a duty owed to plaintiff, not merely that the defendant breached a duty owed to the public as a whole. Unless there is such a private duty owed to the plaintiff, there is no liability for the defendant's failure to enforce a statute or to provide police protection[61] or other services, which are intended to benefit the general public.[62]

The public duty doctrine has long been recognized as a defense in tort litigation against public entities and their officers and employees; however, the doctrine has been overshadowed by sovereign immunity, or, where there is no sovereign immunity, by the governmental defendant's potential immunity for the exercise of discretionary functions. Some jurisdictions, such as Arizona,[63] Colorado,[64] and Florida,[65] rejected the public duty doctrine. (However, it appears that Florida subsequently, in effect, reinstated the public duty doctrine.)[66]

The public duty doctrine developed in the law of personal liability of public officials and was adopted in the law of tort liability of the sovereign. Although virtually all states no longer have sovereign immunity in tort, in some states the public duty doctrine is important as a defense to tort actions against public entities.[67] The doctrine is more widely accepted in cases involving alleged inadequate police[68] and fire protection and inspection of buildings[69] than in highway cases. In *Hamilton v. Cannon*,[70] the court held that the public duty

[60] 569 A.2d at 26–27, *citing* Husovsky v. United States, 590 F.2d 944, 950 (D.C. Cir. 1978); Johnson v. State, 636 P.2d 47 (Alaska 1981); Butler v. State, 336 N.W.2d 416 (Iowa 1983). It should be noted that the *Hall* case arose under the Connecticut highway defect statute, C.G.S.A., § 13a-144.

[61] Eldridge v. Trenton, 1997 Tenn. App. Lexis 573 (1997) ("[T]he evidence presented at trial brings the actions of Defendant and the officers of the Trenton Police Department within the scope of the public duty doctrine of governmental immunity," as there is no "alleged duty to warn Plaintiff of a potential crime at his place of business." *Id*., *10. The special duty exception did not apply.)

[62] Nelson v. Salt Lake City, 919 P.2d 568, 572, 1996 Utah LEXIS 68 (Utah 1996) (implicit recognition of the public duty doctrine in a highway case).

[63] Ryan v. State, 134 Ariz. 308, 656 P.2d 597, 1982 Ariz. LEXIS 293 (1982), *later proceeding*, 150 Ariz. 549, 724 P.2d 1218, 1986 Ariz. App. LEXIS 556 (Ct. App. 1986), *superseded by statute as stated in* Bird v. State, 170 Ariz. 20, 821 P.2d 287, 1991 Ariz. App. LEXIS 310 (Ct. App. 1991) (holding that the state has absolute immunity regarding the licensing and regulation of any profession or occupation).

[64] Leake v. Cain, 720 P.2d 152, 1986 Colo. LEXIS 574 (Colo. 1986), *superseded by statute as stated in* Aztec Minerals Corp. v. Romer, 940 P.2d 1025, 1996 Colo. App. LEXIS 300 (Ct. App. 1996), *reh'g denied,* (Dec. 19, 1996) (holding that governmental immunity act precluded claim against the State for issuing a certain permit).

[65] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1979 Fla. LEXIS 4645 (Fla. 1979), *on remand*, 372 So. 2d 1022, 1979 Fla. App. LEXIS 15402 (Fla. Dist. Ct. App. 3d Dist. 1979), *appeal after remand*, 398 So. 2d 488, 1981 Fla. App. LEXIS 19857 (Fla. Dist. Ct. App. 3d Dist. 1981), and *on remand,* Cheney v. Dade County, 372 So. 2d 1182, 1979 Fla. App. LEXIS 15463 (Fla. Dist. Ct. App. 3d Dist. 1979).

[66] Everton v. Willard, 468 So. 2d 936 (Fla. 1985) (court relied on both discretionary immunity and public duty doctrines).

[67] The doctrine may apply in some areas but not others. *See* Houle v. Galloway Sch. Lines, Inc., 643 A.2d 822, 826-27 (R.I. 1994) (The doctrine applied to the design of bus routes but not to the negligent operation of a school bus; even so, "the elements of egregious conduct" may permit the negligent design claim to go to the jury.).

