

Special Duty and Governmental Immunity: The Law After Valdez


Andrew J. Orenstein, Esq.
Bradley M. Wanner, Esq.

County Attorneys' Association of the State of
New York – 2021 Annual Meeting

Cooperstown, New York
September 14, 2021


Special Duty and Government
Immunity: The Law After *Valdez*

Andrew J. Orenstein & Bradley M. Wanner
Harris Beach PLLC




Introduction

- Governmental immunity
- Special Duty Rule
- *Valdez v. City of New York*
- Post-*Valdez* Law



Governmental Immunity

- Common law doctrine that shields public entities from liability for discretionary actions taken during the performance of governmental functions



Governmental Immunity

- Governmental immunity can only attach if the defendant:
 - Timely raises the defense
 - Proves the alleged negligent act or omission involved the exercise of discretionary authority
 - Establishes the discretion possessed by its employees was exercised in relation to the conduct on which liability is predicated

HARRIS BEACH

Discretionary vs. Ministerial Acts

- Case law has differentiated between the kinds of actions that are shielded from liability

HARRIS BEACH

Discretionary Acts

- A discretionary act is conduct involving the exercise of reasoned judgment which typically could produce different acceptable results

HARRIS BEACH

Ministerial Acts

- Ministerial acts do not require the exercise of discretion

HARRIS BEACH
Attorneys at Law

Special Duty Rule

- To show a special relationship existed, a plaintiff must prove:
 - (1) An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
 - (2) knowledge on the part of the municipality's agents that inaction could lead to harm;
 - (3) some form of direct contact between the municipality's agents and the injured party; and
 - (4) the party's justifiable reliance on the municipality's affirmative undertaking.

Cuffy v. City of New York, 69 NY2d 255 [1987]

HARRIS BEACH
Attorneys at Law

The Law Before Valdez

- In 1929, Section 12-a of the Court of Claims Act was enacted, waiving New York's sovereign immunity
- Courts determined this waiver was not absolute

HARRIS BEACH
Attorneys at Law

Tango and Lauer

Discretionary acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found

- **Tango v. Tulevech**, 61 NY2d 34 [1983]
- **Lauer v. City of New York**, 95 NY2d 95 [2000]

HARRIS BLACH

Pelaez and Kovit

If a plaintiff can show a special relationship with the municipality, this is an exception to the rule that municipalities are immune from tort liability for discretionary acts

- **Pelaez v. Seide**, 2 NY3d 186 [2004]
- **Kovit v. Estate of Hallums**, 4 NY3d 499 [2005]

HARRIS BLACH

Conflicting Ideas

- **Tango/Lauer** say the special relationship exception applies to ministerial acts
- **Pelaez/Kovit** say the special relationship exception applies to discretionary acts

HARRIS BLACH

Resolving Conflicting Ideas

- *McLean v. City of New York*, 12 NY3d 194 [2009]
 - "If there is an inconsistency, we resolve it now: *Tango* and *Lauer* are right, and any contrary inference that may be drawn from the quoted language in *Pelaez* and *Kovit* is wrong."

HARRIS BEACH LLC
ATTORNEYS AT LAW

Valdez v. City of New York

- Valdez argued
 - A special relationship was formed because of the phone conversation between Plaintiff and the officer
 - The City breached its duty of care in negligently failing to arrest Perez

HARRIS BEACH LLC
ATTORNEYS AT LAW

Valdez v. City of New York

- Jury awarded \$9.93 million in damages
 - Found that the City was negligent and recklessly disregarded Plaintiff's safety
- The City appealed
 - Appellate Division reversed, with three judges finding there was not enough evidence to establish a special relationship
- Plaintiff appealed to the Court of Appeals

HARRIS BEACH LLC
ATTORNEYS AT LAW

Clarifications

- **Government Immunity**
 - Discretionary acts
- **Public Duty Rule**

HARRIS BEACH

Government Immunity

- **“A municipality must do more than merely allege that its employee was engaged in activities involving the exercise of discretion”**
 - Requires an analysis of the functions and duties of the actor’s particular position and whether it entails some exercise of discretion or judgment

HARRIS BEACH

Public Duty Rule

- **If a plaintiff cannot overcome the threshold burden of demonstrating the defendant owed the requisite duty of care, there is no need to address whether the governmental immunity defense attaches**

HARRIS BEACH

Valdez v. City of New York

- Court of Appeals found there was insufficient evidence to establish the existence of a special relationship between Plaintiff and the officer

HARRIS BEACH LLC
ATTORNEYS AT LAW

Valdez v. City of New York

- Since Plaintiff could not prove a special relationship existed, the court did not have to determine whether the governmental immunity defense applied

HARRIS BEACH LLC
ATTORNEYS AT LAW

Key Takeaway from Valdez

- The public duty rule and governmental immunity are separate doctrines
- There is a threshold inquiry plaintiffs must overcome before the question of whether the governmental immunity defense attaches is reached

HARRIS BEACH LLC
ATTORNEYS AT LAW

How has *Valdez* been treated since

- *Valdez* has been followed by New York State appellate divisions
- Has been cited in federal courts

