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STRITMATTER KESSLER WHELAN COLUCCIO



Real Justice for Real People

HIGHWAY DESIGN LIABILITY

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ABOUT THE COVER ART

The cover image, “Mural Study - 2001”, was a study for a mural painted for the California Natural History Museum in 2001. Mural Study was part of an exhibit of photographs about urban space in Los Angeles. This work references other murals that Jose Ramirez had painted, highlighting a community in an urban setting.

ABOUT THE ARTIST


Jose Ramirez is an artist, teacher and the father of 3 girls, Tonantzin, Luna, and Sol.

He received a BFA (1990) and an MFA (1993) in art from UC Berkeley. In 2001, he received the Brody Award/Getty Visual Arts Fellowship.

Jose has illustrated seven children’s books, including *Quinito’s Neighborhood*, *Frog and Friends Save Humanity*, *Zapata para los Niños*, *Papito Dios*, and *Quinito Day and Night*.

Among his commissions, he has worked for several non-profit organizations, hospitals, cities, film and television companies and cultural centers across the country. In addition, he has lectured and exhibited his work in museums, universities, galleries and cultural centers in New York, Washington DC, San Francisco, San Diego, Texas, Japan, and Mexico.

For more info please visit ramirezart.com. You may contact him at joseram@aol.com or 323.377.4967.



“This is the only publication I have seen which attempts to corral Keith’s vast knowledge of this area in one document. It should be unquestioned that Washington highways and its drivers are safer as a result of Keith’s efforts on behalf of his clients.” –Tim Anderson

“Keith Kessler’s treatise on highway design cases is a masterful summary of the law in this area. It is also a wonderful guideline for how to approach these complex and interesting cases.” –Janet Rice



ABOUT STRITMATTER KESSLER WHELAN COLUCCIO

Stritmatter Kessler Whelan Coluccio (SKWC) is a premier Pacific Northwest law firm devoted to representing plaintiffs in personal injury and wrongful death claims. Experienced in trial, SKWC attorneys welcome tough, complex cases. Our verdicts and settlements include product liability, nursing home, government liability, medical negligence, highway design, premise and construction site, class action, vehicle crashworthiness, major vehicle collision, maritime and aircraft crash cases.

The attorneys at SKWC are committed to making a difference in the lives of our clients, in helping to ensure justice for the injured, and in contributing to the legal community through leadership and education.

ABOUT KEITH KESSLER



No one cares more about highway safety. Keith's energy in the field of highway design is not just courtroom victories — it's directed at making a change — correcting bad roads to end unnecessary crashes and the all too often resulting injuries to innocent people in cars, innocent bicyclists and innocent pedestrians.

Keith has been trying difficult highway design cases for the past three decades. His experience and knowledge in this incredibly challenging area of personal injury law is well-summarized in the pages that follow.

His lesson is thoughtful preparation and aggressive work while still respecting his opponent, insisting on cooperation and mutual courtesies with defense counsel. This spirit of civility earned him recognition by the Washington Defense Trial Lawyers as Outstanding Plaintiff Trial Lawyer, the first such award ever given.

The plaintiff bar (Washington State Association for Justice) also honored him as Trial Lawyer of the Year in 1994.

Keith was chosen to serve as President of the Washington State Trial Lawyers Association (now the Washington State Association for Justice), and as President of the invitation-only Washington chapter of the American Board of Trial Advocates. He was then inducted as a Fellow with the American College of Trial Lawyers (who comprise the top 1% of trial attorneys across the country).

Keith's *raison d'être*: "It's not a matter of 'roads don't kill people; people kill people' – that's naïve and point-blank wrong. Roads **do** kill people and we can save people's lives by forcing our government agencies to eliminate hazards on our roads".

HIGHWAY DESIGN LIABILITY IN WASHINGTON *OUR RIGHT TO SAFE ROADS*

By *KEITH KESSLER, Author*¹
GARTH L. JONES, Editor

OVERVIEW

The law is clear: our street and highway departments have a “duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition.”² This is “part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.”³

Because government is no more than its employees, and government employees can and do make mistakes, we, as the traveling public, may encounter unsafe and even hazardous road and highway conditions...

- an intersection with a history of collisions, badly in need of a traffic signal to bring order to streets that converge and result in conflict...



¹ Mr. Kessler thanks his partner, Garth Jones, for strong legal work on the content of this publication, as well as on the cases referenced herein, for which he has provided excellent briefing over the years.

² *Owen v. Burlington Northern and Santa Fe Railroad Company*, 153 Wn. 2d 780, 787-788, 108 P.3d 1220 (2005).

³ *Id.* at 788.

- a steep embankment on a curve in need of a guardrail...



- a lack of chevrons to warn of a sudden, sharp curve...



- a cable median barrier on a 60- or 70-mph highway that is wholly inadequate to redirect or even restrain errant cars to prevent innocent people from being hit head-on...



Highway design standards across the country are fairly uniform in the areas of regulatory and warning signs, traffic signals, guardrails, median barriers and lateral recovery zones along our shoulders. But state law requiring governmental entities to take responsibility for their mistakes and unsafe roads varies, with some such as California limiting responsibility for demonstrable errors in highway design, and others, like Oregon and Idaho, setting an arbitrary ceiling on the amount that one may recover for injuries or death caused by a dangerous road.

With the State of Washington's waiver of sovereign immunity for itself and its municipalities, governmental entities responsible for our streets and highways are held to the same standard of care as a private person or corporation. Other than in instances where a driver is operating his or her car recklessly or in a drunken state, that duty to provide a reasonably safe road extends to all drivers, motorcyclists, bicyclists and pedestrians. The government's breach of that duty to the public renders it liable for injuries and losses caused by its negligence – *as a matter of law*.

The duty to eliminate hazards and protect the public extends to roadway geometrics, signing, intersections, roadway surface friction,⁴ shoulders, the elimination of sight obstructions (especially at intersections), railroad grade crossings, and accommodating bicycles on roads and bridges.

⁴ For an analysis of roadway maintenance issues, including the duty to prevent ice formation through the use of anti-icers, see Kessler, "Anti-icers: Is It Time for Courts to Recognize Municipalities' Use of Anti-icers for Roadway Ice Control", WASHINGTON STATE BAR NEWS (February 2005).

Important Practice Tip – The careful practitioner will examine first-hand all aspects of the road where the collision occurred for design or operational problems before ever considering a settlement with the defendant-driver that will destroy joint and several liability. Too often, I am approached with the defendant’s \$25,000 policy limits as an associating attorney’s “war chest” for a case against the State. Too late. And \$25,000 is a drop in the bucket in these very complex, expensive cases.

WAIVER OF SOVEREIGN IMMUNITY

The starting point for any analysis of governmental liability for an unsafe road is whether, by virtue of sovereign immunity, municipalities are above the law. In Washington, the State and its municipalities are by law to be held accountable for their negligence, the same as any other individual or entity.

There is no sovereign immunity for governmental entities here. In 1961, the Washington Legislature passed RCW 4.92.090, waiving any entitlement to immunity, and holding state and local governments accountable for injuries and damages caused by their negligence:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090. The same holds true for cities and counties. RCW 4.96.010. This means that, except for the rare case of

discretionary immunity,⁵ Washington’s cities, counties and the State itself are to be held accountable for their negligence in providing unsafe roads.

HISTORY AND BREADTH OF WASHINGTON HIGHWAY DESIGN LAW

While Washington law has held governmental entities responsible for unsafe roads for well over 60 years⁶, at one point our case law provided that a plaintiff had to be fault-free before a municipality’s duty would even arise (*Hansen v. Washington Natural Gas*, 95 Wn.2d 773, 632 P.2d 504 (1981)). This anomaly occurred even though RCW 4.22.070 clearly provided that a plaintiff’s fault is merely to be compared with the fault of the municipality and other defendants.

Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002) was the initial appellate breakthrough, rejecting the old language of WPI 140.01 that provided that a governmental entity had a duty to design, construct and maintain its streets and highways in a reasonably safe condition only for persons “using such roads in a proper manner and exercising due care for their own safety”. Now the law is simply that, without regard to the plaintiff’s negligence,⁷ all governmental entities

⁵ See, e.g., *Cougar Business Owners Association v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982) (Governor exercised her statutory authority as the state’s top-level executive to declare an emergency, excluding the public from the Mount St. Helens area prior to and following the May 18, 1980 volcanic eruption).

⁶ See, e.g. *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).

⁷ An exception to our law imposing a duty on governmental entities to design and provide a reasonably safe road for travelers exists where a person is driving extremely recklessly and/or in a drunken condition. See, e.g., *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 766 P.2d 1137 (1989) (intoxication and reckless driving); compare *Stephens v. City of Seattle*, 62 Wn. App. 140, 813 P.2d 608 (1991).

responsible for our streets and highways have a duty to provide travelers with reasonably safe roads:

Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.

Owen v. Burlington Northern and Santa Fe Railroad Company, 153 Wn.2d 780, 787-788, 108 P.3d 1220 (2005).

Initial Design Errors



Sometimes roads are just wrong to begin with. A curve that is banked in a manner that results in cars leaving the roadway. An unnecessarily sharp curve. A combination of vertical and horizontal curves that places a sharp horizontal curve at the crest of a vertical curve. A road that conflicts with pedestrian traffic. A bridge without a sidewalk for pedestrians.⁸ A highway with a steep embankment.⁹ A road with a series of trees or utility poles right next to the lane of travel.¹⁰

In some cases, the design started out okay (back in the 1920s). But design inadequacies under current standards are to be identified and corrected when the opportunity arises. While it is true that our streets and highways need not be brought into compliance with design standards immediately upon the adoption of those standards, new requirements for roadway safety are to be implemented when a significant project such as a roadway re-design or even resurfacing is undertaken. At that point, it is incumbent upon the project engineer to look around to assess and correct all substandard conditions. And until substandard conditions are corrected, a municipality needs to post warning signs or implement an interim solution.

Failure to Monitor and Respond to Changing Conditions

Increasing traffic volumes. A new mall near what used to be a quiet neighborhood. A new school with kids now crossing a busy street by the school. Municipalities need to be alert

⁸ See *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).

⁹ See *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972).

¹⁰ See *Breivo v. Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1974).

to changing conditions, because what was once a safe street may now be hazardous.



An unsafe condition develops when the lack of gaps in the major street traffic creates frustration for turning vehicles or pedestrians attempting to cross the street, with people forced to use their bodies to challenge oncoming traffic to slow or stop.

Do cars turning left to get to the new mall need left-turn channelization and a left-turn green arrow? Have there been left-turning collisions (failure to yield right-of-way) because there simply were inadequate gaps in traffic to safely turn within a reasonable waiting period?

Are kids now at risk of being hit by a car because they believe that the painted crosswalk is a safety zone? Is a pedestrian-actuated traffic signal needed to provide protected crossing for these students?

Has a street become so busy that a pedestrian refuge island is needed halfway across?



It is incumbent on the governmental entities responsible for our roads to conduct vehicle counts to determine average daily traffic volumes for various locations, and to stay abreast of increases. Similarly, they are responsible for evaluating collision data to identify areas in need of corrective measures, such as a traffic signal to provide for orderly movement through an intersection.

Well-qualified transportation engineers are familiar not only with the tools available to state and local road departments for solutions, but they are also aware of applicable standards,

warrants and requirements for the safe operation of streets and highways. A violation of those **standards, warrants and requirements**, without a valid excuse, is evidence of negligence.

CLAIM FOR DAMAGES

Laws applicable to suits against governmental entities in Washington are unique in requiring the filing of a Claim for Damages (using the new Standard Tort Claim Form) and waiting 60 days before filing suit. This requirement is jurisdictional, and a failure to file the claim and/or to wait the 60 days has been fatal to some unsafe roadway cases.

In 2009, the legislature significantly amended the statutes for filing claims against the State and local governments. These amendments include:

- Standardizing forms and spelling out required contents of the claim form;
- Revising the presentation requirements for claims;
- Creating a “substantial compliance” standard for both content and filing requirements; and
- Allowing a five-day window at the end of the 60-day waiting period for filing a lawsuit to eliminate the trap for the unwary.

Under RCW 4.92.100(1), as amended in 2009, claims against the State must now be presented on a standard tort claim form. The statute requires the Office of Financial

Management to “maintain” the form and put it on its website.¹¹ RCW 4.92.100(1). Claims against local governments may be presented on either the state’s standard tort claim form or a form provided by the local government. RCW 4.96.020(3)(c). Local governments and the State must make the standard form available with instructions on how the form is to be presented, along with the name, address and business hours of the agent authorized to receive the claim. RCW 4.92.100(2); RCW 4.96.020(c).

The standardized claim form developed by the state must not require disclosure of the claimant’s social security number. It also “must not” require information that is not specified in the statute. RCW 4.92.100(2). If a local governmental entity develops its own form, the form may request additional information beyond that set forth in RCW 4.96.020(3)(a), but the local governmental entity may not deny a claim because of a claimant’s failure to provide that additional information. RCW 4.96.020(3)(c)(i). As with the state’s standardized form, claim forms developed by local governmental entities “must not” require a claimant’s social security number. RCW 4.96.020(3)(c)(ii).

Although both RCW 4.92.100 and RCW 4.96.020 require the claimant to include the amount of damages claimed, the amount of damages stated on the claim form is not admissible at trial. RCW 4.92.100(c); RCW 4.96.020(3)(f).

¹¹ <http://www.ofm.wa.gov/rmd/tort/default.asp>

RCW 4.92.100(2) directs that “the standard tort claim form... must not require information not specified under this section.” Despite this statutory restriction, the standard tort claim form recently developed by the state appears to violate this provision by requesting a significant amount of information beyond that required by RCW 4.92.100(1)(a). (For example, the standard form asks for the “names, addresses and telephone numbers of treating medical providers” and for “copies of all medical reports and billings”, even though the statute does not require a claimant to disclose any of this information).¹² Because the standard tort claim form “must” only require information specified in RCW 4.92.100(1)(a), a claimant should object under RCW 4.92.100(2) to any items on the form that request information not specified under the statute.

Under RCW 4.96.020(3)(f), if a municipality develops its own tort claim form, the claimant has the option of choosing to file the standard tort claim form or the local tort claim form; “presenting either the standard tort claim form or the local government tort claim form satisfies the requirements of [the statute].” As explained above, if a claimant chooses to file the standard tort claim form against a local governmental entity, an objection should be made based on RCW 4.92.100(2) to any items on the standard tort claim form that request information not specified in RCW 4.96.020(3)(a).

¹² Additional information requested on the standard tort claim form but not required by the statute includes: the names, addresses and phone numbers of all state employees having knowledge of the incident; a list of all witnesses on liability and damages and a description of the knowledge of each; and a list of documents that support the allegations of the claim. The standard tort claim form also must be signed under penalty of perjury, which again is not required by the statute.

