IT'S ALL YOUR FAULT... OR IS IT?

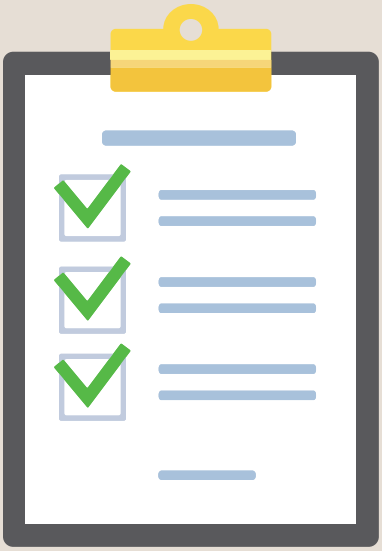
Public Entity Documentation Supports "No Notice" Claims Defense

BY JOHN ROY

SLIPS, TRIPS, FALLS AND VEHICLE accidents on municipal property are common insurance claims. The many causes for these incidents include potholes, raised sidewalks, and damaged, obscured or missing traffic signs.

While specific laws and immunities for governmental entities vary by state, a common thread throughout jurisdictions regarding liability for infrastructure defects is "notice and an opportunity to cure." This means that to prevail on a claim based on the defective condition of municipal property, a plaintiff must show that the entity had notice of the condition and sufficient time to fix the issue, but failed to do so.

The laws on what constitutes notice can also vary by jurisdiction, but the question is always the same – did the entity know (or should it have known) about the problem? Are there known problem areas that are not being inspected or maintained or not often enough?



A multi-layered system for reporting and logging potential liabilities and documenting the steps taken to investigate and correct issues provides critical information that can support the defense of a claim. The ability to show various methods of reporting and produce record keeping that proves there was no indication of a problem is far more convincing than simply stating there was no notice of it.

DOCUMENTATION CRITICAL TO CLAIM DEFENSE

When it comes to "should have known," courts often employ a reasonable care standard which is the degree of caution that an ordinarily prudent person – or entity in this case – would employ in a like or similar circumstance. This is often a jury question, which means going to trial, resulting in resources being redirected from the entity's day-to-day operations and the expense of legal representation.

In the early stages of litigation, defendants will be expected to respond to interrogatories answered under oath and produce documents—including emails—related to any similar incidents or complaints about the area in question. Answering "there are no similar incidents or complaints" is only credible if there is a system of tracking incidents and complaints that can be produced to show that there is nothing related to the plaintiff's complaint.

Interrogatories often include requests such as, "Please state each and every time in the six months preceding the incident an employee was within a six-block radius of the accident site." If the entity has no tracking system in place, even if the area in question is checked regularly, it will be a challenge proving it had either no notice or insufficient time to correct the defect. However, if the entity has a system of logging incidents or complaints, they would be able to attest to the fact that employees routinely check the area in question and an absence of an entry indicates no notice was provided because all complaints are logged and addressed.

It is also likely the entity would receive a request for any documents regarding the policies and procedures of any system or practice of inspection and routine maintenance. An answer of "none" to this request is almost certain to lead to liability as the public expects the entity to have a plan. Not having a plan in place would be considered unreasonable in just about any circumstance.

Responding to these requests, particularly those regarding previous incidents and complaints, could be extremely time consuming if it requires combing through boxes of time records and work logs. This task would be costly as staff would have to be diverted from their routine work, and it would certainly be expensive if defense counsel were to examine entity records. Proactively devising a system of record keeping that allows for efficient response to these types of requests is time well spent and will certainly save public funds.

Consider a claim that a street was in disrepair and caused an accident. How difficult would it be for the entity to determine when maintenance was last performed at or near the site? If the entity's defense is that it did not know about the situation, how would it prove that without documentation? Stating that no one remembers getting a call is not a defense posture. A person could claim that she reported it to the entity, creating a "he said/she said" scenario that would likely result in the claim being settled and possibly invite similar actions.

Training municipal employees to look for issues and report them is a good practice. However, relying on that practice as the sole source of information about potential liability issues will likely not meet the reasonable standard of care and is not a reliable defense against claims.

IMPLEMENT A MULTI-LAYERED SYSTEM

A multi-layered system for reporting and logging potential liabilities and documenting the steps taken to investigate and correct issues provides critical information that can support the defense of a claim. The ability to show various methods of reporting and produce record keeping that proves there was no indication of a problem is far more convincing than simply stating there was no notice of it.

Consider implementing a system that includes multiple methods for reporting issues and captures the data needed to establish notice:

- Perform routine inspections with checklists for municipal employee observation and procedures for reporting damage and deficiencies.
- Log all incoming calls and generate work orders for inspection of reported issues.
- Include a link on the entity's website for reporting issues which, like calls, are logged and initiate inspection.
- Document all inspections and all maintenance and repair work to municipal property, including start and completion dates.
- Store all municipal records as required by state law.

The practice of logging all calls and website submissions, including the date and time received, can strengthen a "no notice" defense of a claim. If someone claims to have reported an issue but the logs show no such entry, a claim denial is more credible and defensible.

If someone is injured at a park on a damaged piece of play equipment or by tripping on a defect on a walking path, the entity is not providing a strong defense against a claim by simply stating that the park turf is mowed at least once a week and employees did not see any issues.

However, providing documentation that the park was mowed at least once a week and each time employees followed an inspection checklist to document the conditions of the play equipment, walking paths, trees, ball fields, etc., significantly strengthens the defense.

IF IT ISN'T WRITTEN DOWN, IT DIDN'T HAPPEN

This may all seem routine and mundane, and it is.

It is the routine and mundane that is necessary in establishing there was no notice provided. It is the lack of information in records routinely kept that leads to the conclusion that notice didn't happen, proving the adage, "if it isn't written down, it didn't happen."

An effective system of documentation is one that logs and categorizes when notice was received and when and what action was taken. A software program that does this, such as Novo Solutions, ESRI and PubWorks, can be a valuable investment for entities.

Well-documented logs can also establish a defense of lack of notice. A spreadsheet that details what areas were inspected and when shows a commitment to being proactive about safety issues. There are sample forms and logs online that entities can customize for their needs. The PRIMA listserv and PRIMAtalk can also be resources for how other organizations have handled the issue.

An additional benefit of implementing a multi-layered system of reporting and logging potential liabilities is that it instills a culture of risk management within the organization. Promoting a culture of risk management that permeates the entire organization leads to fewer claims, injuries, and higher overall job satisfaction.

In defending a claim, it is difficult for defense counsel to "go to bat" for their clients when their clients haven't given them a bat. The strongest defense is solid documentation. Entities should work with their insurance agent, risk control representative and legal representation to design a multi-layered documentation system and then consistently execute the system, supporting a strong defense of no notice under the reasonable care standard.

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