[68] Annot., *Governmental Tort Liability for Failure to Provide Police Protection to Specifically Threatened Crime Victim,* 46 A.L.R. 4th 948, 955, *citing* Stafford v. Barker, 129 N.C. App. 576, 502 S.E.2d 1 (1998), *review denied*, 348 N.C. 695 (1998); Walther v. KPKA Meadowlands Ltd. Partnership, 581 N.W.2d 527 (S.D. 1998) and Orozco v. Dallas Morning News, Inc., 975 S.W.2d 392 (Tex. App. 1998).

[69] Annot., *Municipal Liability for Negligent Fire Inspection and Subsequent Enforcement,* 69 A.L.R. 4th 739, 745, *citing* Jaramillo v. Callen Realty, 588 N.Y.S.2d 61 (1992) (faulty wiring); *see also* O'Connor v. New York, 58 N.Y.2d 184, 460 N.Y.S.2d 485, 447 N.E.2d 33, 1983 N.Y. LEXIS 2886 (1983), *reh'g denied*, 59 N.Y.2d 762, 1983 N.Y. LEXIS 5014 (1983) (gas explosion).

[70] 267 Ga. 655, 482 S.E.2d 370, 372 (1997), *citing* Department of Transp. v. Brown, 267 Ga. 6, 471 S.E.2d 849, 852 (1966) (automobile accident victim's survivor not required to show that the victim had a special relationship with the State in

"does not apply outside the police protection context" and rejected the DOT's assertion that it had no liability in the absence of a special relationship between the DOT and the plaintiff's decedent, a car-collision victim.

Although the public duty doctrine is recognized by a majority of jurisdictions, there appears to be a trend to reject the doctrine in the law of tort liability of public entities.[71] For example, in *Hudson v. East Montpelier*,[72] the court declined to adopt the "'public duty doctrine' and its 'special relationship exception'…which in recent years has been rejected or abolished by most courts considering it." The courts that have rejected the public duty doctrine have done so primarily in the belief that it was merely a form of sovereign immunity.[73] Under the public duty doctrine, however, there is no tort liability, because under the circumstances of the case the defendant owed no duty to the injured plaintiff.

Sovereign immunity and the public duty doctrine, however, are distinct issues. Sovereign immunity does not deny the tort but precludes any liability. In contrast, under the public duty doctrine, because there is no duty owed to the plaintiff, there is no tort, and, therefore, no liability. As the court stated in *Davidson v. City of Westminster:*[74]

> In sorting out the issues presented, it is important to consider first things first. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.

Most courts do not equate the absence of sovereign immunity with the existence of liability in all cases.[75] Many courts have agreed that the public duty doctrine is not a relic of sovereign immunity.[76] Furthermore, it has been held that "the purchase of insurance…does not constitute a waiver of the public duty doctrine."[77]

B.2. The Public Duty Doctrine in Highway Cases

There is a lack of uniformity among the states that have considered the public duty doctrine as a defense in highway litigation. The jurisdictions that rejected the public duty doctrine, usually on the basis that it is a form of sovereign immunity, certainly will not apply the doctrine in highway cases. Even some jurisdictions, which recognize and apply the doctrine in non-highway cases, will not do so in highway cases. A number of courts distinguish between providing highways for use by the public and furnishing other governmental services to protect the public. Thus, police and fire protection and building and safety inspections may be held to be public duties, whereas in a few jurisdictions safe highways may be held to involve a special duty owed to highway users.

As seen in previous chapters, there are numerous examples in which the courts have held that the transportation department had no duty under the circumstances to a highway user. Thus, there may be no duty to control traffic at uncontrolled highway intersections by installing stop signs or traffic signals or installing median barriers on highways,[78] or to provide street lights on highways,[79] left-turn lanes,[80] or shoul-

---

connection with its decision to open the road on schedule rather than when it was complete).

[71] *See* Annot., *Modern Status Of Rule Excusing Governmental Unit From Tort Liability On Theory That Only General, Not Particular, Duty Was Owed Under The Circumstances,* 38 A.L.R. 4th 1194 (1985).

[72] 161 Vt. 168, 638 A.2d 561, 566 (1993).

