GOVERNMENTAL LIABILITY FOR SIGNS AND SPEEDS

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I. DISCRETIONARY FUNCTION IMMUNITY AS APPLIED IN CLAIMS OF NEGLIGENCE IN ROAD SIGNING, MARKING OR CONSTRUCTION.

Beginning with the 1988 Supreme Court decision in Peavler v. Board of Commissioners of Monroe County, 528 N.E.2d 40 (Ind. 1988), Indiana courts have retreated from an expansive view toward the scope of statutory immunity, as afforded by the Indiana Tort Claims Act, at least in the context of road claims involving allegations of negligence in signing, marking, maintenance or construction. The broad interpretation of statutory immunity has begun to erode, as the courts have narrowed or placed restrictions upon immunity for "enforcing a law," for ice and snow on roadways or sidewalks, for the acts or omissions of non-governmental employees, or for initiation of judicial or administrative proceedings: each has been construed by the Supreme Court or Court of Appeals in a way that further restricts the availability of immunity as a defense to various claims in tort.

Perhaps no class of claims has been adversely affected, from the defendant's standpoint, as has been negligence claims against governmental entities, predicated upon alleged defects in signing, marking or road construction. Discretionary function immunity, once readily available as a shield against claims predicated upon the failure to sign or mark roadways, became severely restricted in its application with issuance of the Peavler decision. Yet discretionary function immunity still has application, particularly in claims which assert negligence on the basis of the entity's failure to act legislatively, or to undertake a public improvement, even in the absence of an evidentiary record sufficient to fulfill the onerous Peavler test.

For most attorneys involved in the defense of tort claims against governmental entities, discretionary function immunity traditionally has been applied in claims asserting negligence in road design or


2There is still immunity for natural accumulations of ice or snow on roadways and sidewalks, but not if the entity had "time and opportunity" to remove the ice or snow. Van Bree v. Harrison County, 584 N.E.2d 1114 (Ind.App. 1992).

3Hinshaw v. Board of Commissioners of Jay County, 611 N.E.2d 637 (Ind. 1993) essentially removes any realistic application of Ind. Code 34-4-16.5-3(9).

maintenance, sidewalk maintenance, or in claims asserting the failure to undertake a particular public service or improvement. The focus of this section is on application of discretionary function immunity in tort claims involving roads and sidewalks.

Immunity presumes negligence, Peavler, 528 N.E.2d at 46, and therefore presumes the entity owed a duty of reasonable care, breached the duty, and that the breach was a proximate cause of plaintiff's injury. The purpose behind immunity is to afford non-liability status to the governmental entity, despite its potential negligence, for public policy reasons as embodied in the Tort Claims Act itself. If an immunity applies to the conduct complained of, the entity is simply not liable. State v. Taylor, 419 N.E.2d 819, 823 (Ind.App. 1981). Attorneys representing plaintiffs too often misconstrue immunity by arguing against its application on the basis that the entity owed a duty in tort. In the context of roads, governmental entities owe a duty of reasonable care in the design, construction and maintenance of their roadways, Indiana State Highway Commission v. Clark, 371 N.E.2d 1323, 1327 (Ind.App. 1978), but consideration of their entitlement to statutory immunity has little to do with duties in tort, nor whether it is fair to allow entities to escape liability where an immunity has application.

The Tort Claims Act provides governmental entities are immune from liability for discretionary functions of government:

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from:

* * *

6) the performance of a discretionary function

Ind. Code 34-4-16.5-3(6).

Peavler changed the law, particularly in the context of road claims, by requiring governmental entities show policy-oriented decision making in order to enjoy immunity. Most road claims involve allegations concerning the entity's failure to install a warning sign, a road marking, a regulatory sign, or involve allegations of negligence in the manner by which a particular road was constructed, signed or marked. Discretionary function immunity clearly has no application to maintenance claims, e.g., downed signs, see Board of Commissioners of Delaware County v. Briggs, 337 N.E.2d 852 (Ind.App. 1975), but its application may be broader than the Peavler test suggests. To understand the broader sweep of discretionary function immunity, as espoused here, it is important to first review the history of the courts' construction of the immunity, as derivative from common law.

A) History of Governmental Immunity.

Sovereign immunity was abrogated by the Supreme Court in 1972. Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). With sovereign immunity went the common law distinction based on governmental functions as opposed to proprietary functions. Technically speaking, sovereign
immunity applied only to the state, but counties, cities and towns also enjoyed immunity from many claims in tort until the late 1960s, when the Court of Appeals aban

Sovereign immunity, or simply governmental immunity, was adopted from English common law, but began to erode as early as the late 19th Century. City of Goshen v. Myers, 119 Ind. 196, 21 N.E. 657 (1889) (city subject to liability for poorly maintained bridge). The governmental/proprietary distinction was fashioned by the courts as a means of distinguishing traditional governmental functions from those functions or acts which were analogous to acts exercised by private parties. The entity was considered immune when exercising governmental functions, but not when performing proprietary functions. Campbell v. State, 284 N.E.2d at 735; City of Kokomo v. Loy, 185 Ind. 18, 112 N.E. 994 (1916). Duties administered for the public benefit, such as for public health, schools, or protection of property against fire, were considered governmental undertakings for which there was immunity. Peavler, 528 N.E.2d at 42.

The governmental/proprietary test, however, was never clearly enunciated by the Indiana courts, which were unable to establish definitive criteria for the test's application, resulting in opinions such as Brinkman v. City of Indianapolis, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967), transfer denied ("The governmental/proprietary rule, however, often produces legalistic distinctions that are only remotely related to the fundamental consideration of municipal tort liability"). Brinkman was followed by Klepinger v. Board of Commissioners, 143 Ind. App. 155, 239 N.E.2d 160 (1968), transfer denied, where the Court of Appeals made it clear that the governmental/proprietary distinction was to be abrogated in claims where immunity was asserted on behalf of a city or county.

The Supreme Court conceded, in 1969, that municipal corporations and counties were exempt from common law immunity, Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969), though the state continued to enjoy immunity for governmental functions until the Campbell decision in 1972.

The Campbell decision, while abrogating sovereign (or "governmental") immunity, noted that certain common law immunities, such as immunity for legislative decisions, must remain. Quoting Prosser, the court in Campbell suggested that "it was more or less obvious that some vestige of governmental immunity must be retained . . . [i]n several of the decisions abrogating the immunities, there was language used which reserved the possibility that there might still be immunity for 'legislative' or 'judicial' functions, or as to acts or omissions of government employees which were 'discretionary.'" Campbell, 284 N.E.2d at 737.