Unlike the previous requirement, under the 2009 legislation, a claimant no longer is required to identify what was his or her residential address six months prior to the time the claim arose, stating instead only his or her actual residence at the time the claim arose. RCW 4.92.100(1)(a)(vii); RCW 4.96.020(3)(a)(vii). Another major change made by the 2009 amendments is that a claim may now be signed either by the claimant (who must also verify the claim), by the claimant's attorney-in-fact under a power of attorney, by an attorney licensed to practice in Washington, or by a court-approved guardian or guardian ad litem on behalf of the claimant. RCW 4.92.100(1)(b); RCW 4.96.020(3)(b).

A claim against a local governmental entity is deemed presented when the form is delivered in person or received by the agent by regular mail, registered mail or certified mail, with return receipt requested. RCW 4.96.020(2). Similarly, for claims against the State, presentation of the claim is accomplished by service upon the agent or by registered mail. RCW 4.92.100(1).

When presenting a claim to a local governmental entity, practitioners should be careful to file the claim with the proper local agent. As indicated above, RCW 4.92.020(2) requires the governing body of each local governmental entity to appoint an agent to receive claims for damages. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity by law must be recorded with the auditor of the county in which the entity is located.

The 2009 amendments also clarify that for claims against local governments, if a claim form provided by a governmental entity fails to request the information specified in the statute or incorrectly lists the agent to whom the claim is to be filed, the local government is deemed to have waived any defense related to the failure to provide that specific information or to file with the proper agent. RCW 4.96.020(3)(d).

“Substantial Compliance”

Before its amendment in 2009, RCW 4.92.100 stated that “With respect to the content of such claims, this section shall be liberally construed so that substantial compliance will be deemed satisfactory.” Similarly, RCW 4.96.010(1) (which was not amended in 2009) provides that “The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.”

Based on the language of these statutes, Washington courts required substantial compliance with the “content” requirements of RCW 4.92.100 and RCW 4.96.020. *See Medina v. Public Utility Dist. No. 1*, 147 Wn.2d 303, 53 P.3d 993 (2002); *Reyes v. City of Renton*, 121 Wn. App. 498, 86 P.3d 155 (2004). On the other hand, these cases required strict compliance with claim filing procedures on the basis that filing a claim is a condition precedent to commencing an action seeking damages from governmental entities. *Medina v. Public Utility Dist. No. 1, supra*; *Reyes v. City of Renton, supra*. As explained by the court in *Reyes*:

“Although the claim filing statutory scheme authorizes substantial compliance with the laws specifying the content of the notice of claims, strict compliance is clearly emphasized with the filing procedures themselves.” Failure to strictly comply with statutory filing requirements leads to dismissal of the action.

Reyes v. City of Renton, 121 Wn. App. at 502 (citations omitted).

The application of this strict compliance rule sometimes led to harsh results. For example, in the *Medina* case, the court affirmed the dismissal of a personal injury case brought by a motorist against a county public utility district on the basis that he had failed to strictly comply with the 60-day waiting period between presentation of his tort claim to the utility district and the commencement of his action in the superior court.

The 2009 amendments to the claim statutes overrule the strict compliance rules cases, and now provide that “[w]ith respect to the content of claims under this section ***and all procedural requirements in this section***, this section must be liberally construed so that substantial compliance will be deemed satisfactory.” RCW 4.92.100(3); RCW 4.96.020(5) (emphasis added). Presumably, cases addressing what constitutes substantial compliance for purposes of the claim statutes still remain good law after the 2009 amendments. For example, in *Renner v. City of Marysville*, 145 Wn. App. 443, 187 P.3d 283 (2008), the court held that, for purposes of the claim-filing statutes for tort claims, the substantial compliance rule has two necessary conditions: first, there must be a sufficient bona fide attempt by the claimant

to comply with the law even though the attempt may be defective in some particular, and, second, the attempt at compliance must actually accomplish the statutory purpose of the claim statutes, which is to give governmental entities sufficient notice to enable them to investigate the cause and character of the injury.

Waiver

The *Renner* court also held that, based on the substantial compliance rule, the doctrine of waiver may preclude a governmental entity from asserting a defense at least as to the claim's content when doing so would be inconsistent with the governmental entity's previous behavior or the governmental entity's failure to plead a claim defect under CR 9(c). Whether or not the doctrine of waiver applies to a governmental entity's failure to properly plead claim-filing defects depends on the facts of the case and in particular whether or not the statute of limitations has run. On one hand, Washington courts have held that a failure to strictly comply with the filing procedures of the claim statutes deprives the court of jurisdiction over the case. *See Levy v. State*, 91 Wn. App. 934, 942, 957 P.2d 1272 (1998). Under these cases, the doctrine of waiver did not apply because a party may raise lack of subject matter jurisdiction at any time, including after final judgment. *See Bour v. Johnson*, 80 Wn. App. 643, 910 P.2d 548 (1996).

On the other hand, in *Dyson v. King County*, 61 Wn. App. 243, 809 P.2d 769 (1991), the plaintiff did not file a claim before filing a lawsuit against the City of Seattle. The City failed to

raise a claim-filing defense in its Answer to the Complaint, and proceeded to defend the case on the merits until the statute of limitations had run on the incident giving rise to the claim. The City then moved to dismiss the plaintiff's complaint because he had not complied with the claim-filing ordinance. The court concluded that the City's actions were misleading, and the court applied equitable estoppel to prevent the City from raising the claim-filing defense for the first time at that point in the litigation. *Dyson*, 61 Wn. App. at 246. More recently, the court in *Brevick v. City of Seattle*, 139 Wn. App. 373, 379, 160 P.3d 648 (2007) held that both equitable estoppel and waiver operated to prevent the City from raising the claim-filing defense that a motorist's notice of claim, which was signed by the motorist's attorney, not by the motorist, was defective. The court held that because the City's answer in the original action admitted that the motorist complied with the statute and ordinance governing notices of claims and that the motorist had reasonably relied on the Answer, the motorist was prejudiced because he no longer had an avenue for relief after the expiration of the limitations period.

It is an open question how the courts will address issues of waiver and estoppel after the 2009 amendments' adoption of the substantial compliance rule for both filing and content defects. It is also unclear whether or not Washington courts will continue to hold that defects in the filing of a claim deprive a court of subject matter jurisdiction under the new substantial compliance rule. One would expect a liberal interpretation of the rule where there is good faith substantial compliance, particularly where the governmental

entity is put on notice of the claim and has an opportunity to investigate its basis.

The New “Grace” Period

Before their amendment in 2009, the claim statutes prohibited the commencement of a tort action against governmental entities until 60 days had elapsed after the filing of the notice of claim with the governmental entity. The claim statutes also provided that the applicable period of limitations within which an action could be commenced was tolled during the 60-day period. Under this statutory scheme, claims filed on the last day before the running of the statute of limitations created a trap for practitioners. In *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 111 P.3d 1173 (2005), the Supreme Court held that the 60-day tolling period of the claim statutes required the passage of a full 60 days before a lawsuit could be commenced. The court then set forth guidelines for determining when a lawsuit should be filed under this scenario. As stated by the court in *Troxell*, “neither the filing date of the claim notice nor the date on which suit is commenced may be counted toward the 60-day period.” *Troxell*, 154 Wn.2d at 352. This in effect left one day in which to file the lawsuit and any errors in calculating the appropriate date for the filing left the practitioner open to a malpractice lawsuit.

The 2009 amendments to RCW 4.92.100 and RCW 4.96.020 create a “grace” period for filing a lawsuit after the running of the 60 days by now providing that an “action commenced within five court days after the 60-calendar-day period has

elapsed will be deemed to have been presented on the first day after the 60-calendar-day period.” Presumably, the method for determining when the 60-day period has run as set forth in *Troxell* will still apply after these amendments, but the one-day period is now expanded to five court days.

Practitioners should still be very careful when filing claims close to the time when the statute of limitations runs. It is important to comply with all of the requirements set out in RCW 4.92.110 and RCW 4.96.020. Even though the statutes now only require substantial compliance with the content and filing requirements of the claim statutes, a finding that the claimant has failed to substantially comply with these requirements could still result in the dismissal of the case. If the statute of limitations has run and the claim is dismissed, another claim cannot be filed, and the practitioner may face a legal malpractice suit.

In any action involving a claim against a governmental entity, plaintiff’s counsel should serve a request for admission (Civil Rule 36) upon the governmental defendant immediately after commencing the lawsuit, asking it to admit or deny that the claim conforms with all of the statutory requirements, and to admit or deny that the claim was properly filed. If the request is legitimately denied, counsel should consider taking a nonsuit and re-filing the claim, recommencing the action 60 days after the claim is filed.

Again, it is advisable to file the claim well in advance of the statute of limitations’ expiration date to correct any defects without risking a potential dismissal of the case.

ENGINEERING EXPERTS

The second most important person after the plaintiff is the transportation engineer – and the more conservative and direct, the better.

Transportation engineers deal with the design, maintenance and operational characteristics of highway and street development.

Highway design engineers should not be confused with traffic engineers whose expertise is generally limited to traffic signals, regulatory and warning signs and roadway striping. The transportation engineer, by contrast, addresses all fields of roadway design, including geometrics.

Highway Design cases are difficult and expensive. Only the most viable can be undertaken. And only the best transportation engineer should be consulted and relied upon. Any concern by the engineer should be respected and, if appropriate, the case rejected.

At the same time, Highway Design continues to be a cutting edge area of personal injury law, and we owe all people injured by governmental mistakes or oversight a duty to (1) secure justice for them, and (2) make a change for everyone else.

A good transportation engineer will assist with a list of information and documents needed through discovery, will work with counsel on strategy, will prepare well for the deposition, will assist over the long run with exhibits, and will be well-prepared for trial – and still be honest and objective.

This is an important key to winning.

ACCIDENT REPORTS

Most practitioners have no idea of the difficulty accessing something as fundamental as accident reports for a given location in a highway design case, even though the accident history is essential to a proper and complete analysis.

Transportation and traffic engineers in fact determine the need for a traffic signal at an intersection on the basis of several factors, among them gaps in cross-traffic and, most importantly, **accident history**.

Similarly, a concentration of collisions at a given section of highway provides evidence of an unsafe condition that repeatedly produces property damage, bodily injury and even death. Again, this concentration of collisions is demonstrated through the **accident history** for this location.

Because the accident history for a given location is critical evidence of a dangerous condition, a number of governmental entities are trying to shield themselves from liability for their mistakes by refusing to make accident reports for their roads available to plaintiffs, even though the reports are **public records**.

Over the past few years, these governmental entities have tried to use a federal statute – 23 U.S.C. § 409 – as a basis for denying plaintiffs and their attorneys access to these traffic collision reports and related information. The federal statute provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409.

As discussed below, the Washington State Patrol has a **statutory duty** to collect and compile accident reports. WSP is a **public agency**. See RCW 42.56.010(1). The accident reports are **public records**. See RCW 42.56.070. Both WSP and these accident reports are subject to the Public Records Act,¹³ which requires public agencies to make public records available to the public. Nevertheless, WSP, WSDOT and a number of municipalities have refused to provide accident reports for a particular location unless the person seeking the reports signs a form promising that the records will not be used in litigation brought against any governmental entity. That promise not to sue, as a condition of accessing

¹³ Chapter 42.56 RCW.

accident reports, has been repeatedly rejected by our trial courts. But the battle is not over.

A brief history of the fight for accident reports follows.

Guillen

As discussed later, the *Guillen*¹⁴ and *Whitmer*¹⁵ plaintiffs brought suit against Pierce County for unsafe county roads. Dick Benedetti of Davies Pearson and I represented the Whitmer sisters whose Volkswagen Beetle was struck and knocked into a utility pole at an unsignalized intersection. The Guillen family sued Pierce County for the death of Clementina Guillen-Alejandre, which they contended was caused in part by a dangerous county road.

In our separate actions, the *Guillen* and *Whitmer* Plaintiffs sought an accident history for our respective accident locations. In both cases, Pierce County refused to produce the requested accident reports that had been collected by the Sheriff's Office, relying on its own interpretation of 23 U.S.C. § 409.

Division II of the Court of Appeals held that the accident reports should be produced. The Washington Supreme Court agreed, going so far as to hold that a portion of § 409 was unconstitutional. Pierce County petitioned the United States Supreme Court for review.

¹⁴ *Guillen v. Pierce County*, Pierce County Cause No. 96-2-13404-5; 98-2-06119-2.

¹⁵ *Whitmer v. Pierce County*, Pierce County Cause No. 97-2-07236-6.

So, in *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003), the U.S. Supreme Court addressed the extent to which the privilege created by § 409 applies to accident reports. Defendant Pierce County argued that, under § 409, virtually everything in its possession was privileged and need not be produced. The *Guillen* Plaintiffs contended that § 409 protected only materials created by an agency in the process of applying for federal funding. The U.S. Solicitor General took a middle position that § 409 protected data actually compiled or collected just for purposes of hazard elimination, but should not protect information that was originally compiled or collected for purposes unrelated to a specific hazard elimination project.

The U.S. Supreme Court adopted the Solicitor General's position, observing that the police traffic collision reports and accident history being sought by the Plaintiffs were collected by the Pierce County Sheriff's Office, rather than the Public Works Department. It held that the police reports therefore were not covered by the § 409 privilege, even though the Pierce County Public Works Department subsequently analyzed the same police reports for highway improvement projects:

The United States, as intervenor, proposes a third interpretation: § 409 protects all reports, surveys, schedules, lists, or data actually compiled or collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the

agencies that compiled or collected it, even if the information was at some point “collected” by another agency for § 152 purposes.... Under this interpretation, an accident report collected only for law enforcement purposes and held by the county sheriff would not be protected under § 409 in the hands of the county sheriff, even though that same report would be protected in the hands of the Public Works Department, so long as the department first obtained the report for § 152 purposes. We agree with the Government’s interpretation of the statute.

Guillen, 537 U.S. at 146 (citations omitted).

By adopting the Solicitor General’s interpretation of the statute, the Supreme Court placed significant limits on the interpretation of 23 U.S.C. § 409 by striking a balance between blanket assertions of the § 409 privilege and claims at the opposite extreme that § 409 only protects materials and reports created by an agency in the act of seeking federal funding for a particular project. As *Guillen* makes clear, the privilege created by § 409 does not apply to documents compiled or collected for purposes unrelated to § 152 (hazard elimination projects) and held by agencies that are not pursuing a specific § 152 objective, even though this information or data may later be included in a federally mandated report, survey, schedule or list. Thus, the privilege does not apply to accident reports, nor to documents and information originally gathered for other purposes.

As the Supreme Court noted in *Guillen*, to construe § 409 to cover all facts and documents that ultimately end up in such federally mandated reports would go far beyond the congressional intent, and would hide otherwise discoverable information essential to supporting claims that could have been proven had there been no safety enhancement project:

*[T]he text of § 409 evinces **no intent to make plaintiffs worse off than they would have been had § 152 funding never existed.** Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.*

Guillen, 537 U.S. at 146 (emphasis added).