[73] Adams v. Alaska, 555 P.2d 235 (Alaska 1976) (first modern case to reject public duty doctrine), *superseded by statute as stated in* Wilson v. Anchorage, 669 P.2d 569, 1983 Alaska LEXIS 473 (Alaska 1983) (holding that the legislature amended statute to preclude municipal liability in actions based on the inspection of private property for violations of statutes, regulations, and ordinances or for hazards to health or safety).

[74] 32 Cal. 3d 197, 185 Cal. Rptr. 252, 649 P.2d 894, 896, 1982 Cal. LEXIS 219 (1982).

[75] *See* Cootey v. Sun Investment, Inc*.,* 68 Haw. 480, 718 P.2d 1086 at 1091 (1986) ("Whether there is a duty of care owed by the government tortfeasor to the injured party should be determined by an analysis of legislative intent of the applicable statute or ordinance.").

[76] *See, e.g*., O'Brien v. State, 555 A. 2d 334,336, 1989 R.I. LEXIS 35 (R.I. 1989)

(We are of the opinion that the special- duty doctrine does not resurrect the concept of sovereign immunity but it does take into account the unquestionable fact that many activities performed by government could not and would not in the ordinary course of events be performed by a private person at all.).

See also Texaus Inv. Corp., N.V. v. Haendiges, 761 F.2d 252, 256, 1985 U.S. App. LEXIS 31021 (6th Cir. 1985) ("Ohio case law strongly supports the proposition that the abolition of sovereign immunity did not abolish the private duty/public duty doctrine."); Johnson v. Municipal Univ. of Omaha, 169 N.W.2d 286 (Neb. 1969); and Motyka v. Amsterdam, 15 N.Y.2d 134, 256 N.Y.S.2d 595, 204 N.E.2d 635, 1965 N.Y. LEXIS 1652 (1965).

[77] Jungerman v. Raytown, 1995 Mo. App. Lexis 1752 (Mo. App. 1995). (However, the doctrine did not bar suit against the involved police officers.)

[78] *See* Annot., *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused By Failure To Erect Or Properly Maintain Traffic Control Device At Intersection,* 34 A.L.R. 3d 1008. The annotation collects cases holding, for example, that in the absence of statute, the initial decision whether or not to erect or install a traffic control device is not actionable, *citing, e.g.*, McKinley v. Cartersville, 232 Ga. App. 659, 503 S.E.2d 559 (1998). The article also collects cases in which under various circumstances the highway authority was held to have a duty to provide or maintain them.

[79] *See* Annot., *Governmental Tort Liability As To Highway Median Barriers,* 58 A.L.R. 4th 559, 579 (1987). The article collects cases in which the courts held that the governmental defendant had no duty to install guardrails or barriers along the median, *citing, e.g.*, Wallace v. Department of Transp., 701 A.2d 307 (Pa. Commw. Ct. 1997), *allocatur denied,* 727 A.2d 134, 1998 LEXIS 1676 and Hull v. Chicago, 236 Ill. App. 3d 405, 177 Ill. Dec. 128, 602 N.E.2d 1300 (1st Dist. 1992).

ders.[81] It has been held that there is no duty to provide crosswalks for pedestrians.[82] The court in Ohio held that the department had no duty to provide protective screening on a pedestrian bridge to prevent objects from being thrown onto the highway below.[83] Even where the public duty doctrine is not recognized, the issue of whether the state has a duty under the circumstances is an essential issue in a tort case.[84] The absence of a duty may be a valid defense under the state's statute imposing liability for a "dangerous condition" of public property.[85]

Although the public duty doctrine is not applied often in highway cases, possibly because of confusion of the doctrine with immunity for discretionary functions, or simply because of oversight, there are a few such cases.[86] In *Keene v. Bierman,*[87] the plaintiff, injured when the car in which he was riding struck a tree approximately 3 ft from the road, sued the state highway engineer who designed the highway. The court based its decision on both the discretionary function immunity and the public duty doctrine. As for the latter doctrine, the court stated: "Here [the state highway engineer] had no relationship with Cope [the injured plaintiff] as an individual and therefore his status as a professional would not give rise to any basis for liability. Any duty owed by Hare was owed to the public generally."[88]