The Campbell court also suggested that "the proper forum for such argument is in the legislature," 284 N.E.2d at 737, and the legislature did in fact act by enacting the Tort Claims Act in 1974. Immunity for discretionary functions of government, as set forth in Ind. Code 34-4-16.5-3(6), is therefore subject to interpretation with this historical background in mind.

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B) Enactment of the Tort Claims Act and Adoption of the Discretionary/Ministerial Test.

Having abandoned the governmental/proprietary test as a basis for evaluating claims of common law sovereign (governmental) immunity, the courts then had to fashion a test for determining which functions of government are discretionary and therefore subject to immunity under 34-4-16.5-3(6). Were discretionary functions again to be viewed as governmental functions, as per the old test, or evaluated by some new standard? The new test adopted by the courts was the discretionary/ministerial test. This test was described in the 1919 decision in Adams v. Schneider, 71 Ind.App. 249, 255-56, 124 N.E. 718, 720 (1919), and has generally been construed as follows: a discretionary function requires judgment and choice as to what is proper and just under the circumstances, whereas a ministerial act is simply performed in a prescribed manner, without the exercise of judgment upon the propriety of the act. See generally, Rodman v. City of Wabash, 497 N.E.2d 234 (Ind.App. 1986); Coghill v. Badger, 418 N.E.2d 1201, 1211, n.9; Peavler, 528 N.E.2d at 43.

Under the discretionary/ministerial test, governmental functions involving choice, judgment or decision making were considered discretionary and subject to immunity, whereas ministerial acts, not requiring judgment, subjected entities to potential tort liability.

Applied in the context of road claims, discretionary function immunity, as construed under the discretionary/ministerial test, served as a shield against a variety of claims alleging negligence in failing to install signs or markings on roadways:

1) City of Tell City v. Noble, 489 N.E.2d 958 (Ind.App. 1986) (city's failure to install stop sign at intersection a discretionary act);
2) City of Indianapolis v. Constant, 498 N.E.2d 1308 (Ind.App. 1986) (city's decision not to install left turn arrow signal for southbound traffic while installing left turn arrow signal for northbound traffic a discretionary act);
3) Board of Commissioners of Steuben County v. Hout, 497 N.E.2d 597 (Ind.App. 1986) (failure to place warning signs at approach to a T-intersection a discretionary function);
4) DuBois County Bank v. City of Vincennes, 517 N.E.2d 805 (Ind.App. 1988) (city's failure to install warning signs at or near juncture of street and parking lot exit a discretionary act; See also dicta at page 808: decision to place curb markings at a particular location a discretionary act).

But see Court of Appeals' decision in Peavler v. Board of Commissioners of Monroe County, 492 N.E.2d 1086 (Ind.App. 1987) (failure to install a warning sign at a dangerous location may be a ministerial act).

These decisions, overruled or modified in large part by the Supreme Court decision in Peavler, rest on the general principle that a governmental entity had no absolute duty to provide signs, and that the exercise of such was discretionary. City of Tell City v. Noble, 489 N.E.2d at 963. The holdings rested on a distinction between the decision to install a sign at a particular location (a discretionary function) and the obligation to maintain the sign once in place. Board of Commissioners of Steuben County v. Hout, 497 N.E.2d at 599. The distinction was best described in Tell City:
After analyzing the above material, we find that the alleged negligent act in the instant case was Tell City's failure to erect traffic control devices at the intersection in question. We are not dealing with an assertion of faulty maintenance, or an assertion that the physical aspect of the signs did not meet the manual's specifications. Nor are we dealing with an assertion that the alleged negligent act was committed by a workman, by a maintenance crew foreman, or even by the director of the street department. We are dealing with an act of the governing body itself. Under Ind. Code 9-4, as discussed above, the decision to erect traffic control devices is to be made by ordinance of the city council and therefore the decision is legislative as well as penal in nature. Neither the statutes nor the manual create any mandatory duty in that regard, rather the how, what and where of traffic control device placement is addressed to the discretion of the city council. Such an act by a city council is both legislative and discretionary. Non-action is likewise is legislative and discretionary.

Therefore, under the plain meaning of Ind. Code 34-4-16.5-3(6) and (7), Tell City is immune from liability for its decision not to erect a traffic control device at the intersection in question. If Ind. Code 34-4-16.5-3(6) and (7) are not applicable here, we are at a loss as to where they would be applicable. A contrary decision would emasculate the tort claim immunity statute.

City of Tell City, 489 N.E.2d at 964 (emphasis added).
The court in Tell City went on to note that "we perceive that it was not the intent of the legislature to permit a lay jury to second guess the acts of local authorities." City of Tell City, 489 N.E.2d at 964.

Tell City essentially held that all signing decisions were subject to immunity, a holding predicated on the legislature's use of permissive language in Chapter 9-4 (now 9-21) in granting traffic control powers to local government: "Should the legislature have intended to make placing stop signs mandatory, it would have used the word 'shall' . . . of course it would have been impracticable for the legislature to do so, since the signing of streets and highways clearly requires judgment and discretion." City of Tell City, 489 N.E.2d at 961-62.

The rationale in Tell City was also described in City of Indianapolis v. Constant:
Tell City also set forth the statutory scheme governing the placement, legal effect, and enforcement of traffic control devices as provided by Ind. Code 9-4, the Uniform Act Regulating Traffic on Highways. Although the act has state-wide application, we noted that local authorities have the power, with respect to streets and highways under their jurisdiction, and within the reasonable exercise of police power, to regulate traffic by means of control signals. Tell City, supra, at 960. Indeed, no signal can ever be installed except by ordinance of a governmental entity.

City of Indianapolis v. Constant, 498 N.E.2d at 1310 (emphasis added).
This body of law, favorable to governmental defendants, was undermined by Peavler's abandonment of the discretionary/ministerial test, insofar as it was no longer law, after Peavler, that all signing or marking decisions were automatically subject to discretionary function immunity. However, there are important aspects of this pre-Peavler line of cases which still provide bases for discretionary function immunity, even post-Peavler. Decisions such as Tell City and Constant may, and should still be good law when dealing with claims based upon a failure to install regulatory signs, or where
comprehensive road sign ordinances exist. Further, warning signs must be viewed differently than regulatory signs or devices, at least for purposes of discretionary function immunity, and comprehensive road sign ordinances may, independently, provide a basis for discretionary function immunity.

C) Peavler and Adoption of the Planning/Operational Test.