Following *Guillen*, raw data, accident reports, and most other documents that were accessible by the public prior to the enactment by Congress of 23 U.S.C. § 152 back in 1973 are to still be provided to plaintiff's counsel because, according to the U.S. Supreme Court, "the text of § 409 evinces no intent to make plaintiffs worse off than they would have been had §152 funding never existed." *Guillen*, 123 S.Ct. at 731. However, even after *Guillen*, argument as to the scope of 23 U.S.C. § 409 persists. Some municipalities continue to assert that *Guillen* authorizes them to withhold **all** raw data and information, including police accident reports and the accident history of a location, from citizens seeking this

information in potential or current highway cases against governmental entities. This was, however, precisely the position taken by Defendant Pierce County in *Guillen* that the U.S. Supreme Court expressly rejected.

As indicated above, this has resulted in some municipalities insisting that anyone seeking an accident history for a section of road must, as a condition precedent to receiving the accident reports, sign a form promising that the accident reports will not be used in litigation against any governmental entity.

Recent Rulings

With my team of Garth Jones and Ray Kahler, I have for years challenged governmental entities' invocation of their interpretation of *Guillen* as a shield to try to prevent disclosure of these public records. We have repeatedly won in King County Superior Court, and have forced the municipalities being sued to produce the accident history for the problem location.¹⁶

Having had to repeatedly battle the municipalities' assertion that the accident reports might be used for a roadway project at some point in the future, and were therefore not discoverable, even with our victories I switched my focus to the Washington State Patrol. RCW 46.52.060 provides that the Chief of the Washington State Patrol is required to:

¹⁶ For a description of these rulings, see WSAJ *Trial News*, "Open Government", April 2008, Vol. 43, No. 8.

...file, tabulate, and analyze all accident reports and to publish annually, immediate following the close of each fiscal year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location [and] the frequency....

RCW 42.52.060. As was the case with the Pierce County Sheriff's Office in *Guillen*, WSP collects these accident reports pursuant to statute for **law enforcement purposes**.

I was recently asked to represent a bicyclist injured on a defectively constructed and improperly maintained state bridge. Before bringing this suit against the State, I requested accident reports for the bridge from WSP. I was sent a form to sign in which I was supposedly required to promise not to use the information in any lawsuit against a governmental entity. Of course I refused. I asked my client to make the same request, as he would be *directly* harmed by the denial of these public records. He too was directed to sign the form. He told WSP that he would not waive his right to hold government accountable for a dangerous road simply to access public records to which he, as a citizen, was already entitled by law. WSP refused to provide the records unless he signed the form.

We sued the Chief of the Washington State Patrol, a seemingly nice public servant who nevertheless was, by statute, responsible to serve as the public's custodian of these public records. WSDOT intervened, claiming an interest in blocking our access to the accident reports. Anticipating that this issue would go to the appellate courts, I engaged Charlie Wiggins,

one of Washington's most respected appellate attorneys, at this stage to make sure that the case was properly teed up for appellate review.

It is important at this point to trace WSDOT's conduct following issuance of the *Guillen* opinion by the U.S. Supreme Court. Because the *Guillen* court had held that accident reports collected by law enforcement agencies for law enforcement purposes were not shielded by the §409 privilege, WSDOT first undertook a run at the Washington State Legislature, trying to substitute itself for WSP as custodian of the accident reports. Under this approach, all reports that came in from law enforcement agencies around the state to WSDOT would go into what I referred to as a "black hole", never to be accessed by any plaintiff. The Legislature rejected WSDOT's scheme. When that attempt to manipulate the Legislature failed, WSDOT put together a Memorandum of Understanding with WSP. As an end run around the Legislature, the Memorandum provided that WSDOT would create and control an accident database, effectively precluding even WSP from independently accessing accident reports by location, and certainly denying plaintiffs access to them unless they signed the form waiving their right to use the public records in litigation against the government. Complicit in this scheme, WSP signed the Memorandum, purporting to relinquish its control over the accident reports.

In reality, all accident reports were still sent in by law enforcement agencies across the state to WSP, as required by statute. WSP still scans the accident reports into a database

to which WSDOT has access. WSDOT then uses the data for its various projects. But, under the scheme it created, in a bizarre twist of logic, WSDOT claims that it *owns* the data, and can deny WSP access to its side of the database for purposes of responding to requests for accident reports by location. In fact, WSP continues to retain ownership of the accident reports, and access to them.

Through depositions of WSP and WSDOT IT personnel,¹⁷ we have established that WSP not only has had a long history of accessing the accident reports by location, but also has had the capability of developing a program that would mirror WSDOT's location-based listings, as WSP had previously done by hand. WSP had no legitimate excuse for denying us access.

The trial court agreed, resolving cross-motions for summary judgment in our favor. First, the court rejected the notion that, because WSDOT shared the database, the records were shielded by § 409:

Since the creation of the joint Washington State Patrol/ Department of Transportation database, both agencies have been able to review these reports. But as the Memorandum of Understanding between Defendants confirms, the reports remain the property of the Washington State Patrol.... They continue to be held by that agency within the database.... The fact that the Department of Transportation now also has immediate

¹⁷ Mimy Bailey of our office did a brilliant job of cornering both agencies' IT people.

access to the records and reports does not change their character and does not transform them into information “compiled or collected for Sec. 152 purposes.”

Gendler v. Batiste, Thurston County Superior Court Cause No. 08-2-01833-1, *Memorandum Decision* at 3 (emphasis added) (appeal pending, Court of Appeals, Division II, 39333-6-II). The court then rejected the claim that WSP was unable to access the reports by location, and that WSDOT’s production of these records was somehow protected by § 409:

Defendants further argue that it is only with the coding employed by the Department of Transportation that the Washington State Patrol is able to determine the location of a particular accident. However, the record establishes that long before the creation of the database, Defendant Washington State Patrol was searching its reports and finding the information requested in this case by Plaintiff. (see Declaration of John L. Messina). The fact that Washington State Patrol has elected not to develop the software to search its own records now in electronic format does not relieve it of the obligation to provide such records upon request. The placement of public records in an electronic database alone cannot prevent the public from reviewing them under the Public Records Act. The strong public policy towards openness of government expressed by the Act supports this result. If anything, these documents currently should be more available to the public, just as they are more available to the agencies who manage the database.

Ibid. The Court awarded daily penalties to the plaintiff, as well as reasonable attorney fees, for WSP’s improper withholding of these public records.

And, most importantly, among the reports held by WSP was a bicycle accident involving the same dangerous condition as in our case.

Defendants WSP and WSDOT have appealed. We hope for a ruling affirming the trial court later this year.

All in all, a major battle that we have waged for well over a decade. But unless we win, all victims of roadway department negligence are in peril of further loss, injury and injustice at the hands of governmental entities that will not take responsibility for their mistakes, and will then try to conceal the damning evidence against them to which these accident reports bear witness.

GOVERNMENT BUDGET – NOT A DEFENSE TO TORTIOUS CONDUCT¹⁸

If someone who’s out of work can’t afford to have the brakes on his or her car fixed, and then hits a pedestrian crossing the street because the car can’t stop in time, is it excusable because fixing the brakes was outside his or her budget?

“Limited funds” is not, and never has been, a defense to tortious conduct. A tight budget does not excuse the breach

¹⁸ This chapter is largely the work of Garth Jones of the Stritmatter Kessler Hoquiam office. Garth’s research included a thorough review of the legislative history of the Priority Programming Act and the State Liability Account over many days in the State Archives.

of a duty to exercise ordinary care or to otherwise meet one's responsibilities, whether a person or a city.

No one is second-guessing the budgeting processes engaged in by the State and our various municipalities. The issue is whether these governmental entities obey the law that requires them to operate reasonably safe roads, and are held responsible where people are injured because the road or highway was dangerous.

A claim by a governmental entity that, because it prioritized its road projects, it should be excused for not getting to all of its dangerous roads is a red herring. The Priority Programming Act¹⁹ – enacted by our Legislature to end pork-barrel projects and to bring some order to the manner in which our road safety dollars are spent – merely requires prioritizing projects. It's not a defense when someone is injured because a road was dangerous. That's where the Tort Claim Fund takes over.

The Priority Programming Act and the Tort Claim Fund are easily harmonized with the overriding common law duty to provide the traveling public with reasonably safe roads. While the Priority Programming Act requires that areas in need of work be ranked and addressed in that order, the Tort Claim Fund provides a safety net for areas not yet addressed by these projects where, by law, compensation is due injured drivers and passengers because the road was

¹⁹ See RCW 47.05.010 *et. seq.*

indeed hazardous. The Act, the Fund and the common law work together.

The Waiver of Sovereign Immunity and the State Liability Account

In 1961, our Legislature waived sovereign immunity. *See* RCW 4.92.090. Two years after it waived sovereign immunity, the Legislature enacted comprehensive legislation that set procedures for bringing tort claims against the State. *See* Laws of 1963, chapter 159. As part of this legislation, the Legislature created a state tort claims account for the payment of claims against the State. *See* Laws of 1963, c 159 § 7 (codified as RCW 4.92.130).

Beginning in the early 1960s, the State paid for claims against state agencies as they arose, whether the settlements or judgments were for property damage or personal injury. The State paid these claims from the Tort Claims Revolving Fund and then charged the amount paid back to the responsible agency. In instances where a claim was too large for the defendant agency to absorb out of its budget, the agency requested a waiver from the Office of Financial Management. If OFM approved the waiver, the agency then asked for a direct appropriation from the Legislature in the next legislative session.

Under this system, the Legislature routinely made special appropriations to larger agencies with higher than average liability exposure. These appropriations included the establishment of a Motor Vehicle Fund for transportation-

related liability and vehicle claims for the Department of Transportation. Most agencies did not receive special appropriations.

In 1989, the Legislature substantially amended RCW 4.92.130. The 1989 amendments to the tort claim system sought to reduce tort claim costs by restructuring the state's risk management program, increasing accountability of individual agencies, establishing an actuarially sound funding mechanism to pay claims, and establishing an effective safety and loss control program. In particular, the 1989 amendments to RCW 4.92.130 required each agency to prospectively budget for anticipated claims. These amendments also created a new, non-appropriated liability account to pay legal liabilities expeditiously and to promote risk control through a cost allocation system based on agency loss experience and levels of risk exposure. To fund this new account, the Legislature authorized the Office of Risk Management to assess state agencies for an annual premium based on their risk history and exposure. The liability account then provided coverage for liabilities incurred by an agency in excess of the agency's budgeted self-retention levels.

In 1999, the Legislature once again amended RCW 4.92.130. Up until 1999, the State relied on two separate systems for paying claims arising from tort cases. Claims from incidents prior to July 1, 1990 were paid out of the Tort Claim Revolving Fund ("Tort Fund") and those claims arising after July 1, 1990 were paid out of the Self-Insurance Liability Account ("Liability Account"). The Tort Fund involved a pay-as-

you-go approach. The agency responsible for the tortious conduct paid the claim, and then invoiced the Department of General Administration. The Liability Account was funded through premiums paid by agencies under the Self-Insurance Liability Program. In the 1990s, the percentage of claims paid out of the Tort Fund declined while the amount paid through the Liability Account increased.

Also up until 1999, the cost of tort defense was paid to the Attorney General's Office by the defendant agency. Although some large agencies, such as DSHS and the Department of Transportation, historically received appropriations for tort defense costs, most agencies did not. These latter agencies either found money to pay claims in their respective operating budgets or they had to request expenditure authority through the Tort Fund managed by the Office of Financial Management.

To simplify these procedures, the Legislature consolidated financing for all tort-related claims into one account – the Liability Account. *See* Laws of 1999, c 163 § 1. The Legislature also revised claim procedures by providing that the payment of the cost of tort defense services for state agencies was to be made from the Liability Account and then billed to state agencies on a premium basis.

The Priority Programming Act

In 1963, in addition to enacting procedures for bringing tort claims against the State, the Legislature also established a priority programming system for highway development to

provide for a ranking of hazard elimination projects. *See* Laws of 1963, chapter 173, §1 (codified as RCW 47.05.010). Significantly, the enactment of this priority program for highway development did not refer to, or cross-reference, the tort claims procedure that the Legislature enacted the same year. Nor did it address the State of Washington's waiver of sovereign immunity. Nothing in the highway priority legislation or its legislative history has ever even discussed governmental immunity. Nor is there anything that could be remotely construed as being a defense in a tort action brought against the State based on highway design or maintenance. Instead, the 1963 legislation addressed only the manner in which highway *construction* funds were to be spent.

The Legislature has amended the priority array statutes a number of times since 1963, with amendments occurring in 1969, 1993, 2002, 2006 and 2007. These amendments merely made technical revisions to the priority array statutes, such as redefining how state highways are categorized, the time requirements for the development of comprehensive highway plans, expanding the program to cover not only state highways, but also county and city roadways. Similar to the 1963 legislation that established this prioritization program, none of these amendments in any way addressed governmental immunity or tort liability. As set forth in the Declaration of Purpose of the current statute, Chapter 47.05 RCW simply relates to the creation of a computer generated array of priority programming for highway development:

It is the intent of the legislature that investment of state transportation funds to address deficiencies on the state highway system be based on a policy of priority programming having as its basis the rational selection of projects and services according to factual need and an evaluation of life cycle costs and benefits that are systematically scheduled to carry out defined objectives within available revenue. The state must develop analytic tools to use a common methodology to measure benefits and costs for all modes.

RCW 47.05.010.

Merely anti-pork barreling. Nothing in Chapter 47.05 RCW grants the State immunity from personal injury actions just because the State prioritized its highway construction and repair projects. Nor does Chapter 47.05 create a “poverty” defense for the State or municipalities based on budgeting decisions.

There Is No Such Thing as a Poverty Defense

As advanced at the outset, a party’s lack of finances is not a defense in a tort action, and is therefore irrelevant and inadmissible.

This situation is no different than a corporation claiming that it can’t effectively address the toxic gases its factory emits into the community until it has more money to correct the situation. It’s liable until it stops the hazardous pollution.



Nor is this any different than holding a young person liable who knows that his or her vehicle needs new tires to drive safely in snow or ice, but can't afford them, who then drives in the snow and causes a collision.



In neither situation does the lack of funds or money excuse the offending corporation or the negligent driver from liability.

Washington law imposes a duty upon municipalities to provide us with reasonably safe roads. *Owen v. Burlington Northern and Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005). Neither legislative appropriations nor the availability of funds limits the scope of this duty. As was observed by a majority of Supreme Court Justices in *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1996), “[t]he duty of care owed to another does not change according to a party’s financial situation.”²⁰

And, of course, a governmental entity is liable for its tortious conduct “to the same extent as if it were a private person or corporation.” See RCW 4.96.010(1); *Owen* at 787 (“Today, governmental entities are held to the same negligence standards as private individuals.”). It has never been a defense for a private person to claim that he or she had insufficient funds to avoid being negligent or to correct a hazardous situation. The same is true for governmental entities: a majority of the Justices of our Supreme Court held that a city’s budget constraints cannot be a defense to tortious conduct:

Evidence of the City of Stanwood’s efforts to obtain federal grant money to raise lagoon dikes was not relevant on the issue of the City’s negligence. This evidence, at the very least, is a close relative to poverty defense evidence and has no place in a negligence action.