In a case involving the alleged faulty design of a highway, it was held that the official's duty was to the public, not to the plaintiffs.[89] Similarly, in *Genkinger v. Jefferson*,[90] a county engineer's "duty [to erect warning signs was] one owing to the general public and not to any certain individual...." Later, in *Harryman v. Hayles*,[91] the court disagreed and stated that the court's conclusion that the individual defendants owed no duty to the plaintiffs was wrong, because the conclusion was based on a theory that depended on governmental immunity. Elsewhere, county commissioners were held not liable for the absence of guardrails, again because their statutory duties were owed to the public, not to any individual.[92] (Of course, Iowa[93] and Colorado[94] later rejected the public duty doctrine.)

In a series of highway decisions in Rhode Island, commencing with *Knudsen v. Hall,*[95] the courts upheld the application of the public duty doctrine to deny liability in a variety of factual situations.[96] On the other

---

[80] Antenor v. L.A., 174 Cal. App. 3d 477, 220 Cal. Rptr. 181, 1985 Cal. App. LEXIS 2758 (2d Dist. 1985).

[81] Pickering v. Washington, 260 So. 2d 340, 1972 La. App. LEXIS 6556 (La. App. 1st Cir. 1972) *cert. denied,* 261 La. 1062, 262 So. 2d 43, 1972 La. LEXIS 4960 (1972) *cited with approval in Williams v. Peterson*, 551 So. 2d 37 (La. 1989), in which the court held that there is also no duty to install stop signs at an uncontrolled intersection merely because there have been a number of accidents there. *Cf.* Kyle v. Bogalusa, 506 So. 2d 719, 1987 La. App. LEXIS 9383 (La. App. 1st Cir. 1987) (question of fact whether there was a duty to provide a shoulder on a state highway).

[82] Swett v. Algonquin, 169 Ill. App. 3d 78, 119 Ill. Dec. 838, 523 N.E.2d 594, 1988 Ill. App. LEXIS 595 (2d Dist. 1988), *appeal denied*, 122 Ill. 2d 595, 125 Ill. Dec. 238, 530 N.E.2d 266 (1988).

[83] Zebrasky v. Ohio Dep't of Transp., 16 Ohio App. 3d 481, 16 Ohio B. 564, 477 N.E.2d 218 (1984), *mot. overruled.*

[84] Chance v. State, 567 So. 2d 683, 686–87, 1990 La. App. LEXIS 2190 (La. App. 3d Cir. 1990) (county sheriff did not owe a duty to DOTD to inform it of wash-out on state highway, where after DOTD settled suits it sought indemnification from sheriff).

[85] Gray v. America West Airlines, Inc., 209 Cal. App. 3d 76, 256 Cal. Rptr. 877, 1989 Cal. App. LEXIS 266 (4th Dist. 1989).

[86] Nelson v. Salt Lake City, 919 P.2d 568, 572, 1996 Utah LEXIS 68 (Ut. 1996) (implied recognition of the public duty doctrine in a highway case); Oppe v. Missouri, 171 Ill. App. 3d 491, 121 Ill. Dec. 882, 525 N.E.2d 1189, 1988 Ill. App. LEXIS 938 (4th Dist. 1988), *appeal denied,* 122 Ill. 2d 579, 125 Ill. Dec. 222, 530 N.E.2d 250 (1988).

[87] 184 Ill. App. 3d 87, 132 Ill. Dec. 600, 540 N.E.2d 16, 1989 Ill. App. LEXIS 883 (5th Dist. 1989).

[88] 540 N.E.2d at 17.

[89] Rose v. Mackie, 177 N.W.2d 633 (Mich. 1970); *see*, however, Bush v. Oscada Area Schools, 405 Mich. 716, 275 N.W.2d 268, 273, 1979 Mich. LEXIS 346 (1979) (In the Governmental Tort Liability Act, the "[l]egislature intended to protect the general public from injury by imposing upon governmental agencies the duty to maintain safe public places, whether such places are public highways or public buildings.").

[90] 250 Iowa 118, 93 N.W.2d 130, 132, 1958 Iowa Sup. LEXIS 405 (1958).