In 1988, the Supreme Court accepted transfer in Peavler v. Board of Commissioners of Monroe County and in Board of Commissioners of Steuben County v. Hout, in order to resolve the issue of whether governmental entities were immune from liability for the exercise of discretionary functions, where the claims in negligence rest upon the entity's failure to install signs in the first instance. The court held that governmental entities were not immune absent a showing of policy-oriented decision making; that immunity was available only for planning or policy-making functions, not errors in judgment. In the words of the court, "the discretionary function exception insulates only those significant policy and political decisions which cannot be assessed by customary tort standards." Peavler, 528 N.E.2d at 45.

In other words, the failure to sign or mark a roadway will not invoke discretionary function immunity absent the entity showing that it specifically decided not to sign, where that decision involved policy considerations: "the governmental entity seeking to establish immunity bears the burden of proving that the challenged act or omission was a policy decision made by consciously balancing risks and benefits." Peavler, 528 N.E.2d at 46.

In an effort to fashion a test for determining "whether the function is the type intended to benefit from immunity," the court described various factors which "point toward immunity," 528 N.E.2d at 46:

1) The nature of the conduct --
   a) Whether the conduct has a regulatory objective;
   b) Whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
   c) Whether the conduct requires judgment based on policy decisions;
   d) Whether the decision involved adopting general principles or only applying them;
   e) Whether the conduct involved establishment of plans, specifications and schedules; and
   f) Whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.

2) The effect of governmental operations --
   a) Whether the decision affects the feasibility or practicability of a government program; and
   b) Whether liability will affect the effective administration of the function in question.
3) The capacity of the courts to evaluate the propriety of the government's action -- a) Whether tort standards offer an insufficient evaluation of the plaintiff's claim.

These various factors were adopted by the court as a means of evaluating discretionary function immunity under a new test adopted in Peavler, the planning/operational test, drawn from Federal Tort Claims Act litigation. Under the planning operational test, courts are to distinguish between decisions involving the formulation of policy, which are entitled to immunity, from decisions regarding only the execution or implementation of that policy, which are not entitled to immunity. Greathouse v. Armstrong, 616 N.E.2d 364, 366-67 (Ind. 1993).

The court did not suggest how many of the factors require proof in order to warrant application of discretionary function immunity, but the essential conclusion is that a challenged decision is subject to immunity if the decision resulted from a policy-oriented decision making process. If entities engage in that process, the courts may not judge the wisdom of their decisions, as that judgment is left to the political process.

This standard posed obviously difficult requirements for some entities to meet, particularly rural counties and smaller cities and towns. To begin with, many road claims do not involve a "challenged decision" at all, as the road in question may have never been signed at the location in question. Further, even if signed, the "decision" to install a certain sign at a certain location may have been made years ago, by certain unknown personnel, for reasons not entirely clear. Few signing decisions, especially on rural county roads, arose from conscious balancing of risks and benefits.

Burdened now with offering proof to satisfy the new factors under the planning/operational test, discretionary function immunity, at least in road claims based on negligence in signing or marking, retained only a shadow of its former scope. The court, under the new test, determined that neither Monroe County or Steuben County presented evidence showing their respective failure to install warning signs resulted from a policy-oriented decision making process:

The county did not present evidence that the T-intersection had been considered by the Board of Commissioners or that it was part of a policy process in which elected officials played a key role. It did not introduce minutes of board meetings where the need for a warning sign was rejected or present testimony of commissioners regarding the decision making process involved. It did not introduce a comprehensive ordinance, studies or surveys of the area in question which showed that this area had been evaluated and a warning sign had been deemed unnecessary.

The county presented no evidence from which we can evaluate the nature of the board's conduct in failing to erect a warning sign, the potential effect of liability on county operations, or the capacity of the court to judge the county's action. We cannot determine from this record whether the failure to erect a warning sign arose from a judgment based on policy considerations.

Peavler, 528 N.E.2d at 48.

The court remanded the two suits with the admonition that "if the county in either case can present
evidence that the commissioners engaged in a policy-oriented decision making process and determined, for whatever reason, that a warning sign should not be posted, the courts will not second-guess their judgment." 528 N.E.2d at 48.

Justice Pivarnik, writing in dissent, recognized the magnitude of the new burden of establishing policy-oriented decision making in signing claims:

The majority seems to infer that with respect to every point in every road and street in this state, whether it is a curve, a hill, an intersection, or any other type of terrain, the governing body must be able to show that it had an affirmative hearing and made express and affirmative findings that a sign was not necessary at that particular point. Obviously, this is a burden no governing body can hope to carry and certainly is not what the legislature intended. Peavler, 528 N.E.2d at 51.

In the words of Justice Pivarnik, "the effect of the holding of the majority is to virtually wipe out all governmental immunity . . . " 528 N.E.2d at 51.

Peavler clearly created new burdens for defense counsel in establishing an entitlement to discretionary function immunity, which burdens often cannot be met, at least in the context of warning signs. Regulatory signs, on the other hand, are installed by ordinance and deserve different consideration, as suggested even by the Peavler majority under note 2. Before discussing the impact of note 2, and the post-Peavler decisions, it is useful to review the statutory scheme and provisions of the Manual on Uniform Traffic Control Devices, in order to appreciate the different considerations which come into play in evaluating warning sign claims from those alleging a failure to post regulatory signs or markings which regulate traffic.

D) **The Statutory Scheme Under Ind. Code 9-21 and the Manual on Uniform Traffic Control Devices: Note 2 of Peavler.**

Chapter 9-21 of the Indiana Code contains a comprehensive statutory scheme governing the powers and authority of local units of government to regulate traffic on roadways, Ind. Code 9-21-1 through 4. Regulation of traffic is accomplished by use of regulatory signs or signals, such as stop signs, yield signs, traffic lights, markings on pavement prohibiting passing, etc. Regulation of speed is accomplished by speed limit signs, which are to be distinguished from advisory speed plates posted beneath advance curve warning signs or other warning signs, which plates warn the driver of a recommended speed through the curve or road condition which the driver is approaching.

The legislature has granted local units of government the authority to regulate traffic, by ordinance, through use of regulatory signs and devices. Ind. Code 9-21-1-3(b). Posting regulatory signs such as stop, yield, or speed limit signs requires the entity first enact an ordinance, authorizing the installation. Many entities have enacted comprehensive road sign ordinances which delineate four-way stop intersections, two-way stop intersections, yield sign installations, speed limits, etc. These comprehensive ordinances require amendment each time the entity elects to change a regulatory device, or lowers a speed limit.
The Manual on Uniform Traffic Control Devices has been adopted by statute, and governmental entities must follow the manual and its specifications when installing signs or markings. Ind. Code 9-21-4-1, 3. If roads are signed, adherence to the manual is required, Smith v. Cook, 361 N.E.2d 197, 200 (Ind.App. 1977), and the failure to adhere raises a maintenance issue not subject to immunity.\(^6\) The manual requires signs be visible, so claims involving signs shrouded by trees or growth involve potential violations of the manual and are not generally subject to immunity considerations. See Miller v. Indiana State Highway Department, 507 N.E.2d 1009, (Ind.App. 1987).