²⁰ *Bodin v. City of Stanwood*, 130 Wn.2d 726, 743, 927 P.2d 240 (1996) (Johnson, J., dissenting) (emphasis added). The four dissenting Justices and Justice Alexander, in his concurring opinion, all agreed on this point, forming a majority of five Justices on this issue. See also *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992) (affirmed, 125 Wn.2d 1, 882 P.2d 157 (1994)) (“lack of funds was an improper defense”).

Id. at 742 (Alexander, J., concurring).

Evidence of reasons or excuses for failure or delay in action is not relevant to the basic issues of duty and breach.... To admit this evidence in this case allowed the City, in essence, to mount a poverty defense. Such a defense is not allowed in negligence actions because the duty of care owed to another does not change according to a party's financial situation.

Id. at 743 (Johnson, J., dissenting).

A budgeting exception for governmental entities would swallow the entire legislative abrogation of sovereign immunity. To prevent this, the Legislature has mandated and created the above-described tort claim funds to pay for damages caused by the State's tortious conduct. If the State doesn't get around to fixing its dangerous roads, it has nevertheless committed funds to pay for resulting injuries.

A Limited Budget Does Not Trump the Duty to Provide Reasonably Safe Roads for the Traveling Public

In *Owen v. Burlington Northern*, 153 Wn.2d 780, 108 P.3d 1220 (2005), the Supreme Court held that governmental entities owe "a duty to all travelers, whether negligent or fault-free, to maintain [their] roadways in a condition safe for ordinary travel." *Owen* at 786-787 (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). This "includes the duty to safeguard against an inherently dangerous or misleading condition." *Owen* at 787-788.

Once the plaintiff presents evidence that the road is unsafe, the burden shifts to the municipality to try to show that the corrective action it took was reasonable. It is up to the jury to decide whether or not the corrective action (if any) was adequate:

If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. E.g., Goodner vs. Chicago, Milwaukee, St. Paul & Pac. RR Co., 61 Wn.2d 12, 17-18, 377 P.2d 231 (1962). If the corrective actions are adequate, then the city has satisfied its duty to provide reasonably safe roads.

Owen at 789.

The Priority Programming Act does not eliminate the State's duty to provide reasonably safe roadways. The priority array is imposed on WSDOT simply as a mechanism for allocating highway construction and repair funds. If a road is dangerous, and the State has failed to take corrective action to make it reasonably safe, the Tort Claim Fund comes into play, and is to be used to compensate for injuries and deaths caused by the unsafe road condition. By law, the State is not allowed to convert a computer-generated array of priorities used as a construction budgeting tool into a grant of immunity or legal defense that undermines decades of Washington law that has consistently held governmental entities responsible for unsafe roadway conditions.

CLEAR ZONES

The shoulders of our highways are to be stripped free of such hazards as trees, utility poles and boulders – anything that would cause injury to the occupant of a car that, for any reason, left the asphalt.

The Federal Highway Administration (“FHWA”) and the American Association of State Highway Transportation Officials (“AASHTO”) have designated these areas along our highways and even rural roads as “Clear Zones” and “Lateral Recovery Areas”, and have set standards that designate the required width of the hazard-free area based on average daily traffic volume (“ADT”) and posted speed limit (design speed).

The AASHTO *Roadside Design Guide* defines a **clear zone** as the total roadside border area, starting at the edge of the traveled way, that is to be available for safe use by errant vehicles. It is an unobstructed, relatively flat area beyond the edge of the traveled way that allows a driver to stop safely or regain control of a vehicle that leaves the traveled way. It also takes into account a **recoverable slope** which is defined as a slope on which a motorist may, to a greater or lesser extent, retain or regain control of a vehicle by slowing or stopping. Slopes flatter than four feet horizontal for every one foot vertical (1V:4H) are generally considered recoverable. A steeper slope is considered nonrecoverable and presents a hazard.

The AASHTO *A Policy on Geometric Design of Highways and Streets* (“Green Book”) sets out clear zone values for various types of roads and highways. The **minimum width** of the clear zone in all cases is **10 feet** (and up to 30 feet on high speed highways). The clear zone widens as the speed limit and traffic volumes increase.

The Forgiving Roadside²¹

Cars can end up using the highway shoulders and non-roadway surface outside the traveled lane for a variety of reasons. A driver may pull off because of a mechanical problem or flat tire, or to rest, or to use a cell phone. A deer or other animal may suddenly run out onto the roadway, and an evasive maneuver is needed, using the area off the road to avoid injury. Or a tired driver may simply nod off, as can occur on late night journeys. The roadside is to be forgiving, as we are, after all, merely human.

The first foray into liability for negligence in failing to provide a proper clear zone in Washington was my partner Paul Stritmatter’s case in *Breivo v. Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976). Breivo involved a vehicle traveling at an excessive rate of speed that went out of control, jumped a curb and careened along the sidewalk for 66 feet, striking a solid cement barrier 13 inches from the traveled roadway.

²¹ The concept refers to reducing the severity of run-off-the-road accidents. The driver is to be allowed the opportunity to regain control and either stop or return to the travel lane without injury or damages. See Powers, et al, “The ‘Forgiving Roadside’ – Design of Roadside Elements” (Transportation Research Board 1995) (Transportation Research Board, 500 Fifth Street NW, Washington, DC 20001 – <http://onlinepubs.trb.org>).

The cement barrier had been erected by the city **to protect the breakaway light pole behind it** (which had been struck before). The court ruled that reasonable minds could not differ that “the City was palpably negligent in erecting a solid, immovable barrier in such a location. Any potential benefit which could be derived from erecting a breakaway light standard was entirely negated by such action. The City acted in total disregard for the safety of those using its public highways....” The case recognizes the duty of a municipality to provide a clear zone free of hazards outside of the traveled roadway.²²

This includes trees...



²² It is reported that 30% of fatalities result from single vehicle, run-off-the-road crashes. Wendling, “Roadside Safety Milestones” (Iowa State University, Institute for Transportation, 1996) (<http://www.cpre.iasate.edu/PUBS/semisesq/session1/wendling>). This, of course, calls into play guardrails and barriers where the hazard cannot be eliminated. See “Guardrails and Median Barriers”, *infra*.

utility poles...



boulders...



...sharp embankments, and roadway drop-offs.



The urban environment is generally treated differently than state routes and rural highways. Traffic is slower, and sidewalk curbs generally deflect cars away from signs, utility poles, street lights and fire hydrants. Additionally, there is generally on-street parking.



Utility Poles

Utility poles are to be located along the right-of-way line to provide a safe environment for traffic. WAC 468-34-130, 468-34-300(4) (Utilities Accommodation Policy M22-86, Washington State Department of Transportation).²³

WAC 468-34-130(13) provides that highway roadsides are to be designed and maintained “as free as practical from physical obstructions above the ground such as...*utility poles*” (emphasis added).

Locating a pole as far as feasible from the traveled way improves sight lines and visibility, and provides a less hazardous roadside.



²³ “This policy was established in cooperation with the Utility Industry, AASHTO policy guidelines on accommodating Utilities within highway and freeway rights of way, state laws and regulations governing the accommodation of utility facilities, and in compliance with federal aid policies and procedures.” WSDOT July 20, 1982 Letter from R.E. Bockstruck, P.E., Project Development Engineer.

In *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811 (1976), the trial court entered summary judgment against a truck driver who collided with a telephone pole. In reversing the trial court, the appellate court emphasized that the location of the utility pole constituted an unsafe condition for motorists:

All of the evidence and the reasonable inferences therefrom, when construed most favorably to the plaintiff, show clearly the existence of genuine issues of material fact. Plaintiff has successfully framed issues of negligence on the part of the defendants in permitting the pole to remain in the roadway and in failing to place and maintain barricades and warning devices. Can it be said that all rational minds would agree the defendants' conduct was not negligent when considered in the light of the duty owed by defendants to persons using the roadway? We think not. That duty has usually been expressed as requiring that streets be maintained in a reasonably safe condition and that users be reasonably and adequately warned of any inherently dangerous or deceptive conditions and, in certain instances, that adequate barriers be placed and maintained.

Smith, 16 Wn. App. at 393-394.

Case Example:

A father and son traveled north on State Route 105 in the Grayland/Westport area. They had their dog in the back of their Mitsubishi pickup. The boy was feeding the dog a biscuit while his father was driving. The father momentarily glanced at his son, and the truck continued straight at the beginning of the subject curve.



The right tire dropped into a deep culvert hole on the edge of the road, within the clear zone. The ditch directed him into a power pole, in spite of the father's effort to steer away from it. The ditch and the utility pole were located next to the roadway, both within the clear zone.

The boy was injured and the father was killed.



I brought suit against PUD not only for this man's family, but to force PUD to move this and other poles back to the right-of-way line so that there would be no further injuries and deaths along this route.

Pavement Edge Drop-offs

Another hazard within the clear zone is the pavement edge drop-off, where the dirt shoulder has worn away, and is no longer level with the asphalt or concrete roadway surface. The classic hazard here is that, for whatever reason, the right front tire of the vehicle drifts to the edge of the paved portion of the roadway and drops down a matter of inches onto the dirt shoulder. The inside of the right side tires now travel against the asphalt lip, unable to readily return to the lane of travel. The driver then instinctively turns the steering wheel more to the left to try to return to the traveled portion of the road, only to have the right front tire suddenly climb the pavement edge. The over-corrected car then swerves sharply across the road and directly into the path of an oncoming vehicle, resulting in a deadly head-on collision.

Case Example:

Richard and Deborah spent Sunday riding their motorcycle through the countryside, passing Mount Rainier. About 5:45 p.m., they were heading northbound on State Route 7 from Morton toward Elbe. Approaching from the opposite direction was a Buick Riviera towing an AMC Concord.

This section of SR 7 had 11-foot lanes – considered narrow, given the 55-mph speed limit (standards applicable to 55-mph highways call for 12-foot lanes). More important than the narrow lanes in this curved portion of SR 7 were the hazardous conditions of an extremely narrow and abrupt paved shoulder (only 15 inches), and a sharp pavement edge drop-off (asphalt to dirt shoulder) in excess of nine inches.

Just before the collision, the right front tire of the Buick dropped off the pavement edge on the right side of the road, and the driver found himself fighting to get his car back up over the pavement edge drop-off and onto the roadway:

- A. ...All I can tell you for certain is that my steering could not steer me back on the road.
- Q. Describe that for us, if you would.
- A. I had turned to the left, and I held it consistently to the left. Because I know better than to cock a wheel hard when you're in a difficult situation, especially when you're towing. And so I turned it to the left. I knew that at some point it was going to come back on the road. It did not come on the road. At the

same time I was braking; and that's evident in the skidding. And I was braking and braking.

....

...I know I had slowed considerably, and I was hoping to get back on the road. I had no way of knowing at the time, because of the speed of everything happening, what was happening with the car I was towing....

....

Q. (BY MR. KESSLER) The dropoff, where the pavement edge ends and it drops down to the dirt shoulder, in that vicinity there where you were off the road, how big of drop was that? What was the distance between the pavement edge, at the top of the pavement, and the –

....

A. It was considerable....

Q. (BY MR. KESSLER) When you say “considerable” what do you mean by that?

A. I would say – it looked like nine to 12 inches down. I...

Q. And you took a look at it after the collision occurred, did you?

A. Yes.

- Q. Could you see it at the time you were driving along, what the, what that distance was?
- A. There was no way. There was weeds on the side. You can – I have driven that road many times, and I never knew that dropoff existed.
- Q. Okay. What did it feel like, then, as you're traveling along? Either in terms of your, what you're sensing through the steering wheel, or –
- A. Yeah. I felt the car trying to get up, and I couldn't get up.

Because of the excessive height of the pavement edge that the Buick's tires needed to climb, the efforts to turn left and return to the roadway were futile. As the defendant-driver fought to re-gain control, he forced the Buick to return to the roadway, whip around out of control, and travel backward.

The Buick's towed car struck Richard and Deborah's motorcycle head-on, sending them flying through the air and into a ditch on the east side of the road.

Richard died several minutes later. Deborah lived for a while longer.

Deborah told the treating EMTs that she was hot and in pain, that she was having a hard time breathing, that she was dying and that she wanted to be turned onto her back.

She looked up and exclaimed "The sky is so blue". She then exhaled and was gone.

GUARDRAILS AND MEDIAN BARRIERS

As discussed in the “Clear Zones” section, municipalities have a duty to eliminate potential hazards alongside our roads.²⁴ Where a hazardous condition can’t be removed, the municipality must, by law, protect the public from the roadway hazard.²⁵ A common, long-proven solution is the guardrail.

The most deadly consequence of a dangerous road is the head-on collision, when a car travels through a narrow median into oncoming traffic. Nearly as deadly is traveling into the median and crashing into an overpass pillar at freeway speed. The solution for that hazard is the median barrier.

The W-Beam Guardrail

Years of testing and design went into the development of our standard steel W-beam guardrail. The purpose of the strong-post W-beam guardrail, according to the Federal Highway Administration, is to “prevent vehicles from leaving the roadway and becoming involved in a more hazardous condition.”²⁶

²⁴ WPI 140.01.

²⁵ [W]here the condition in or along the highway is inherently dangerous... the rule *requires* the municipality to... maintain adequate protective barriers where such barriers are shown to be practical and feasible. *Raybell v. State*, 6 Wn. App. 795, 802, 496 P.2d 559 (1972) (emphasis added).

²⁶ *Summary Report on Selected Guardrails*, Report No. FHWA-SA-91-050 (Federal Highway Administration, June 1992) at 26.



The height of the rail is 27 inches, aligning with typical passenger car bumpers in order to re-direct the car.²⁷ The beam “provides a flexible barrier that deforms with the vehicle, dissipating energy in the process.”²⁸

²⁷ *Ibid.* The California Transportation Department (CALTRANS) developed a 27-inch tall guardrail and a 32-inch tall median barrier in the 1960s with tests performed at 65 mph, using a 4,500-lb. sedan approaching the barrier at 25 degrees.

²⁸ *Ibid.*



As a result, a 4,500-lb. vehicle approaching W-beam rail at a 25° angle at a speed of up to 70 mph will be deflected and re-directed to half the entry angle, with only mild injuries to vehicle occupants.

The Continuous Concrete Barrier

The Jersey barrier has also been used successfully along our highways for a half-century.²⁹ First installed in New Jersey in 1955, it was initially only 18 inches tall and consisted of a short wall with curbing on both sides. By 1959, its design had changed to essentially its current shape – 32 inches high, with the first two inches rising vertically from the pavement, the next 10 inches rising at a 55° angle, and the remainder at an 84° angle.



²⁹ Interestingly, New Jersey did no crash-testing, instead developing the design based on a study of in-service collisions. By contrast, General Motors used crash-testing in the early 1970s to develop a similar barrier, working with the Texas Transportation Institute at a time when cars were larger. Crash test criteria then shifted from those based on the large passenger sedan (NCHRP Report 230, Michie 1981) to vehicles characteristic of the more compact trend in the later 1980s and early 1990s (NCHRP Report 350, Ross, et al. 1993). As a result, the GM barrier was wider, and the slope breakpoint was three inches higher.

