

What if the design or maintenance of a road causes an accident

There are no traffic control devices at an intersection that obviously needs them. The striping on the road makes it look like a driver can go straight when he actually can't. A signal malfunctions. All of these events can lead to a traffic accident. How should such a case be handled?

If you have any reason to believe that the design or maintenance of a road or intersection contributed to the cause of an accident, the first thing you need to do is send out a tort claim notice. Notice in a wrongful death case needs to be sent within one year after the accident. Notice of all other claims must be given within 180 days. Some roads are maintained by the State, some by the County and some by the city. Unless you are sure which government entity is responsible for the road at issue, in an abundance of caution, you should send tort claim notices to all three.

The tort claim notice must be sent on behalf of the injured person. Accordingly, if driver A is injured by driver B which is insured by your company, you should send the tort claim notice in the name of driver A. The notice should contain a description of the accident and should state that the road design or maintenance contributed to the cause of the accident. The notice should contain the sentence "We are seeking contribution on behalf of claimant A" and needs to list claimant A's contact information.

The governmental entity will most likely claim that it has discretionary immunity and therefore cannot be held responsible for the accident. It may be right. ORS 30.265(3)(c) provides: "Every public body and its officers, employees and agents acting within the scope of their employment of duties * * * are immune from liability for: (c) Any claim based upon the performance of or the failure to exer-

The Intersection Made Me Do It

— by Lori DeDobbelaere

cise or perform a discretionary function or duty, whether or not the discretion is abused." Not every exercise of judgment and choice is the exercise of discretion. Immunity will apply to decisions involving the making of policy, but not to routine decisions made by employees in the course of their day to day activities, even though the decision involves a choice among two or more courses of action.

The governmental entity has the burden of establishing its entitlement to immunity. It must show that it made a decision involving 'the making of policy' as opposed to a 'routine decision' made by employees in the course of their day-to-day activities.

In some instances, the nature of the function alone is sufficient to establish immunity. In other instances, evidence of how the decision was made is necessary. The decision how to build and design a road may sometimes be immune and sometimes will not be immune. Without some evidence that a decision was made and how that decision was made, a court cannot say that a governmental entity's action or failure to act is an immune exercise of governmental discretion.

One of the leading cases in this area is *Stevenson v. State*, 290 Or 3, 15, 619 P.2d 247 (1980). In *Stevenson*, the issue was whether the State was immune from liability for a malfunctioning traffic signal or in the alternative for the defective design of that traffic signal. The State argued that the decision whether to change the traffic signal was a discretionary function and it therefore could not be held liable. The *Stevenson* court stated:

The decisions that make up planning and design of highways and their maintenance involve the exercise of two very different kinds of judgment. First, there is the exercise of what we may term governmental discretion or

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policy judgment. The decision to build a highway rather than a railroad track is such a decision.

Like virtually every other activity, both planning and design, as well as maintenance of roads, frequently require the making of decisions which do not involve the making of public policy; for example, the decision whether to make a safety fence two feet rather than three feet high or the decision to first remove the snow from Street A rather than from Street B. These decisions involve the use of ‘discretion’ in the sense that a choice must be made but they do not involve the use of ‘discretion’ in the sense that a policy decision is required.

Stevenson at 9-11.

By way of illustration, the court stated:

If the responsible officials had determined, for example, that their budgets would not permit them to provide all desirable safety features and that the public would be better served by facilities other than cattle guards or median barriers, that would constitute the immune exercise of governmental discretion. If, on the other hand, they had decided to install cattle guards or median barriers wherever certain kinds of conditions existed and the failure to install them in a particular location was the result of a failure to determine that those conditions did in fact exist at that location, no exercise of judgment about governmental policy would be involved.

Stevenson at 14-15.

The court held that the State was not immune from liability. In so holding, the court stated that there was nothing in the record to suggest that the employees responsible for the decisions concerning the traffic signal made any policy decisions.

Whether the governmental entity will have discretionary immunity will boil down to how the decision was made to design and/or maintain the road. In some cases, the governmental entity will have no idea how the decision was made. In that case, discretionary immunity will not apply – there needs to be some evidence of how a decision was reached.

However, in other cases, for example, you may find that improvements were not made to a particular intersection because the County decided as a policy matter to spend its limited resources on funding mental health clinics and not on road maintenance. Such a decision would be protected by discretionary immunity.

Making a determination whether discretionary immunity applies most likely will entail undertaking some discovery. You will want to ask for all documents concerning the design and maintenance of the road. Depending upon what the documents show, you may also need to take the deposition of the person most knowledgeable about the design and maintenance of the road.

The governmental entity may also try to raise a statute of limitations defense if the road was built more than 10 years ago. A claim regarding negligent on-going maintenance is not barred by the statute of ultimate repose. You will want to find out how often maintenance is performed and whether there have been any design changes in the 10 years prior to the accident.

A claim against a governmental entity arising from the negligent design or maintenance of a road will require some extra work to prove, but it can often mean the difference between paying 100% of the damages or paying far less. ❖

— Please direct any questions in this area of law to the author, Lori DeDobbelaere, at 503-768-9600, or by email to lori@lerlaw.com.