Regulatory signs are identified in Part II-B of the manual, and are generally regarded as signs which inform highway users of traffic laws or regulations, and which indicate the applicability of legal requirements which would not otherwise be apparent to the driver. Manual. Section No. 2B-1. Section 2B-1 provides regulatory signs require ordinance by local authorities, though it exempts one-way streets, dual-lane highways, ramp and restricted turn lane signs from the requirement of a supporting resolution or ordinance.

Section 2B provides "warrants" for installation of stop and yield signs, Sections 2B-5 and 8; for multi-way stops, Section 2B-6; and specific procedures for establishing or altering speed limits, Section 2B-10.12. Speed limits are generally established at the five mile-per-hour increment at or above the 85th percentile of the prevailing speed on the roadway, as established by speed sample and traffic count. Section 2B-10.12(h).

Warning signs, as distinguished from regulatory signs, are installed as an aid in alerting motorists to approaching road conditions, and generally serve the driver who is unacquainted with the road. Warning signs are described under Part IIC of the manual. Typical conditions or locations for consideration of warning signs are in advance of changes in horizontal alignment (curves and turns), severe changes in grade, dips, bumps, substantial changes in pavement width, such as narrow bridges, changes in roadway surface conditions, or at locations where advisory speeds are justified. Excerpts from the manual are contained in the appendix.

The failure to install warning signs, and the willingness of engineering experts retained by plaintiffs to offer opinions concerning the desirability of such signs, has resulted in a substantial body of litigation predicated on the notion that warning signs are required in advance of numerous road conditions in order to render the road reasonably safe.

Ind. Code 9-21 does not address warning signs, nor does the Uniform Manual provide that an ordinance or resolution is required for their installation. Regulatory signs control the flow of traffic; their violation constitutes a civil offense, penal in nature, Tell City, 489 N.E.2d at 964, a violation not only of the requirements imposed upon motorists under Ind. Code 9-21-8-1 et seq, but a violation of the ordinance itself.

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\(^6\) Violation of the manual is not, however, a basis for per se negligence; the manual does not create a statutory duty. Miller v. Ind. State Highway Dept., 507 N.E.2d 1009, 1012 (Ind.App. 1987).
A warning sign, on the other hand, imposes no obligation on the part of the driver; it merely warns him of a condition, and it is up to the driver as to whether he intends to alter his driving behavior in response to the warning. Again, the purpose of a warning sign is to alert drivers of conditions which may be unsafe, at least while traveling at prevailing speed, or conditions which may pose a problem for the unacquainted.

Governmental entities are free to install warning signs wherever they choose, without limitation in number, though the manual discourages too frequent use of signs. Entities are even authorized to fashion their own warning signs, not described in the manual itself. The manual only requires that warning signs be of the standard shape and color, and be placed in accordance with the requirements of the manual as to distance from the condition, and as to appropriate choice of sign in relation to the condition to be warned of.

Viewed in the context of a typical rural county, for example, it can be said that the county highway superintendent is free to install a warning sign in advance of a curve on a road, on his own volition, pursuant to his statutory authority. Ind. Code 8-17-3-2. No action on the part of the Board of Commissioners is required, no ordinance or resolution, no approval by legislative decision making.

But the same county superintendent has no authority to unilaterally install a stop at an intersection which was previously unmarked, or which was previously a two-way stop or two-way yield intersection. That decision requires an ordinance enacted by the Board of Commissioners, which ordinance directs the superintendent to install the required regulatory signs.

What are the implications of the distinctions between warning and regulatory signs and devices in the context of discretionary function immunity? The implications, in the view of this writer, are 1) comprehensive road sign ordinances pertaining to regulatory signs are sufficient to invoke discretionary function immunity; 2) the failure to install regulatory signs or devices, by ordinance, is still a function subject to immunity; 3) the failure to install a warning sign may still be subject to immunity, if addressed at a legislative level.

Footnote 2 of the Peavler decision illustrates how comprehensive road sign ordinances, which typically pertain only to installation of regulatory signs and devices, still serve as a basis for discretionary function immunity. Peavler overruled Hout and other prior decisions which held that signing decisions were discretionary as a matter of law, but distinguished those cases from City of Tell City v. Noble. 489 N.E.2d 958 (Ind.App. 1986), at note 2 of the decision, on the basis that Tell City did have a comprehensive ordinance which identified how intersections were to be marked with regulatory signs:

2. These cases are therefore distinguished from City of Tell City v. Noble (1986), Ind.App., 489 N.E.2d 958, where there was evidence that a comprehensive ordinance existed which delineated intersections which should be marked. The intersection in question was not
included in the ordinance. From this, we conclude that the city considered the intersection in question in adopting the comprehensive ordinance and determined that the intersection should not be marked. The wisdom of this decision cannot be reviewed by the courts.

Note 2 may be dictum, but the language of the footnote and the court's unwillingness to overrule Tell City suggests that policy-oriented decision making is established, as a matter of law, where 1) the entity had a comprehensive road sign ordinance delineating how intersections or other locations were to be signed by use of regulatory signs or devices and 2) where the location in question is specifically addressed in the ordinance itself.

Tell City involved an unmarked city intersection. The plaintiff alleged the city was negligent in failing to install a stop sign at the intersection, or at least some regulatory control. Yet the city enjoyed immunity, even if Tell City is examined again in light of Peavler, because it had an ordinance delineating intersections which should be marked, which ordinance deleted the intersection in question. Tell City, 489 N.E.2d at 959.

Critics of Tell City and of the too expansive reading of note 2 argue that it is not the mere existence of an ordinance which confers discretionary function immunity, but proof of the process by which the entity concluded that the location in question should not be marked. The process may be reflected in the language of the ordinance itself, or may be proven up by evidence of studies, surveys, board minutes, etc., as discussed in Peavler.