In the early 1960s, California began widely using the Jersey barrier, installing 132 miles by 1972 and 680 miles by 1988.



Today, the Jersey barrier is in use throughout the country.

It is estimated that these tried and true median barriers – both W-beam and Jersey – have saved hundreds of thousands of lives in re-directing errant cars that would otherwise have crossed through the median and crashed head-on into an oncoming car.

Earth Berms...

In spite of this success in re-directing cars back onto the roadway, the State of Washington has occasionally decided to experiment with alternatives to the proven W-beam and Jersey barriers. In 1973, a senior administrator with the Washington State Highway Commission insisted that aesthetics were more important to him than the effectiveness of the W-beam steel guardrail, and he demanded that his staff install “earth berms” in freeway medians to redirect cars away from bridge and overpass cement pillars located in the median.³⁰ An earth berm is merely a slope of compacted dirt.

His staff was incredulous because the earth berm, at freeway speeds, was nothing more than a ramp into an overpass pillar or an oncoming lane.³¹

The earth berm had been tested in Texas and had repeatedly failed to redirect a car, instead sending it over the top and into what would be a bridge pillar or oncoming traffic.

But, as with the Emperor’s new clothes, the staff compliantly installed earth berms up and down Washington’s highways.

³⁰ The Highway Commission administrator called for a design of an “**earth mound treatment which would gracefully divert an errant auto from an object in the median.**” January 16, 1973 Memo from J.D. Zirkle to R.L. Elwess.

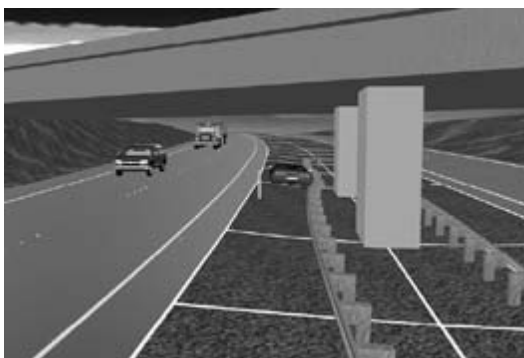
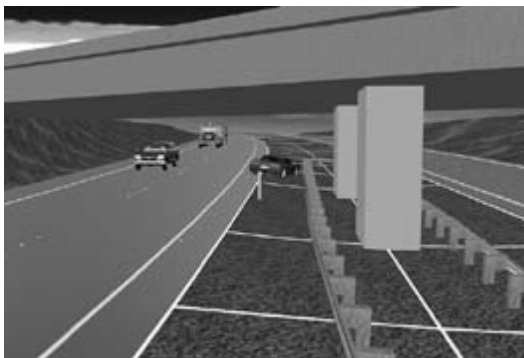
³¹ The 1/16/73 Zirkle memo stated: “I believe we have research documents that indicate that slopes in excess of 4 to 1 [one foot vertical rise for every four horizontal feet] are negotiable by a high speed vehicle.” The memo was marked up by an engineer in the highway department: “**Therein lies the fallacy of this idea. If they are negotiable then the hazard is vulnerable.**”

...and the Deadly Consequences

On April 10, 2003, a car's rear tires lost traction on the wet roadway surface of State Route 522, and slid backward into the grassy median between the westbound and eastbound lanes, heading directly toward overpass pillars. The concrete pillars were located within the area alongside the roadway that is universally recognized as a "clear zone" that must be free of hazardous obstructions.³² The only protection that was available to the occupants of the sliding car was the earth berm "barrier".

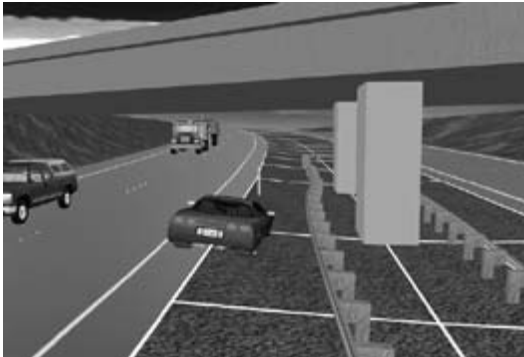
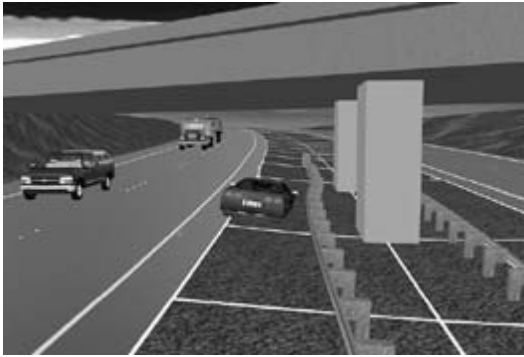
³² *Roadside Design Guide* (American Association of State Highway and Transportation Officials (AASHTO)); *Washington State Department of Transportation Highway Design Manual*. If the hazard cannot be eliminated, the public is to be protected (usually by means of a longitudinal barrier). *Highway Design and Operational Practices Related to Highway Safety* (AASHTO 1967). "The most clear-cut fixed object locations that require guardrail are approaches to bridge rails and around bridge columns and piers within the clear zone." Glennon, *Roadway Defects and Tort Liability* (1996) at 69. See "Clear Zones", *supra*.

With the car's shallow approach angle of 8° to 10°, the standard W-beam guardrail would have re-directed it to a 4° to 5° exit angle, resulting in virtually no injuries for either occupant.^{33,34}



³³ Deposition of Jarvis D. Michie (March 28, 2006) at 53-54, *Merdes v. State*, King County Superior Court Cause No. 05-2-03265-1SEA.

³⁴ These slides are four stages of a computer-generated animation prepared for my case by Jay Syverson of OnPoint Productions, 12508 Lake City Way NE #230, Seattle, WA 98165; Jay@onpointpro.biz.



Instead, the earth berm did not re-direct the car at all, and the rear collided with the pillar, rupturing the gas tank, and causing an explosion.

According to the Washington State Patrol, the earth berm actually served as a “slight ramp” into the pillar.



The occupants were trapped inside the car as it burned. Passing motorists who had witnessed the crash stopped to try to put out the fire and extricate the driver from the burned vehicle. Ultimately, the driver's seatbelt was cut, and he was removed to safety. The passenger's door, however, was jammed shut, and the passenger—my client—could not be removed from the burning car until fire department personnel were able to cut off the roof and pull him out. The only unburned area of the car's interior was that portion of the passenger seat where his body had been. Both men were airlifted to Harborview Medical Center.



Six days later, surrounded by his family, the passenger succumbed to his severe burns.

This earth berm-related death had been preceded by a triple fatality in 1997 at an earth berm at the Smokey Point Interchange on Interstate 5.

These dangerous earth berms remain in place along our highways to this day.

Cable Rail

Still intent on experimenting with alternatives to the successful W-beam and Jersey barriers, the State recently launched a cable rail program, returning to the system used nearly a century ago along some of Washington's roadways. Presumably, the cable rail had been abandoned because of its ineffectiveness in redirecting cars that contacted it. In one of my cases, the old cable actually tripped the car and flipped it over.³⁵

The cable rail system currently being installed here in Washington became standard in California in the early 1960s, but was abandoned there in 1978 because it caused more damage and higher maintenance costs than other types of barriers.³⁶

California DOT determined that cable barrier was “the least expensive to install, but it has had the worst accident experience and is the most expensive to maintain.”³⁷ Further, the cable rail required more frequent repair work, and subjected maintenance workers to the hazard of conducting the repair work near large volumes of high-speed traffic.³⁸

Upon contact, cable rail deflects 12 feet, assuming a post spacing of 16 feet; by contrast, the block-out W-beam, with

³⁵ *Smith v. State*, Kittitas County Superior Court Cause No. 95-2-00153-2 (1995).

³⁶ Tye, *Traffic Bulletin No. 22 “Median Barriers in California”* (California Department of Transportation (1975)).

³⁷ *Cable Median Barriers Report* (California Department of Transportation 1977) at 7.

³⁸ Tye, *supra*.

posts every 6' 3", deflects only two feet.³⁹ The significance of this degree of cable rail deflection is that the Washington State Department of Transportation (WSDOT) is installing it in close proximity to overpass pillars where its installation is therefore useless.⁴⁰



Nevertheless, 70 miles of cable rail have recently been installed along Washington highways.⁴¹

As with the folly of earth berms that fail to re-direct errant cars, the cable rail system has quickly begun claiming lives.⁴²

³⁹ NCHRP Report 54 (Michie, et al. 1968).

⁴⁰ See Deposition of Mark Leth (WSDOT Northwest Region Traffic Engineer) at 56, *Merdes v. State*, King County Superior Court Cause No. 05-2-03265-1SEA.

⁴¹ Washington State Department of Transportation (www.wsdot.wa.gov/projects/cablebarrier).

⁴² *The Seattle Times*, December 20, 2006 ("DOT to pay \$2 million in death claim"); *The Seattle Times*, February 14, 2007 ("Fatal collision near Marysville was at site of previous crashes").

The cable is designed to trap cars that enter at a shallow angle. It does not redirect as does W-beam, and frequently fails when contacted by cars at highway speeds approaching at anything greater than a shallow angle.⁴³



With mounting deaths, our Governor finally called for an investigation into cable rail-related fatalities⁴⁴ The resulting analysis was a condemnation of cable rail in a number of locations.

Nevertheless, cable rail continues to be strung, and vehicle occupants will continue to die.

⁴³ *The Seattle Times*, October 2, 2006 (“Cars can squeeze beneath cable median barriers”).

⁴⁴ Gov. Christine Gregoire has ordered an independent review of freeway cable barriers following a fatal accident Feb. 13 on Interstate 5 near Marysville. A vehicle ripped through two sets of cable barriers and collided with a charter bus, leaving the driver dead and another person injured. Just weeks earlier, the state Department of Transportation (DOT) had installed a second set of cable barriers along a 10-mile stretch of highway near Marysville. *The Seattle Times*, February 24, 2007 (“Gregoire orders review of freeway cable barriers”).

WARNING SIGNS

A fundamental engineering safety rule is to **eliminate** a hazardous condition; if it cannot be eliminated, then prevent injury through guarding; and if **guarding** or shielding is not possible, then, at a minimum, **warn** of the hazard.

Consistent with this fundamental principle, our Supreme Court has held that when an inherently dangerous condition cannot be eliminated or guarded against, the alternative duty of any governmental entity is to adequately warn the traveling public of the dangers that are present:

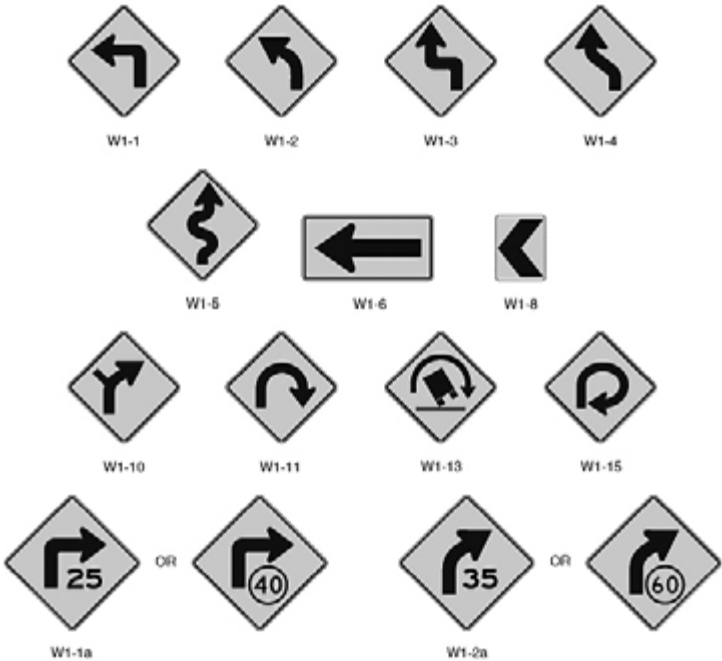
This obligation includes posting warning signs when required by law or when the State has actual or constructive knowledge that the highway is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care.

McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 6, 882 P.2d 157 (1994).

The undeniable advantage of warnings is that they are inexpensive and serve as an interim measure until the dangerous roadway condition can be addressed and remedied. Warning signs cost \$75.

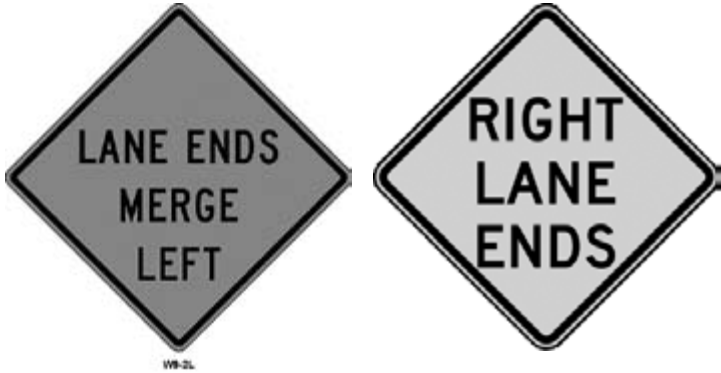
Sudden sharp curves may warrant chevrons or right-angle arrow warning signs, accompanied by a speed reduction advisory:

Figure 2C-1. Horizontal Alignment Signs



Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) (2009 Edition).

The elimination of a lane of travel, requiring the merging of traffic, is to be preceded by warning signs to avoid impact when the lane evaporates:



“Narrow Bridge” warning signs are critical for commercial truck drivers unfamiliar with the road.



Bridge ends are hazardous structures because they do not absorb energy when struck, and are located immediately adjacent to the outside lanes at the bridge entrance. Redirectional barriers and reflectorized object markers are to be used to warn of the hazard.

Marking of Objects Adjacent to Roadway

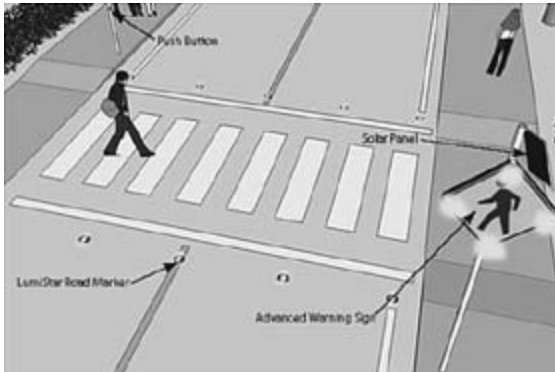


The warning “Pavement Ends” is essential where the asphalt surface terminates and the driver will suddenly encounter unstable dirt or gravel.



Where a stop sign or traffic signal exists at the end of a horizontal or vertical curve, such that a driver lacks time to safely stop once the stop sign or signal comes into view, an advance sign warning the driver of the stop sign or traffic signal ahead is essential to avoid intersection collisions.