[91] Harryman v. Hayles, 257 N.W.2d 631, 638, 1977 Iowa Sup. LEXIS 1138 (Iowa 1977) (duty runs to all those rightfully using the roads), *overruled in part by* Miller v. Boone County Hosp., 394 N.W.2d 776, 1986 Iowa Sup. LEXIS 1321 (Iowa 1986) (involving constitutionality of notice provision).

[92] Richardson v. Belknap, 73 Colo. 52, 213 P. 335, 1923 Colo. LEXIS 290 (1923), *overruled in part by* Liber v. Flor, 143 Colo. 205, 353 P.2d 590, 1960 Colo. LEXIS 558 (1960) (members of board of county commissioners could be held liable if they were actual tortfeasors or if they were negligent in supervising subordinates), and *overruled in part by* Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968, 1971 Colo. LEXIS 890 (1971) (doctrines of governmental and sovereign immunity prospectively overruled as to tort claims against counties, school districts, and the state).

[93] Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979).

[94] Leake v. Cain, 720 P.2d 152, 1986 Colo. LEXIS 574 (Colo. 1986), *superseded by statute as stated in* Aztec Minerals Corp. v. Romer, 940 P.2d 1025, 1996 Colo. App. LEXIS 300 (Ct. App. 1996) *reh'g denied* (Dec. 19, 1996); *see* Board of County Comm'rs v. Moreland, 764 P.2d 812, 1988 Colo. LEXIS 204 (Colo. 1988) (stating that the general duty–special duty test is no longer relevant).

[95] 490 A.2d 976 (R.I. 1985).

[96] Carroccio v. Moran, 553 A.2d 1076 (R.I. 1989) (failure to keep highway in state of repair); Polaski v. O'Reilly, 559 A.2d 646 (R.I. 1989) (stop sign mutilated beyond recognition and obscured by trees, shrubs, and bushes); and Kowalski v. Campbell, 520 A.2d 973 (R.I. 1987) (negligence in maintaining safety lines on a highway).

hand, a number of jurisdictions (e.g., Arizona, Iowa, Colorado, and Wisconsin[97]) have not applied the public duty doctrine in highway cases. In *Duran v. City of Tucson,*[98] the court held that the public duty doctrine did not apply to governmental activities relating to highway services or facilities.[99] The courts in Louisiana[100] and New Mexico[101] have held that, although the maintenance of highways is a duty owed to the general public, the failure to properly carry out this function is actionable by an injured individual.

Although the public duty doctrine is recognized in a majority of jurisdictions in police and fire protection and building and safety inspection cases, the doctrine has not been asserted as often or as successfully in highway litigation. Moreover, the trend appears to be one of rejection of the doctrine because of the belief that it is a relic of sovereign immunity. However, the public duty doctrine is distinct both from sovereign immunity and immunity for discretionary functions; neither doctrine of immunity is based on the absence of a tort. Rather, as the public duty doctrine holds, if the defendant had no duty to the injured person, regardless of immunity, there is no tort.

Because the absence of a duty of care is the threshold issue in any tort action, it may be advisable to assert the public duty doctrine as a defense along with other defenses and immunities, including the transportation department's immunity for discretionary functions. Although the public duty doctrine should be raised as a defense, the defense in highway cases is not as successful as in other cases involving public services.

---

[97] Coffey *v.* Milwaukee*,* 247 N.W.2d 132 (Wis. 1976).

[98] 20 Ariz. App. 22, 509 P.2d 1059 (1973) Ariz. App. LEXIS 615 (1973), *disapproved as stated in* Daggett v. Maricopa 160 Ariz. 80, 770 P.2d 384, 387, 1989 Ariz. App. LEXIS 11 (Ct. App. 1989) (county enacted regulations requiring it to approve and inspect swimming pools).

[99] *See also* State v. Superior Court of Maricopa County, 599 P.2d 777 at 785 (Ariz. 1979) ("A duty to the individual may also exist when the governmental agency is itself the active tortfeasor. For example, if the State of Arizona is building highways it has a duty to the individual driver to build safe highways.").

[100] Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980).

[101] Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728, 1984 N.M. LEXIS 1688 (1984).