From the entity's perspective, however, all legislative decision making is, by its nature, policy-oriented decision making. Ordinances are clearly acts of the policy-making authority of the entity, but are they in fact policy-oriented decision making, i.e., "planning," or mere operational functions which take place under the guise of actual legislation? The defendant's response should be that a legislative function is a discretionary function. The legislature has determined that regulatory signs require ordinance, and therefore require legislation, i.e., policymaker-level action. The county superintendent of highways or street commissioner cannot install regulatory signs on his own authority. Where the legislature vests authority according to the discretion of the legislative bodies of local units of government, a discretionary function of government exists. This is the fundamental argument in Tell City, as distinguished from other signing scenarios as presented to the court in Peavler.

The impact of Tell City has been watered down by subsequent decisions, discussed infra, yet the fundamental argument remains that legislative functions are discretionary functions; that the Peavler factors provide more nothing more than a means of determining, on an evidentiary level, whether discretion was in fact utilized when confronted with scenarios which do not involve legislative decision making. In other words, if the challenged act or omission is not one which would necessarily require enactment of a law, the Peavler factors provide a means for assessing whether in fact the entity acted as though it were involved in formulation of law or policy.

The Peavler factors must be met in order to show an entity enjoys discretionary function immunity for not installing an advance curve warning sign, for example, but can be disregarded if the condition complained of is the absence of a stop sign, per Tell City, where the missing regulatory sign was previously addressed by comprehensive ordinance, even if the ordinance simply deleted the
intersection from any signing whatsoever. The ordinance is, in itself, evidence of policy-oriented decision making.

Peavler hints that legislative functions are discretionary functions, though no doubt the court had something more weighty in mind than the mere enactment of an ordinance authorizing installation of a stop sign. The court cited the Restatement of Torts:

This interpretation of the discretionary function exception also comports with the Restatement (Second) of Torts:

Even when a state is subject to tort liability, it and its governmental agencies are immune to liability for acts and omissions constituting

a) the exercise of a judicial or legislative function, or

b) the exercise of an administrative function involving the determination of fundamental government policy.

Restatement, supra, Section 895B(3).

Peavler concedes that under the planning/operational test, the type of discretion which may be immunized from tort liability is that "attributable to the essence of governing," 528 N.E.2d at 45, which legislative decision making clearly is, yet the court defines the inquiry as "not whether judgment was exercised, but whether the nature of the judgment called for policy considerations." 528 N.E.2d at 45. Plaintiffs may argue that merely deciding not to install a stop sign, even if done per comprehensive ordinance, does not confer immunity because such a decision does not involve the kind of policy considerations Peavler contemplates.

Yet Peavler, fundamentally, is really a decision about separation of powers; the separation of powers doctrine forecloses the courts from reviewing political, social and economic actions within the province of coordinate branches of government. Discretionary function immunity exists so that coordinate branches of government are not subject to scrutiny by judges or juries as to the wisdom of their performance. 528 N.E.2d at 44.

Discretionary function immunity under the Tort Claims Act is therefore inextricably tied in with the notion of separation of powers, and the purposes behind governmental immunity. At common law, governmental entities owed no duty to legislate, nor perform legislative functions, and could not be liable for negligence in the performance or failure to perform legislative duties or powers. Weis v. City of Madison, 85 Ind. 241 (1881); Stackhouse v. City of Lafayette, 26 Ind. 17 (1866); Vaughtman v. Town of Waterloo, 14 Ind.App. 649, 43 N.E. 476 (1896). Nor could a governmental entity be subject to liability for failing to enact an ordinance. Millett v. City of Princeton, 167 Ind. 582, 79 N.E. 909 (1907); Wheeler v. City of Plymouth, 116 Ind. 158, 18 N.E. 532 (1888); See generally, 57 Am.Jur.2d, Section 211, Municipal Tort Liability.

These common law rules are embodied more explicitly in subsection 7 of the immunities section of
the Tort Claims Act (immunity for "failure to adopt a law"), but apply as well in order to add
definition to the parameters of discretionary function immunity, in the context of immunity for
legislative acts. From the perspective of governmental entities, the Tell City court was right when
it announced that legislative acts are discretionary acts, as a matter of law. Tell City. 489 N.E.2d at
964.

The objective of defense counsel, when confronted with signing claims involving regulatory functions,
is to convince the court that Tell City and Peavler complement one another, each addressing specific
fact situations which require different considerations. That objective, however, is made all the more
difficult when confronted with decisions such as Board of Commissioners of Adams County v. Price,
587 N.E.2d 1326 (Ind.App. 1992), a post-Peavler decision.

E) Post-Peavler Decisions

Board of Commissioners of Adams County v. Price, 587 N.E.2d 1326 (Ind.App. 1992) is troubling
to defense counsel not so much for its holding, but for its use of language in relegating Tell City to
the scrap heap of overruled pre-Peavler decisions addressing discretionary function immunity.

Price involved an unmarked rural intersection, where a collision took place. Plaintiff alleged
negligence on the part of the county in failing to install stop signs. Adams County apparently did not
have a comprehensive road sign ordinance, as in Tell City, and attempted to defeat the claim by
proving up the Peavler factors, a fruitless exercise for most counties.

The county attempted to prove policy-oriented decision making by offering evidence that the Board
of Commissioners relied on a system of citizen complaints. The Court of Appeals, correctly, held that
mere "reactive" conduct does not amount to policy-oriented decision making; that the Board of
Commissioners had not arrived at a policy-oriented decision to not sign the particular intersection,
and noted that there was no evidence before the court such an ordinance, board minutes, studies, etc.
which showed the board had, in fact, elected not to sign the particular intersection.

The problem with Price is that Adams County argued on appeal that its case was analogous to Tell
City, because both involved unsigned intersections; that Tell City should therefore stand as authority
barring the claim. The Court of Appeals, in response, noted that Tell City was "superseded" by
Peavler. Price. 587 N.E.2d at 1329, and by the new Peavler test.

Judge Barteau's statement in Price is correct insofar as the absence of signage may no longer
automatically be subject to discretionary function immunity; Peavler did in fact "supersede" Tell City
(and other decisions) to that extent. But Peavler did not overrule Tell City with regard to recognition
of immunity in the face of a comprehensive road sign ordinance, a matter not even at issue in Price,
and to the extent Price holds that Tell City is overruled in all respects, the decision is wrong; Tell City
controls if the immunity issue turns on whether a comprehensive road sign ordinance exists, and if
that ordinance applies to the location or intersection in question. Indeed, the Supreme Court in
Peavler faulted Steuben County, in Hout, because "it did not introduce a comprehensive ordinance
.... " Peavler, 528 N.E.2d at 48.
Even in the context of warning signs, an ordinance may be sufficient to immunize the entity. In *Mullen v. City of Mishawaka*, 531 N.E.2d 229 (Ind.App. 1988), the plaintiff's vehicle left the roadway and the plaintiff sustained injury. She alleged the city was negligent in failing to install some type of warning sign at the particular location. The city offered the testimony of the city engineer, who testified that he established a comprehensive plan for installation of warning signs at certain locations within the city, and that the plan was put before the city council. The city council then passed an ordinance adopting the plan, installing the signs at the locations designated by the engineer, but not at other locations, including the one where the accident took place. The court held the passage of the ordinance, a legislative act, was in itself policy-oriented decision making, and that the city was therefore entitled to immunity for failing to put up a warning sign at that location. *Mullen*, 531 N.E.2d at 230-31.