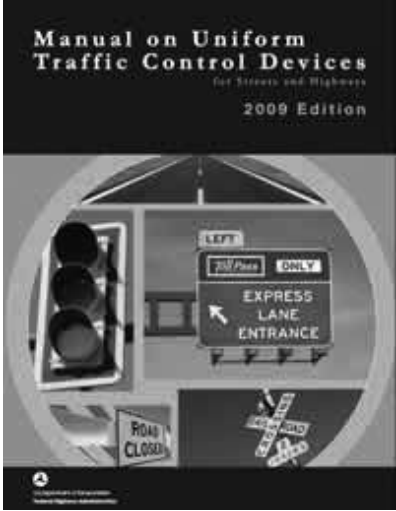
And, of course, the advance crosswalk sign can be critical in saving lives.



Given the vulnerability of pedestrians crossing the street—particularly school children—municipalities need to use these advance warnings, as well as **active warnings** at the crossing area when the crosswalk is being used, as shown above.



The Manual on Uniform Traffic Control Devices (MUTCD) governs the selection and use of all of these warning signs.



Washington and all other states have adopted its provisions.⁴⁵

⁴⁵ See RCW 47.36.020.

Case Example:

In *Provins v. Bevis*, 70 Wn.2d 131, 138, 422 P.2d 505 (1967), a passenger was injured when the vehicle in which she was riding at night struck a tree stump at the end of a dead-end road. Pierce County, which operated and maintained the subject road, had placed a warning sign that the road ended ahead, but the warning sign wasn't reflectorized, and it was followed by a 35-mph speed sign. Based on this evidence, the plaintiff alleged that Pierce County had failed to provide adequate warning of a deceptive and dangerous highway condition.

The jury found the county negligent at trial. On appeal, Pierce County challenged the sufficiency of the evidence to support a finding of negligence. In affirming the verdict, the Supreme Court emphasized that part of a governmental entity's duty includes placing adequate warning signs when an inherently dangerous roadway hazard or condition exists:

At the outset, it should be observed that we are committed to the rule that, although a county is not an insurer against accident nor a guarantor of the safety of travelers upon its roadways, it is nevertheless obligated to exercise ordinary care to keep its public ways in a safe condition for ordinary travel. Fritch v. King Cy., 4 Wn.2d 87, 102 P.2d 249 (1940); Berglund v. Spokane Cy., 4 Wn.2d 309, 103 P.2d 355 (1940), and cases cited. And, this obligation includes the responsibility to post adequate and appropriate warning signs when such are required by law, or where the situation, to the county's actual

or constructive knowledge, is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care. Tyler v. Pierce Cy., 188 Wash. 229, 62 P.2d 32 (1936); Johanson v. King Cy., 7 Wn.2d 111, 109 P.2d 307 (1941); Lucas v. Phillips, 34 Wn.2d 591, 209 P.2d 279 (1949); Schneider v. Yakima Cy., 65 Wn.2d 352, 397 P.2d 411 (1964).

Applying the foregoing principles to the evidence adduced at the trial, we are convinced the trial court properly submitted the issue of the county's negligence to the jury. From the evidence concerning the characteristics of the dead ending of Devil's Head road, the jury could well have concluded that the situation was dangerous and deceptive, that Pierce County recognized the condition, and that the dead-end warning sign was negligently and ineffectively placed. We, therefore, find no merit in Pierce County's challenge to the sufficiency of the evidence, nor in its assignments of error directed to instructions defining its responsibility.

Provins, 70 Wn.2d at 138.

Case Example:

The State of Washington allowed the cement roadway surface of State Route 900 to become worn smooth over 60 years of constant use. Although the Washington State Department of Transportation knew of the substandard friction characteristics of this highway,⁴⁶ it posted no sign warning drivers that this section of SR 900 was slippery when wet.



The Handorff-Sherman car lost traction in the rain, crossed the centerline and struck Wally McCluskey's small pickup head-on, killing him.⁴⁷

⁴⁶ Every two years, WSDOT measures and records the roadway surface friction of every State Route at each milepost.

⁴⁷ There had been a number of fatal cross-over collisions along this stretch of SR 900. I argued in Closing: "How many deaths will it take?"

At trial, the State tried to argue that it lacked the funds needed to resurface the road, or to install a Jersey median barrier to prevent cross-over, head-on collisions.⁴⁸ But it could not deny, as observed by the jury, the Court of Appeals, and the Washington Supreme Court, that it could certainly afford a warning sign.⁴⁹

CROSSWALKS

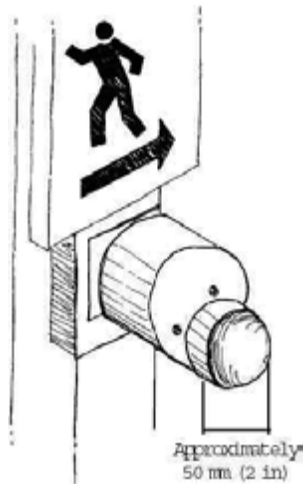
There is no stronger right of way than that of a pedestrian in a crosswalk. But regardless of this strong right of way, there still exists the hazard of 3,000 lbs. of steel hitting a human body.



⁴⁸ Ironically, the Stated tried to take Mr. Handorff-Sherman to task for driving on tires with inadequate tread, rejecting his excuse that he couldn't afford proper tires. See "GOVERNMENT BUDGET NOT A DEFENSE TO TORTIOUS CONDUCT", *supra*.

⁴⁹ See also the well-written opinion by the Court of Appeals at *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 110, 841 P.2d 1300 (1992), *aff'd*, 125 Wn.2d 1, 882 P.2d 157 (1994). My excellent co-counsel throughout trial was Mark Barber of Renton. We were very effectively and successfully aided on appeal by Charlie Wiggins. But it remains a mystery as to whether it was Charlie or me who came up with the argument that "poverty is not a defense to tortious conduct".

The solution is often a pedestrian-actuated traffic signal that allows through traffic on the main line to continue on a green light until a pedestrian needs to cross and activates the crossing signal – very little inconvenience for cars, and red light protection for pedestrians while crossing.



Absent this protection, the alternative is a “multiple threat” hazard that occurs at a non-signalized intersection. A car stops for a pedestrian about to cross. The pedestrian enters the crosswalk, walks past the car that is stopped in the outside (curb) lane, and is struck by a car traveling through in the inside lane. At the 10th and Jackson crossing shown below, my elderly client made it across four lanes before she was struck in the final lane. The City of Seattle had *removed* the pedestrian refuge island in the center of the street. After 24 hours of agony, she died.



RCW 46.04.290 defines a **marked** crosswalk as “any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface of the roadway.” Nevertheless, under RCW 46.04.160, “crosswalk” includes unmarked crosswalks: “the portion of the roadway between the intersection area and a prolongation or connection of the farthest sidewalk line or in the event there are no sidewalks then between the intersection area and a line ten feet therefrom, except as modified by a marked crosswalk.”

A statutory crosswalk exists whenever the requirements of RCW 46.04.160 are met. See *Krogh v. Pemble*, 50 Wn.2d 250, 310 P.2d 1069 (1957). The existence of a marked crosswalk in another location does not act to abrogate the “statutory” crosswalk. However, local authorities may, with proper and clear signage, prohibit pedestrians from crossing at an area that would otherwise qualify as a crosswalk pursuant to RCW 46.04.160. *Hanson v. Anderson*, 53 Wn.2d 601, 335 P.2d 581

(1959). The lack of sidewalks does not affect the existence of a statutory crosswalk. *Krogh v. Pemble, supra*.

The duties and rights of pedestrians crossing the roadway vary depending on whether the pedestrian crosses in a crosswalk or not. A pedestrian crossing a roadway at any point other than within a crosswalk must yield the right-of-way to all vehicles upon the roadway. RCW 46.61.240(1).

On the other hand, because the law directs pedestrians to use crosswalks when crossing streets and roadways (see *Xiao Ping Chen v. City of Seattle*, 2009 WL 5067512, 7 (Wn. App. 2009)), a pedestrian within a crosswalk has the right to assume that all drivers of approaching vehicles will yield the right of way to the pedestrian. *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969); *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 682 P.2d 942 (1984); *Burnham v. Nehren*, 7 Wn. App. 860, 863, 503 P.2d 122 (1972).⁵⁰ Thus, a pedestrian lawfully within a crosswalk has an “exceedingly strong” right-of-way, and has a right to rely on this protection and assume that drivers will respect it until the pedestrian knows otherwise. See *Burnham*, 7 Wn. App. at 863.

[T]he city ignores that a pedestrian using a crosswalk is given a preference over individuals using other modes of transportation.... Motor vehicles must yield to pedestrians in marked or unmarked crosswalks. RCW 46.61.235(1).... Although the law does not permit a pedestrian to walk “suddenly” into a crosswalk so that

⁵⁰ A bicyclist in a crosswalk has the same right of way as a pedestrian. RCW 46.61.235; *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999).

an approaching vehicle cannot stop, RCW 46.61.235(2), Washington courts have long recognized that a pedestrian in a crosswalk “may assume that the driver of a vehicle will recognize the pedestrian’s right of way.” Knight v. Pang, 32 Wash.2d 217, 232, 201 P.2d 198 (1948); see also Jung v. York, 75 Wash.2d 195, 198, 449 P.2d 409 (1969) (citing Jerdal v. Sinclair, 54 Wash.2d 565, 342 P.2d 585 (1959)); Burnham v. Nehren, 7 Wash.App. 860, 864, 503 P.2d 122 (1972) (citing Shasky v. Burden, 78 Wash.2d 193, 470 P.2d 544 (1970)).

Xiao Ping Chen v. City of Seattle, 2009 WL 5067512, 7 (Wash. Wn. App. 2009).

A pedestrian cannot at one and the same time have a right to assume that the right of way will be yielded and a duty to look to make sure that it is. In the absence of circumstances which would alert the pedestrian rightfully in the crosswalk to the fact that an approaching vehicle is not going to yield, negligence cannot be predicated on his failure to look and see the vehicle in time to avoid the accident.

Jung, 75 Wn.2d at 198.

Based on the “exceedingly strong” right of way granted to pedestrians, a driver of a vehicle approaching a crosswalk has a duty of continuous observation to watch for pedestrians in the crosswalk. *See Pudmaroff v. Allen*, 138 Wn.2d 55, 67, 977 P.2d 574 (1999); *Shasky v. Burden*, 78 Wn. 2d 193, 200, 470 P.2d 544 (1970); *Jung v. York*, 75 Wn.2d 195, 198, 449 P.2d 409 (1969); *Oberlander v. Cox*, 75 Wn.2d 189, 192, 449 P.2d 388

(1969). In addition, a statute provides that the driver of an approaching vehicle shall stop and remain stopped to allow a pedestrian to cross the roadway within a crosswalk:

The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. For purposes of this section “half of the roadway” means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.

RCW 46.61.235(1).

The very recently adopted crosswalk instructions take all of this into account. WPI 70.03 and WPI 70.03.03 now set forth the rights and duties of pedestrians in detail. WPI 70.03 explains the right-of-way that a pedestrian enjoys within a crosswalk, while WPI 70.03.03 sets forth the duty of a pedestrian before entering a crosswalk.

A pedestrian within a crosswalk has the right to assume that all drivers of approaching vehicles will yield the right of way to the pedestrian. This right continues until the pedestrian knows otherwise or until surrounding circumstances should have alerted the pedestrian to the fact that an approaching vehicle is not going to yield the right of way to the pedestrian. Absent such circumstances, a pedestrian within a crosswalk has no duty to look for approaching vehicles.

WPI 70.03.

Before entering a crosswalk, a pedestrian has a duty to look for approaching vehicles. A statute provides that no pedestrian shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle that is so close that it is impossible for the driver to stop.

WPI 70.03.03.

Similarly, WPI 70.03.01 and WPI 70.03.02 set forth the duties of a driver approaching a crosswalk:

The driver of a vehicle approaching a crosswalk has a duty of continuous observation.

WPI 70.03.01.

A statute provides that the driver of an approaching vehicle shall stop and remain stopped to allow a pedestrian to cross the roadway within a crosswalk when the pedestrian is [upon the roadway on which the vehicle is traveling or onto which it is turning] [either upon, or within one lane of, the half of the roadway on which the vehicle is traveling or onto which it is turning].

WPI 70.03.02.

The primary duty to avoid a collision rests upon a driver approaching a crosswalk. Thus, a violation of RCW 46.61.235(1), by failing to yield the right-of-way to a pedestrian in a crosswalk, may be considered as evidence of

negligence on the part of the driver. *See* RCW 5.40.050; *Daley v. Stephens*, 64 Wn.2d 806, 394 P.2d 801 (1964).

Poor visibility due to weather conditions does not lessen the protection of a crosswalk unless a pedestrian suddenly leaves a place of safety or walks or runs into the path of a vehicle so close as to make it impossible for the driver to yield. *Oberlander v. Cox*, 75 Wn.2d 189, 449 P.2d 388 (1969).

Case Example:

After entering a crosswalk and establishing his or her course, a pedestrian is not necessarily negligent for failure to keep a further lookout. In *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969), a woman entered a marked crosswalk. As she crossed, a car stopped, yielding the right-of-way. She proceeded in front of this car, entered the next lane, and was struck by a car. The Washington Supreme Court held that Ms. Jung had no duty to stop at various points along the marked crosswalk and look for vehicles that might violate or disregard her lawful right-of-way:

[W]hether or not she could have avoided the accident by stopping one quarter of the way across the intersection and looking, it cannot be held that she had a duty to do so or that the jury would be justified in finding on the evidence in the record that she was negligent if she failed to do so.

Jung v. York, 75 Wn.2d at 197.

Case Example:

In *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 682 P.2d 942 (1984), the plaintiff-pedestrian attempted to cross four lanes of an arterial in Seattle within the crosswalk. As she crossed, a car stopped for her at the crosswalk. After passing in front of the stopped car, she was struck by a car traveling through the next lane. The evidence was “undisputed that Clements [the pedestrian] was looking straight ahead or down in front of her as she walked.” *Clements*, 37 Wn. App. at 550. The court held that, as a matter of law, she had no duty to try to observe oncoming traffic:

Plaintiff ... asserts that the law does not impose a duty to look upon a pedestrian lawfully within a marked crosswalk even if the light changed against her as she crossed. Clements correctly states the general rule. See Riddel v. Lyon, 124 Wash. 146, 149, 213 P.487 (1923). Therefore, Clements' failure to look or to make any effort to observe oncoming traffic even after the light changed to red before she passed the stopped car, standing alone, does not amount to negligence.

Clements, 37 Wn. App. at 550.⁵¹

⁵¹ The court in *Clements* however went on to hold that whether or not the pedestrian was negligent was a question of fact for the jury because the evidence in the case established that a motorist had honked twice in an effort to warn her that the vehicle that ultimately struck her was not going to yield. And in *Oberlander v. Cox*, 75 Wn.2d 189, 193, 449 P.2d 388 (1969), the Supreme Court observed that a crosswalk is not a “sanctuary”.

Case Example:

Poorly lit crosswalks are hazardous for pedestrians.

The City of Vancouver owns and operates Fort Vancouver Way, immediately adjacent to Clark College. The college typically has an enrollment in excess of 13,000 students. Many park in the lot on the west side of Fort Vancouver Way. Additionally, several students take public transit and exit the bus at the stop on the west side of Fort Vancouver Way. All of these students must cross Fort Vancouver Way on foot.