In summary, the Peavler factors constitute a test by which the courts may evaluate the quality of evidence offered by the governmental entity to determine whether in fact discretion was exercised at a policy-making level, thereby warranting discretionary function immunity. Reference to studies, surveys, board minutes, etc. serve to show that, while no legislative action was taken, policy-oriented decision making was.

Where legislative action is undertaken, however, the Peavler factors are not applicable: the legislative decision serves as evidence of policy-oriented decision making in and of itself. This is the argument which defense counsel can and should promote, where available.

Other post-Peavler decisions do not address the precise issue of whether legislative functions equate with discretionary functions, but do illustrate how the courts have grappled with the Peavler factors. The decisions go both ways.

A very recent decision, *City of Crown Point v. Rutherford*, 640 N.E.2d 750 (Ind.App. 1994) involved a pedestrian injured in a slip and fall on a city sidewalk. The city offered evidence that it financed the rehabilitation of its sidewalks from two funds, a HUD program, and a 50-50 program designed to operate as a gap-filler to the HUD program. Under the 50-50 program, the Board of Public Works targets a particular area for sidewalk rehabilitation and the board and residents split the cost of sidewalk repairs. The trial court denied the city's motion for judgment on the evidence, concluding there was no evidence the city ever considered whether to repair the specific segment of sidewalk at issue, and therefore never engaged in the type of policy-oriented decision making required under Peavler. There was also no evidence of planning or budgetary considerations concerning the location in question.

The Court of Appeals reversed a judgment for the plaintiff, finding the trial court's characterization of the issue and its application of Peavler to be overly narrow. The real issue, according to the Court of Appeals, is whether Crown Point's management of its sidewalk rehabilitation program resulted from decisions involving the formulation of basic policy and from a balancing of risks and benefits. Applying the planning/operational test, the court concluded Crown Point's actions were of the general type to be shielded by immunity, as the city had instituted a comprehensive scheme to renovate its sidewalks. There was testimony regarding the decision to target school zones, children's play areas and other high traffic zones such as the town square, all of which was a sufficient showing by the city.
of discretionary decisions, even though the specific sidewalk area in question was not addressed at a policy-making level.

**City of Crown Point** represents a broader application of the Peavler factors than perhaps even the Supreme Court contemplated, but is consistent with another recent decision which applied discretionary function immunity in a fashion more customary to practitioners, *Voit v. Allen County*, 634 N.E.2d 767 (Ind.App. 1994).

In *Voit*, the plaintiff swerved and drove off a road in order to avoid another vehicle that was approaching left of center. She then lost control, sailed over a culvert and collided with the earth embankment on the opposite side of the ditch. The plaintiff sued on the theory that the county was negligent in failing to make needed improvements to the road. According to her expert, these included extending the culvert pipe from 5 to 10 feet, widening the traffic lanes, widening the shoulder, and installing guardrails. The court noted that allegations of a failure to update, improve or modernize a roadway directly implicate discretionary function immunity under subsection 6. The county made a showing that it engaged in a systematic process for determining what improvements were to be made to highways in the county, which occurred through the Director of Transportation Planning making recommendations for improvements to the Urban Transportation Advisory Board, which then made the ultimate decision on whether to accept or reject proposed improvements. The board would consider written recommendations, allocation of available resources, and then prioritized the recommended projects. Here, the board concluded that traffic projections did not show a need to widen or improve the road in question. This showing was sufficient to demonstrate that the county, through its Urban Transportation Advisory Board, consciously engaged in decision making regarding the types of improvements alleged in plaintiff's complaint, thus entitling the county to discretionary function immunity.

It should be noted that the systematic process for determining road improvements in Allen County, as well as the existence of the Advisory Board and Director of Transportation Planning, are typically absent from less populous counties, making the likelihood of a required showing under Peavler all the more difficult.

An analogous result is seen in *Cromer v. City of Indianapolis*, 540 N.E.2d 663 (Ind.App. 1989), where the plaintiff alleged the city was negligent for failing to cure a hazardous condition at an intersection of a county road and state highway by causing the county road to end in a cul-de-sac. The city, through its Department of Transportation, had received a recommendation that the county road be closed north of the state highway, but then considered the costs of closing the road, the availability of alternate routes, the absence of financial participation from the railroad and the apparent lack of cooperation from a neighboring county. The city elected not to implement the recommendation, and the court found the decision making process employed by the city was an executive function characterized by official judgment in weighing alternatives, competing priorities and budgetary considerations, and thus constituted a planning activity entitling the city to discretionary function immunity as to that claim. The court concluded the city was not entitled to discretionary function immunity, however, as to plaintiff's claim concerning the city's failure to install warning signs, as the city made no showing that it consciously balanced risks and benefits to arrive
at a decision not to place warning signs along the county road.

Other noteworthy decisions include *Gerbers Ltd. v. Wells County Drainage Board*, 608 N.E.2d 997 (Ind.App. 1993), where a 100 year storm caused extensive flooding to the property of private landowners, after the board had approved a request to fill a drainage ditch, which step, according to plaintiffs, caused the flooding to take place. The minutes of the Drainage Board reflected little conscious deliberation, but affidavits from former members recited a history of the board's encouraging commercial development along a roadway adjacent to the ditch, which affidavits supported the trial court's determination that the Drainage Board did in fact engage in conscious deliberation by weighing competing interests when allowing the drainage ditch to be filled, i.e., that a policy of economic growth outweighed any potential reduction in drainage capacity by filling the drain.