The City of Vancouver painted a crosswalk for these students to use. The crosswalk spans nearly 100 feet – a third of the length of a football field.



This crosswalk needed proper lighting and crossing signals. Of course, all municipalities have these solutions in their “tool boxes”.

Classes at Clark College begin at 7:00 a.m. In January, students have to cross Fort Vancouver Way in the darkness, and are forced to depend on street lighting for their safety.

In 2002, Fort Vancouver Way had no street lighting for the entire west half of the crosswalk. Soft lights existed in a neighboring parking lot to the west, but the light did not extend to the crosswalk. It was not until a pedestrian was more than halfway across the street and into the northbound lanes that the single street lamp to the east directed any light onto the crosswalk.

A little before 7:00 a.m. on January 29, 2002, a French exchange student exited a city bus, and entered the crosswalk in the darkness. She first crossed the bus stop lane, then the outside lane for southbound traffic. While crossing the third lane, she was struck by a Mazda. Her left side was battered by the force of steel traveling at 27 mph. She was knocked through the air, with her head smashing into the windshield, her body then being slammed to the pavement.



Because of the darkness at this crosswalk and the lack of streetlights, the Mazda driver had no idea that the student was even in the crosswalk. Only when the pedestrian's head shattered her windshield did the driver realize that she had hit something or someone.

Paul Stritmatter and I relied upon experts across the country in the fields of roadway illumination, transportation engineering, biomechanical engineering, accident reconstruction, vocational rehabilitation and a host of health care professionals. Because the City of Vancouver denied liability, claiming that the student was jaywalking at the time, we were forced to establish through the laws of physics and biomechanics that she was, in fact, in the crosswalk when she was struck.

The City of Vancouver ultimately paid for the student's life-threatening injuries and significant brain damage, and the destruction of her beautiful life. She has returned to her home in Le Havre, France

INTERSECTIONS

Nowhere along our streets is there more conflict and potential for injury than at intersections, particularly where they're not controlled by signals or stop signs, with cars converging from four (or more) different directions.



Traffic Signals

Significant traffic volumes and a series of collisions generally mean that the intersection meets criteria (“warrants”) for the installation of a traffic signal, so that both cars and pedestrians are given protected movement through this area of conflict.

WSDOT has developed warrants by which the State’s engineers identify intersections in need of traffic signals.⁵² Where these warrants are met, WSDOT is on notice that the

⁵² MUTCD Part IV – Highway Traffic Signals.

intersection is dangerous, and that something must be done at that location for the safety of the public.



While a governmental entity’s financial status is irrelevant here (“poverty is not a defense to tortious conduct”),⁵³ where it claims that its budget makes the installation of a \$100,000 signal difficult, the simple interim solution is a four-way stop. Each of the four stop signs costs only \$75, and traffic at the intersection is controlled because we as drivers know who should proceed next. There is therefore no excuse for leaving an unsafe intersection uncontrolled.

⁵³ See “GOVERNMENT BUDGET – NOT A DEFENSE TO TORTIOUS CONDUCT”, *supra*.



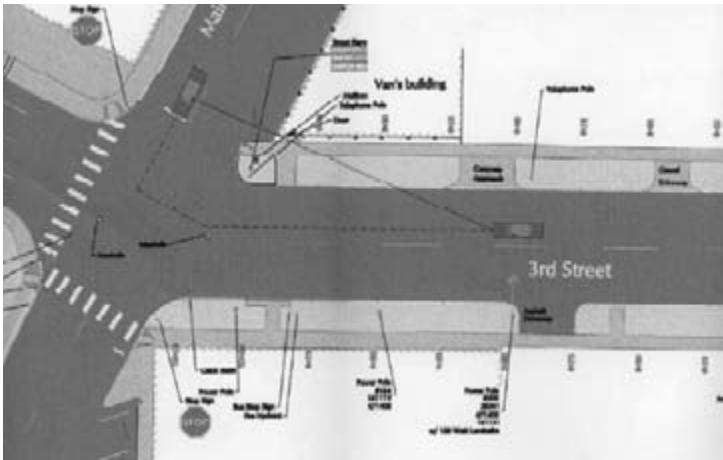
A common intersection hazard is the left-turning vehicle that fails to yield to an oncoming car. Once again, there are rules that apply not only to the drivers but to the governmental entity responsible for the intersection. A history of these collisions may warrant a left-turn pocket and green arrow for protected movement, giving oncoming traffic a red light. This channelization for left turns may involve little more than slightly widening the roadway and painting the left-turn pocket.



The failure to install needed channelization and/or a left-turn arrow may well constitute negligent conduct.

Sight Obstructions

Intersections are to be designed in such a manner that drivers have an unobstructed view of each other. When trees and shrubbery or the corner of a building block a driver's line of sight, a driver may be left with inadequate time to avoid a collision once the previously hidden car suddenly comes into view.



Each leg of an intersection has a required sight triangle on both the left and the right. The size of the triangle is determined based on the design speed, with higher speeds requiring larger sight triangles to allow for greater distances to perceive an approaching car, make a decision as to how

to respond, and then undertake the action needed to avoid a collision (Perception-Decision-Reaction). A well-qualified transportation engineer will be familiar with minimum sight distance requirement tables issued by the American Association of State Highway Transportation Officials (AASHTO) for uncontrolled intersections, yield-controlled intersections, and stop-controlled intersections.

Where the sight obstruction cannot be moved or otherwise eliminated, the solution may be the installation of a stop sign, and placement of a stop bar at a location where the driver can clearly see cars approaching from the left and right. Municipalities will sometimes attempt to excuse an obstructed sight line by claiming that, regardless of where they put the stop bar, the driver should continue out into the stream of cross-traffic until he or she clearly sees all approaching cars. That, however, is not the law, and is no excuse for operating an unsafe intersection.

The law requires that drivers stop at stop lines. RCW 46.61.190(2) states that “...every driver of a vehicle approaching the stop sign shall stop at a clearly marked stop line.” Likewise, the Manual on Uniform Traffic Control Devices (MUTCD), Section 3B.16, provides that “[i]f used, stop lines shall consist of solid white lines... to indicate the point at which the stop is intended or required to be made.”

The Washington State Driver Guide tracks the language of the statute:

... You must come to a full stop at a marked stop line, but if none, before entering a marked crosswalk or, if none,

at the point nearest the intersecting roadway where the driver has a view of approaching traffic....

Washington State Driver Guide at 29.

...When required to stop because of a sign or signal, you must stop before your vehicle reaches the stop line or crosswalk, if there is one....

Washington State Driver Guide at 32.

Only in the absence of stop lines are drivers expected to creep forward:

Except when directed to proceed by a duly authorized flagger, or a police officer, or a fire fighter vested by law with authority to direct, control, or regulate traffic,

every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line,

but if none, before entering a marked crosswalk on the near side of the intersection or,

if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway....

RCW 46.61.190(2) (formatting of statute altered for better readability).

Case Example:

The State of Washington designed and built the intersection of NE Park Drive and a ramp onto the northbound lanes of I-405 in Renton. The intersection lacked a left-turn green arrow for cars turning from Park onto I-405. Multiple left-turning collisions resulted from the lack of a protective (vs. permissive) left-turn signal. The WSDOT Design Manual called for a traffic signal with protected left-turn phasing (left-turn green arrow) where left-turning type collisions on an intersection approach reached three per year or five in two consecutive years. This standard was met here in 2000 and 2002-2005 (*2004-2005 had 21 left-turning collisions at this intersection*).



On January 12, 2006, the plaintiff drove easterly on Park Drive toward the intersection. From the opposite direction, the defendant-driver entered the left-turn lane, intending to

enter onto the Northbound I-405 on-ramp. Thinking he had sufficient room, the defendant began executing his left turn and struck the plaintiff's car head-on. The defendant later testified that, had the traffic signal provided a green arrow, he would have stopped and waited at the red light until the green arrow came on. Result – no collision.

The City of Renton ultimately accepted its share of responsibility for the death of the plaintiff caused in part by its failure to provide a protected left turn here with a simple left-turn arrow on this signal.

Case Example:

State Route 18 runs in an easterly direction from Interstate 5 in the Auburn area, intersecting with Interstate 90 in the vicinity of North Bend. This intersection became quite busy during the morning rush hour. Most cars heading northbound on SR 18 turned left at SR 18 to access the on-ramp onto I-90 westbound toward Bellevue and Seattle. The only traffic control at the intersection consisted of a stop sign for traffic coming down the off-ramp from I-90 westbound.

On August 27, 1998, the plaintiff left her home north of the intersection to head to work as a school teacher. As she approached the SR 18/I-90 intersection, she was following a truck, approximately three to four car lengths behind it. She estimated that her speed was between 35 and 45 mph.



As she entered the intersection, a white pickup truck suddenly turned left in front of her, causing a severe collision.



Plaintiff had the right of way as a vehicle traveling straight through the intersection. The defendant-driver obviously failed to yield the right of way when she turned left in front of the plaintiff's car.

A year before this collision, WSDOT had conducted a traffic study to determine how many vehicles were coming through the intersection and ascertain their movements, including turning movements. According to standards applicable to state highways, where traffic volumes become extremely high at an intersection, a traffic signal is warranted to bring about control. Here, the counts showed that traffic volumes were at a level that met signal warrants. In fact, of the more than 240 intersections being monitored by WSDOT in the Northwest Region of the State, traffic volumes at this intersection ranked it number one in terms of the need for a traffic signal. That was both because of existing traffic volumes, and because it was likely that a State Patrol truck weigh station near the intersection was going to be experiencing increased truck traffic due to a weigh station closure in Cle Elum.

To its credit, WSDOT then set about preparing for the installation of a traffic signal at the intersection. It coordinated funding of the signal with a nearby developer of a subdivision, as well as with the State Patrol because of the increased usage of the weigh station at that location. An outside consultant designed a traffic signal system, and WSDOT put out a request for bids from contractors. Ultimately, the traffic signal system was installed. In the meantime, however, the subject collision occurred.

The intersection had become so overwhelmed with traffic at rush hour that it was clearly unsafe. I argued that, once WSDOT knew that the intersection needed a traffic signal to control traffic at the intersection because of these large traffic volumes, it was required to take action to control

the dangerously heavy traffic volumes during rush hour. One obvious answer was the solution recommended by the Manual on Uniform Traffic Control Devices: install a temporary multi-way stop with stop signs for all directions, so that motorists would stop and proceed through the intersection in an orderly manner. Clearly, if this had been done, the defendant-driver would have stopped at the stop sign and would not have suddenly turned left in front of my client.

Consistent with its well-established *modus operandi*, the State attempted to avoid liability for this crash through a motion for summary judgment. Our trial court rejected the State's claims that it was not liable for this collision, and further ruled that the plaintiff was fault-free. Both defendants were held jointly and severally liable for all of the plaintiff's losses resulting from her quadriplegia.

Case Example:

Plaintiffs were a 20-year-old college student, 31 weeks pregnant, and her sister, a high school student. The collision occurred at the intersection of Custer Road and 75th Street in Lakewood, Washington. Custer Road is a busy arterial with no traffic signal at this intersection. As their Volkswagen Beetle traveled along Custer Road, a car suddenly entered the intersection from 75th and struck the right rear fender of the Volkswagen, causing it to rotate out of control and into a utility pole.



We held both Pierce County and the City of Lakewood responsible for the consequences of their unsafe, unusually configured intersection, including requiring compensation for significant brain injuries to both young women. Not only was a traffic signal warranted by the accident history, but the utility pole that they were knocked into had been located within the prohibited clear zone.

Strategy – Don't assume that just because someone failed to yield the right of way at an intersection, it's simply driver error. The attentive practitioner will go to the intersection and watch what's going on first-hand. He or she will make a public records request for the accident history. Where there are years of the same type of collision over and over, chances are good that the intersection is poorly designed or has outlived its original design, has now become dangerous, probably overwhelmed by traffic, and may be in need of a fix to make it reasonably safe. The city or county's failure to respond is nothing less than negligence for which it is liable under our tort law.

RAILROAD GRADE CROSSINGS



Although conflict among cars at street intersections certainly presents a very real hazard of injury, the potential for severe injury and death is even greater at railroad crossings, where tons of locomotive steel will crush the car and its occupants.⁵⁴ A common problem in rural areas is the uncontrolled crossing – no flashing red lights, no gates, no stop sign.

While railroad companies are empowered to install the signal and arms at a crossing, the municipality has an independent duty to “inspect highway grade crossings” for sight obstructions (RCW 36.86.100), and to install stop signs at the crossings (RCW 36.86.040; RCW 46.61.345).

⁵⁴ See Kessler, “The Thundering Behemoth: Locomotive v. Human”, WSAJ Seminar, Transportation Torts: Planes, Trains and Automobiles (September 2008).

Case Example:

Paul Stritmatter and I tried *Greene v. Pierce County*⁵⁵ for 3½ weeks – one of our more exciting and challenging cases together over the years, although we’ve had many.

The approaching county road is initially at a lower elevation than the level of the crossing. For drivers on 24th Street East, the view of any train on the left was obstructed by houses, barns and trees, blocking a driver’s view of an approaching train for 79% of the 5½-second period during which a driver had to be able to see a train in time to stop without being hit at the crossing.

As cars neared the tracks, the roadway rose up to meet the track grade. At the actual point of the crossing, there were no longer sight obstructions, and an approaching train could then be seen. But by then it was too late to stop.

My position was that, given the sight obstructions and limited opportunity to avoid being struck by a train, a stop sign was warranted here under state law (MUTCD § 8B-9).

It was dark the night of the crash. There were no lights at the crossing. An eyewitness saw three cars go past him traveling westbound on 24th Street East, approaching the crossing at about 30 mph in a 35-mph zone. A train approached from the south. The first car crossed the tracks without incident. The second car followed two seconds later and was struck by the 2,000-ton train. The driver was killed. Our 22-year-old

⁵⁵ Pierce County Superior Court Cause No. 87-2-08729-3 (1994).

passenger was found in the front passenger seat unconscious, with her forehead caved in.

My theme at trial was simple: “What do we do when we see a stop sign?”



I let the jurors silently answer that for themselves. They understood that a stopped driver would have had a clear view of the approaching train, and that there would have been no death or severe brain injury. A \$75 stop sign would have prevented this horrific collision.

Pierce County contended that posting stop signs at crossings in rural areas where trains are infrequent would breed disrespect for regulatory signs in general – people would cross the tracks, rarely see a train, and assume that they wouldn't need to stop at a stop sign here or elsewhere. We all know, however, that it's extremely rare that people intentionally blow through stop signs under any set of circumstances.

Pierce County presented this argument that stop signs shouldn't be used at crossings through its primary liability expert, King County's Traffic Engineer. In spite of his credentials, it struck me that he was, in fact, vulnerable. I set out to photo-document the grade crossings throughout King County where he and his crew had installed stop signs.