Also of note is *Greathouse v. Armstrong*, 616 N.E.2d 364 (Ind. 1993), where a motorcyclist was killed after colliding with a bull on a roadway, during early morning hours. A sheriff's department dispatcher was on notice of the fact that cattle were loose, and attempted to call the suspected owner of the cattle over a two-hour period, but failed to locate the owner. The dispatcher also failed to dispatch an officer to the location where cattle were loose, prior to the collision. The court held that the decision by the dispatcher not to immediately send a deputy to investigate was merely operational and not subject to discretionary function immunity, nor was the decision by the department to adhere to a policy of first attempting to call cattle owners to determine ownership before dispatching deputies. The court did find, however, that the sheriff's department owed no special duty to plaintiff's decedent, and thereby affirmed summary judgment for the sheriff's department.

**F) Immunity for Failing to Adopt an Ordinance**

Linked with discretionary function immunity, in road claims, is the immunity for an entity's "failure to adopt a law:"

A governmental entity or an employee acting within the scope of an employee's employment is not liable if a loss results from:

* * *

7) the adoption and enforcement or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.

Ind. Code 34-4-16.5-3(7).

Immunity under subsection 7 was severely restricted by the Supreme Court's 1993 decision in *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993), but only in the context of immunity for law enforcement activities, as the immunity has always been construed as a bar to claims which rest on assertion that a governmental entity failed to undertake a legislative act.

For example, governmental entities are immune from liability in claims which allege that an unsafe or dangerous speed limit was established on a certain road. Speed limits are established by legislative act of the governing body of the city, town or county. This is sufficient to provide statutory immunity

In *Quakenbush*, the Supreme Court held that immunity under subsection 7 did not apply in favor of a police officer who was allegedly negligent in the operation of a patrol vehicle. The court preserved, however, "law enforcement immunity" in favor of governmental entities with respect to attacks against the wisdom of their laws, rules or regulations, with respect to whether an ordinance should or should not govern, or with respect to claims predicated upon the failure to act legislatively:

In part, this is so because the scope of the phrase "adoption or enforcement of a law" used in Section 3(7) is not limited to traditional law enforcement activities such as the arrest or pursuit of suspects by police. Rather, in its broader (and correct) meaning, Section 3(7) applies to the decision of any governmental entity and its employees about whether to adopt or enforce any statute, rule or regulation. Thus, under Section 3(7), a city is immune from any decision it makes concerning legal action to end a strike by firefighters, *Boyle v. Anderson Firefighters Association* (1986), Ind.App., 497 N.E.2d 1073, 1077; immunity attaches to an administrative order from the Department of Natural Resources that a property owner stop construction of a dam, *State v. Taylor* (1981), Ind.App., 419 N.E.2d 819, 822-23; immunity attaches to the Department of Corrections and its employees for an investigation of attorney's activities, *Indiana Department of Correction v. Stagg* (1990), Ind.App., 556 N.E.2d 1338, 1341-42; immunity attaches to a municipality that issued a stop work order in the course of enforcing a zoning ordinance, *City of Seymour v. Onyx Paving Company* (1989), Ind.App., 541 N.E.2d 951, 958; and immunity attaches to a sanitation officer's enforcement of a local disposal ordinance, *Board of Commissioners of Hendricks County v. King* (1985), Ind.App., 481 N.E.2d 1327, 1331. All of the above activities relate to enforcement of or failure to enforce laws, rules or regulations by a governmental entity.

*Quakenbush*, 622 N.E.2d at 1287 (emphasis added).

Indeed, the holding in *Tell City* rested not only on discretionary function immunity, but on immunity under subsection 7 as well. There has been no change in judicial application of subsection 7 since *Tell City* was decided, and *Tell City*, *Cromer* and *Holiday Rambler* remain good law with regard to their consideration of this immunity. The same can be said of *City of Indianapolis v. Constant* and *DuBois County Bank v. City of Vincennes*, supra, both pre-*Peavler* decisions which rested on application of discretionary function immunity and/or immunity for adopting or failing to adopt a law. Both *Constant* and *DuBois County Bank* were pending on petition to transfer at the time *Peavler* was decided, yet the court denied transfer in each. Why? -- because the issue in *Constant* revolved around the failure to install a regulatory device, as did the issue of curb markings in *DuBois County Bank*.

Therefore, governmental entities are immune for failing to adopt laws, and installation of regulatory signs, markings and other devices which require ordinance may indeed be the types of activities which are subject to immunity for failing to adopt a law. Certain immunity provisions have been construed as a codification of common law, *Walton v. Ramp*, 407 N.E.2d 1189 (Ind.App. 1980), and subsection 7 conforms to the existing body of common law, described previously, which held that governmental entities owe no common law duty to perform legislative functions. Defense counsel should therefore
argue that subsection 7 applies to immunize governmental entities for their failure to adopt ordinances regulating traffic, i.e., for their failure to install stop signs, lower speed limits, etc. An ordinance stands on the same general footing as an act of the legislature. Pittsburg C.C. & S.L. Ry. Company v. Hartford City, 85 N.E. 362, 170 Ind. 674 (1908).

A good example is a hypothetical claim in which two vehicles collide at a blind hillcrest, at night, where the non-passing party joins the county on allegation that the county failed to establish a no passing zone; that had a no passing zone been established, the defendant-driver would not have passed at the blind hill, which hill he claims he could not see at night.

Ind. Code 9-21-4-13 governs installation of no passing zones, and provides:

A local unit that has responsibility for roads and streets may determine by an engineering and traffic investigation those parts of a road or street, including bridges, under the unit’s jurisdiction where overtaking and passing or driving to the left of the roadway would be especially hazardous. Upon making that determination, the local unit may, by ordinance, designate no-passing zones by appropriate signs or marks on the roadway.

The statute therefore requires an ordinance before the entity may establish a no-passing zone by signs or markings on the pavement. Thus, the entity’s failure to enact an ordinance establishing the no-passing zone falls squarely within the immunity for failing to adopt a law. Again, if a statutory immunity applies, the governmental entity is simply not subject to liability. State v. Taylor, 419 N.E.2d 819, 823 (Ind.App. 1981).

G) Summary

The Supreme Court has, since Peavler, consistently displayed a propensity toward narrow construction of the immunity provisions of the Tort Claims Act, the most recent pronouncement being the virtual abolition of "law enforcement immunity" in police-related claims. Quakenbush v. Lackey, supra; Kemezy v. Peters 622 N.E.2d 1296 (Ind. 1993); Belding v. Town of New Whiteland, 622 N.E.2d 1291 (Ind. 1993); Fries v. Fincher, 622 N.E.2d 1294 (Ind. 1993). Still, more than mere vestiges of governmental immunity remain, and the lower courts are not refusing to recognize application of statutory immunity where it is due.