At trial, my heart raced as I anticipated cross-examination. After expressing his disdain for stop signs at grade crossings, one by one I pulled out huge mounted photographs of stop signs at his own crossings, directing him to confirm each of the King County crossing locations.

The jurors also heard evidence that the Union Pacific Railroad was so upset about this crossing that its people installed a stop sign here. The County removed the sign because it hadn't authorized the sign, and signs at crossings were *its* turf. The jurors were aghast.

Their verdict was the largest in a personal injury case in Pierce County history at that time.

Case Example:

Another case involving a municipality's duty to provide a reasonably safe roadway at a railroad crossing is *Owen v. Burlington Northern and Santa Fe Railroad Company*, 153 Wn.2d 780, 108 P.3d 1220 (2005). *Owen* involved sets of parallel tracks crossing a busy street in Tukwila.



On the day of the incident, traffic had been moving slowly and suddenly stopped, backed up by a traffic light at an intersection with another busy road up ahead. A southbound train approached the crossing from the right. The lights suddenly began flashing and the gates dropped on both sides of the cars caught on the tracks. Blocked by the cars ahead and behind, our elderly couple's vehicle was trapped. There was no way the train could stop, and, unable to exit their car in time, they were killed.





The City of Tukwila initially claimed that it owed no duty to these people because they were negligent in stopping on the tracks. Both the Court of Appeals and the Washington Supreme Court readily rejected that argument, pointing to *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) which had held that the duty to provide the public with a reasonably safe road applies even to a negligent plaintiff.

Our Supreme Court then took note of expert and lay observations that the crossing, with its sets of tracks across an unusually busy street, presented a dangerous crossing for drivers, requiring that the City take enhanced corrective action commensurate with the hazard:

According to Owen's expert and the Tukwila public works director there is a high volume of both vehicle and train traffic at the crossing. The train traffic includes high-speed trains. There are three sets of active railroad tracks and two sets of crossing signals together in close

proximity. There are nearby traffic signals which, according to lay witnesses and Owen's expert, frequently cause queuing of vehicles over the tracks. Additionally, there is an incline in the road as westbound travelers approach the crossings that, according to the lay witness and Owen's expert, limits drivers' ability to see the traffic signals or approaching trains.

*If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances.... If the corrective actions are adequate then the city has satisfied its duty to provide reasonably safe roads. According to evidence presented by Owen, an array of remedial measures existed ranging from **installing a stop sign before the crossings, posting additional signage to give warnings at each approach, extending the detection period to give vehicles more than 20 seconds advanced warning of an approaching train, and upgrading signals, to separating the railway and vehicle grades.** The absence of any of these available remedial measures in combination with the particular conditions at this crossing, including the volume of vehicle and high-speed train traffic, the presence of traffic signals that cause vehicles to halt on multiple sets of tracks, and the alleged limited visibility of westbound drivers, provides evidence from which a reasonable jury could conclude the roadway was not maintained in a condition reasonably safe for ordinary travel or was inherently dangerous or misleading, requiring warnings or elimination of the particular dangers present.*

Owen at 789-790 (emphasis added).

As to the separation of railway and vehicle grades as a solution here, the road was in fact later changed to run under the tracks, eliminating any conflict between cars and trains. While this cost more than warning signs and modifications to signal timing, it was completely effective in ending deaths at the crossing.



Before



After

SAFE ROADS FOR CYCLISTS⁵⁶



In the “go green” spirit, people are turning to cycling as a means of exercise and transportation. In 2008, an estimated 3.2 million Americans commuted via bicycle at least once a week.⁵⁷ Bike to Work Day is held in Seattle each May and in 2009, 10,000 cyclists participated (up from 5,000 in 2000).⁵⁸

Washington law supports this mode of transportation by including bicycles in the definition of vehicles;⁵⁹ indeed, “[e]very person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle”.⁶⁰ The cases that

⁵⁶ The author of this section is Mimy A. Bailey of SKWC’s Seattle office. Mimy is national chair of the Bicycle Litigation Group of the American Association for Justice (AAJ). In addition to her legal skills, her experience as a cyclist provides valuable insight in the bicycle cases we work up together.

⁵⁷ 12/30/08, City of Seattle, <http://www.seattle.gov/Transportation/bikeinfo.htm>.

⁵⁸ <http://community.seattletimes.nwsources.com/archive/?date=20010517&slug=here17m>
http://seattletimes.nwsources.com/html/localnews/2009222062_biking15m.html.

⁵⁹ “Vehicle” includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. RCW 46.04.670 (in part).

⁶⁰ RCW 46.61.755. Traffic laws apply to persons riding.

establish the government's duty to provide reasonably safe roads for motor vehicles are equally applicable to bicycles.

Design Defects from the Cyclist's Perspective

Skinny tires; no metal exoskeleton (e.g., a car); only a helmet for protection; surrounded by fast moving vehicles.

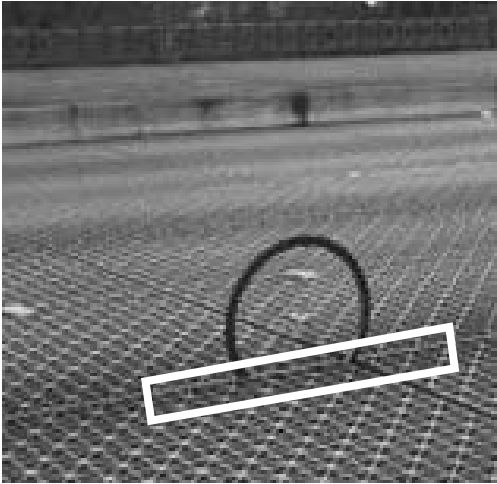
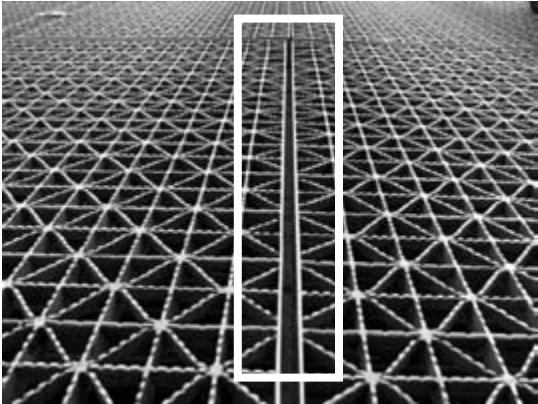


Designing roadways and bicycle facilities⁶¹ for cyclists requires an understanding of the unique challenges and risks to cyclists as they navigate the roads.

Roadway conditions harmless to cars and trucks can present grave danger to cyclists. For example, any type of gap wide enough to swallow a tire will cause a cyclist to go from 15-30 mph to 0 in a split second – the cyclist will flip over the top of the bars and into the air before slamming onto the pavement.

⁶¹ BICYCLE FACILITIES—A general term denoting improvements and provisions made by public agencies to accommodate or encourage bicycling, including parking and storage facilities, and shared roadways not specifically designated for bicycle use. AASHTO Guide for the Development of Bicycle Facilities, p. 2.

In cases involving bridges, bicycle wheels and tires have slotted into and become lodged in gaps between grate sections, again suddenly stopping the bicycle and flipping the cyclist onto the bridge deck.



Designing with Cyclists in Mind

Roadway design for bicycles is a developing science. Portland, OR adopted its original *Bicycle Master Plan* in 1996 and is currently developing *The Portland Bicycle Plan* for 2030.⁶² Seattle started researching its *Bicycle Master Plan* in 2006 and it was approved in 2007.⁶³

Statutes and case law are the foundation of any bicycle roadway design case. The next step in building the liability case is for the practitioner to immerse herself in all relevant standards. If the case is against a city, go to the city code, the city's published bicycle facility design standards, city bicycle route maps, the bicycle plan and any representations made by the city about its goals to encourage bicycle use, develop bicycle facilities and protect cyclists from harm. If against the State, make a similar investigation into state standards. Build your liability case around violations of the government's published standards.

The next step is to review transportation engineering standards. WSDOT utilizes the following design standards in developing bicycle facilities:

Manual on Uniform Traffic Control Devices for Streets and Highways, USDOT, FHWA; as adopted and modified by Chapter 468-95 WAC "Manual on uniform traffic control devices for streets and highways" (MUTCD)

⁶² <http://www.portlandonline.com/Transportation/index.cfm?a=71843&c=34812>.

⁶³ <http://www.seattle.gov/Transportation/bikemaster.htm>.

Selecting Roadway Design Treatments to Accommodate Bicycles, USDOT, Federal Highway Administration (FHWA), 1994

Standard Plans for Road, Bridge, and Municipal Construction (Standard Plans), M 21-01, WSDOT
www.wsdot.wa.gov/Publications/Manuals/M21-01.htm

Understanding Flexibility in Transportation Design – Washington, WSDOT, 2005
www.wsdot.wa.gov/eesc/design/Urban/Default.htm

A Policy on Geometric Design of Highways and Streets (Green Book), AASHTO, 2004

Designing Sidewalks and Trails for Access: Part I of II, FHWA, 2001

Guide for the Development of Bicycle Facilities, AASHTO, 1999



A transportation engineer or bicycle planner expert is key in developing liability, but it is a mistake to expect the expert to be a complete replacement for the attorney's vested approach in leaving no stone unturned. This is a developing science that requires the plaintiff's attorney to research every study, failed design attempt and successful strategy being employed within the U.S. and abroad in progressive cities such as Toronto and Amsterdam. Having a pulse on the relevant cycling community will be key to understanding how design elements (current and proposed) impact the cycling public.

Recreational Immunity

A potential case against the government may change dramatically if the bicyclist is injured on a bike path. The law in Washington State is vastly different for recreational land, including bike paths, as opposed to roadways designed primarily for motor vehicle traffic. The most recent case addressing the status of a bike path viewed it as recreational land and therefore applied the Washington statute that immunizes recreational landowners from liability.⁶⁴

Recreational immunity directly contradicts the recognition that bicycles are given as "vehicles." Cyclists rely on our government agencies to accommodate their right to be on the road by designing proper bike lanes, bike paths, and traffic control devices to minimize the conflict between bicycles and cars. On bike paths, the government holds itself to a low standard.

⁶⁴ See *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987).

Public and private landowners who allow members of the public to use the land for outdoor recreation, including bicycling, without charging a fee of any kind, are not liable for unintentional injuries to such users.⁶⁵ The narrow exceptions are: (1) when a fee is charged; (2) when injuries are intentionally caused; and (3) when injuries are sustained “by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.”⁶⁶

Is it safer for bicycles to travel on bike trails or stick to the adjacent roadways, despite the risks associated with traveling adjacent to motor vehicles? Many transportation engineers are of the opinion that bicycle routes that are separate from vehicle traffic are ideal (e.g., bike trails over sharrows⁶⁷ and bike lanes). In Seattle, the Burke-Gilman Trail is the best example. The Burke-Gilman is a paved multi-use trail that runs north-south for over 25 miles on the path of old railroad tracks.

⁶⁵ RCW 4.24.210.

⁶⁶ *Riksem v. City of Seattle*, 47 Wn. App. 506, 510, 736 P.2d 275 (1987).

⁶⁷ Shared lane pavement markings (or “sharrows”) are bicycle symbols carefully placed to guide bicyclists to the best place to ride on the road, avoid car doors and remind drivers to share the road with cyclists. Unlike bicycle lanes, sharrows do not designate a particular part of the street for the exclusive use of bicyclists. They are simply a marking to guide bicyclists to the best place to ride and help motorists expect to see and share the lane with bicyclists. <http://www.seattle.gov/Transportation/sharrows.htm>.



Riding the Burke-Gilman, bicyclists are less likely to come face to face with a bumper or a windshield on their way to work, but what about the surface of the Burke-Gilman? What about the design of the trail and especially the intersections with streets and driveways? When bicycles travel on the street they can rely on the state, county or city government to provide a reasonably safe roadway.

Laws evolve, sometimes ahead of our social, moral and political values, and at other times behind them. If bicycling is a legitimate form of transportation that is the wave of the future, doesn't it make sense that separate bike facilities should be kept as "reasonably safe" as highways, roads and streets? Hundreds of cyclists use Seattle area bike trails everyday and most without incident; but without a law that encourages specific conduct in designing and maintaining bike trails, will they be maintained to the same level that we require for highways, roads and streets?

THE ROAD AHEAD

What is...

Washington has a strong history of insisting that our roads be reasonably safe, both in design and in operation. This requires nothing more than ordinary care by our governmental entities charged with responsibility for our roads and our safety.

There is no reason to believe that this duty to provide the traveling public with reasonably safe roads will change.

First, it's just plain good policy to protect the public from unnecessary injury. There's no excuse for governmental negligence that causes harm to its citizens.

Second, although there are always budget challenges, even **poverty** has never been a defense for a tortious act. It is the practice and policy of our State, through its Tort Claim Fund, to anticipate that it will make mistakes or otherwise operate dangerous roads, and it therefore budgets a reserve to compensate people injured by its bad roads.

Third, we have nearly 70 years of common law precedent requiring reasonably safe roads. We are well-entrenched in the demand for proper roads, and there's no conceivable reason to drop our concern for safety.

What can be...

Our challenges include persuading our trial and appellate courts to pay attention to current winter maintenance procedures actually being employed by State and local governments in reviewing weather forecasts and applying anti-icers to our roads for the sake of innocent drivers, rather than only recognize the old sanding procedures employed some 80 years ago.

Through lawsuits, we must hold WSDOT liable for the deaths that occur when its median cable rails fail. We can show the foolishness of using three strands of cable that will not prevent cross-over collisions. We can, through these verdicts, persuade the State to return to the well-designed and extremely effective W-beam guardrail along the medians of our state highways.

An important development has been the success in holding municipalities responsible for unsafe crosswalk areas (*Jung v. York, supra*; *Clements v. Blue Cross, supra*; and now *Chen v. City of Seattle*). The responsibility for a safe crossing – at every intersection – takes into account traffic volumes, gaps in traffic for safe passage, refuge islands, pedestrian-actuated traffic signals, and a host of other pedestrian protections. Rather than sandblast away the paint of our existing crosswalks, as has been the practice of the City of Seattle for the past five years to eliminate pedestrian reliance upon this zone of safety, municipalities need to re-focus on signals that provide protected passage for pedestrians trying to cross our busy streets. Seattle is supposed to be a pedestrian-friendly city. Perhaps we will see that over the

next few years under a new city administration.

The battle for open government needs to be won once and for all. Accident reports are public records. Our public agencies are required by law to turn public records over to us. The efforts by state and local governments to immunize themselves from liability for their tortious conduct by concealing public records is shameful. RCW 42.56.030 makes clear the role of government agencies in providing the public with public records, and in being accountable for their conduct:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control of the instruments that they have created.

The sooner we put an end to our government agencies hiding public records that show governmental tortious conduct, the better.

Too many people are seriously injured because of bad roads. Too many families get the phone call that they've lost a loved one down an unshielded embankment, or to a collision at an uncontrolled intersection, or while trying to walk across a high-volume street without the protection of a traffic signal.

Through vigorous representation of our clients, and aggressive efforts to hold government accountable, we can reduce suffering. We can make a change.



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