Immunity for crashes involving police vehicles had no correlative at common law, but there are a number of common law rules and understandings which are codified in the Tort Claims Act, for example, the notion that there is no duty in tort for injuries arising from natural accumulations of ice or snow on streets or sidewalks. City of South Bend v. Fink, 139 Ind.App. 282, 219 N.E.2d 441 (1966); LaPorte Civic Auditorium v. Ames, 641 N.E.2d 1045 (Ind.App. 1994). This common law rule is codified now in subsection 3 of the immunities section of the Tort Claims Act, which confers immunity for temporary conditions of public thoroughfares which result from weather.

Discretionary function immunity, likewise, is really just a statutory choice of words for the old governmental immunity: immunity for governmental functions as opposed to "private" functions. Its historical and jurisprudential antecedents are long-standing, as is immunity for failing to adopt a
Attempting to fulfill the Peavler factors in road litigation often is an exercise in futility, especially in claims involving rural counties or small towns, which tend to operate on a haphazard level, without professional staff, boards or risk managers, and with few resources for activities such as studies, or recommendations. Most governmental entities, at least outside of the larger urban centers, do little more than attempt to maintain deteriorating roadway surfaces and re-erect downed signs. Many have no engineer.

The task of defense counsel therefore becomes one of finding immunity where it is available. Peavler, viewed properly, deters effective arguments in favor of discretionary function immunity in many claims, but not all. Comprehensive road sign ordinances may exist to provide a bona fide basis for immunity, as do legal arguments predicated upon the failure to undertake actions which, by statute, require legislation. The following checklist provides tips for investigating road claims from both the perspective of plaintiff and defendant, and may also be useful for drafting written discovery.

H) Checklist

Failing to secure immunity does not equate with liability, but the availability of immunity arguments must be explored and dealt with on motion for summary judgment. Remember immunity is an affirmative defense and must be pled as such, and the defendant, not the plaintiff, bears the burden of proof on the issue. However, immunity is a question of law for the court to decide -- it is never a jury issue, and immunity cannot be defeated on mere assertion that there exists material issues of fact. Where the facts are controverted, it is the role of the court, not a jury, to make findings of fact, Peavler, 528 N.E.2d at 46 n.1, and then determine whether, based on the facts, the governmental entity has carried its burden in establishing entitlement to immunity.

1) What is the nature of the act or omission complained of? Generalized assertions that a road or intersection is "dangerous" are insufficient, as the claim must be reduced to specific failings: absence of signage, absence of markings, improper location of signs, etc.

2) Is the claim actually one based on failure to undertake a major public improvement, e.g., that the road has no shoulder, or has too sharp a curve? If so, not only discretionary function immunity but design immunity under Section 34-4-16.5-3(16) may apply. See Voit v. Allen County, 634 N.E.2d 767 (Ind.App. 1994).

3) For the plaintiff, it is best to attempt to characterize the claim as one in maintenance, if possible, and therefore one involving the failure to undertake operational activities, exempt from discretionary function immunity.

4) Locate applicable ordinances, board minutes, or other writings which show consideration by the entity's legislative branch of various problems with its roads. For example, a plan to improve roads on a systematic basis, year in and year out, or a program whereby various roads receive treatment or improvement as monies become available, may be sufficient to satisfy discretionary function immunity as to certain claims.
5) Determine whether the entity assessed priorities, weighed budgetary considerations, or allocated resources, be it by passage of ordinance or otherwise, in determining whether to sign its roads.

6) If the entity has an engineer, find out if he has developed a systematic plan for addressing the county's road needs, including its signing needs, as he is required to do by statute, Ind. Code 8-17-5-6, and whether his plans or proposals were considered by the county board of commissioners, the city council or town board, and with what result.

7) Attempt to characterize the entity's conduct as a policy decision, if possible, by evidence showing the entity elected not to pursue improvements due to cost, manpower considerations, etc.

8) If decisions were made by vote of the legislative body of the entity, a split vote is all the more evidence that the body dealt with a bona fide political issue, as opposed to a mere operational issue.

9) Determine whether the omission complained of involved a regulatory objective, under Ind. Code 9-21.

10) Determine if the legislative body delegated policy-making decision making to other officials, such as a county superintendent of highways.

11) For the plaintiff, it is best to focus the claim on a failure to undertake the least expensive measure, e.g., putting up a sign as opposed to rebuilding a roadway, as the courts are prone to recognize immunity where the claim rests on the failure to undertake large public improvements.

12) Secure the accident history of the location in question by securing copies of prior reported accidents from the county sheriff or from the Indiana State Police, Central Records Division. Evidence of prior accidents at the location may be admissible at trial to show notice if the prior accidents arose at the same location, under similar conditions, from the same cause. State v. Fair, 423 N.E.2d 738 (Ind.App. 1981). But see State v. William, 423 N.E.2d 668 (Ind.App. 1981).

13) If the claim involves a downed sign, discover the evidence concerning actual or constructive notice. Governmental entities are not liable for road defects absent actual or constructive notice. Three hours actual notice has been held sufficient to permit a jury issue, Howard v. Trevino, 613 N.E.2d 847 (Ind.App. 1993), but absent actual notice, plaintiff still has to offer some evidence showing the sign to have been down for at least some time, in order to avoid summary judgment. Bodnar v. City of Gary, 629 N.E.2d 278 (Ind.App. 1994).

14) If the claim involves a pothole, road dropoff, or other pavement defect, determine if the entity was on notice of the defect and if it had in place a plan for systematically dealing with it as time and resources became available.
15) Determine the extent of the entity's road system, in miles. The magnitude of the burden in maintaining many miles of roadway can serve as a basis for arguing non-liability, where the entity effectively shows its methods of remedying defects were reasonable, in light of the number of miles of roadway under its jurisdiction. See Miller v. Indiana State Highway Department, 507 N.E.2d 1009 (Ind.App. 1987).

16) Encourage entity clients to adopt comprehensive road sign ordinances for their regulatory signs and devices, by establishing first an inventory of existing signage and then codifying their lawful installation by ordinance.

17) Encourage entity clients to evaluate warning sign requirements, marking requirements, or any other potential measures, to formulate plans for undertaking such measures, and then securing legislative body approval of the plans, as a means of securing discretionary function immunity.

18) Verify that the tort claim notice was served on the "governing body" per Section 34-4-16.5-7, meaning the board of commissioners, the county attorney, the mayor, the city council, the town board. Service of a tort claim notice on a sheriff, for example, is insufficient to show service on the board of commissioners, and will bar the claim as against the county. Hupp v. Hill, 576 N.E.2d 1320 (Ind.App. 1991).