HARRIS BEACH

First Department

- ***Ivan D. v. Little Richie Bus Serv., Inc.***, 162 AD3d 587 [1st Dept 2018]
 - Adopted holding in *Valdez* and found no special duty existed in this case
- ***Hepzibah v. City of New York***, 124 AD3d 442 [1st Dept 2015]
 - Adopting *Valdez* and *McLean*

HARRIS BEACH

Second Department

- ***Graham v. City of New York***, 136 AD3d 747 [2nd Dept 2016]
- ***Lewery v. City of New York***, 191 AD3d 855 [2nd Dept 2021]

HARRIS BEACH

Third Department

- **Feeney v. County of Delaware**, 150 AD3d 1355 [3rd Dept 2017]
 - Adopted holding in *Valdez*
 - Cited to *Mclean*
- **Trimble v. City of Albany**, 144 AD3d 1484 [3rd Dept 2016]
 - Discussed *Valdez* more in depth

HARRIS BEACH LLP

Fourth Department

- **Maldovan v. County of Erie**, 188 AD3d 1597 [4th Dept 2020]
 - Followed *Valdez* in declaring the fourth element of the special relationship test "critical"

HARRIS BEACH LLP

Second Circuit

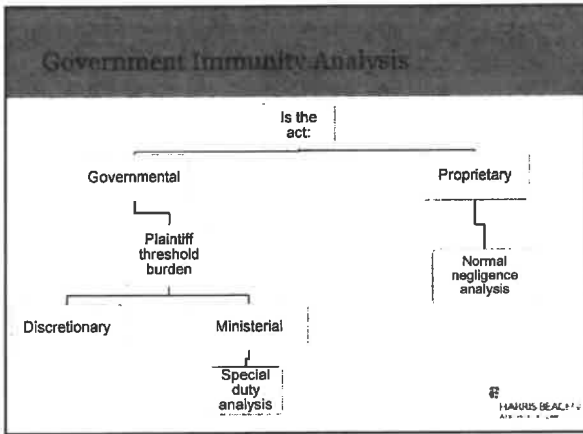
- **Ferreira v. City of Binghamton**, 975 F.3d 255 [2d Cir 2020]
 - Discretionary immunity applies unless actions violated internal rules or policies, or acceptable police practice
 - Special duty rule
 - Plaintiff argued did not apply because police actions violated acceptable police practice and City inflicted the injury
 - Second Circuit certified question to Court of Appeals on whether special duty applies to injury inflicted by municipality

HARRIS BEACH LLP

Takeaways

- Before *Valdez*, state of the law was unclear
 - Government immunity vs. special duty rule
 - Discretionary acts
- After *Valdez*
 - Courts have followed its holding, but is the law really clarified?

HARRIS BEACH



What if there was no exercise of discretion?

- *Haddock v. New York*, 75 NY2d 478 [1990]
 - The city did not exercise discretion
 - Liable for negligence

HARRIS BEACH

Limits on Governmental Acts

- Pothole law requires written notice of a hazard
- Roadway design is not a government function

HARRIS BEACH LLC

Questions?

- Andrew J. Orenstein
 - aorenstein@harrisbeach.com
 - 212-313-5473
- Bradley M. Wanner
 - bwanner@harrisbeach.com
 - 518-427-9700

HARRIS BEACH LLC

**County Attorneys' Association of the State of New York
2021 Annual Meeting**

Cooperstown, New York

September 14, 2021

Special Duty and Government Immunity: The Law After *Valdez*

Andrew J. Orenstein & Bradley M. Wanner

Harris Beach PLLC

Introduction

Municipalities and states can be sued by citizens for negligence. In New York, when a municipality is faced with a negligence suit, it may have the option to assert governmental immunity as a defense. The law of governmental immunity is complex and confusing, with courts across the state following different analyses to reach inconsistent conclusions. In 2011, the Court of Appeals aimed at clarifying this confusion in *Valdez v. City of New York*. To understand how to best defend against negligence claims and assert governmental immunity, it is important for counties to understand the history of the law before *Valdez* and how the law has changed since that decision.

This talk is intended to offer practical advice and an overview of governmental immunity and the special duty rule to attorneys who are charged with anticipating and defending these claims.

What is Governmental Immunity and the Special Duty Rule?

Governmental immunity is a common law doctrine that shields public entities from liability for discretionary actions taken during the performance of governmental functions. The purpose of this defense is to allow public servants to exercise their decision making authority without interference from the courts. Courts have recognized there is a need for this defense because there is a broader interest in giving government officers and employees freedom to exercise their judgment without fear of retaliatory lawsuits which outweighs the benefits to be had from imposing liability for an injury to a member of the public.

Governmental immunity can only attach if the defendant municipality: (1) timely raises the defense, (2) proves the alleged negligent act or omission involved the exercise of discretionary authority, and (3) establishes the discretion possessed by its employees was exercised in relation to the conduct on which liability is predicated.

The second element needed for governmental immunity to attach makes an important distinction between discretionary and ministerial acts. Generally, discretionary acts are shielded from

liability while ministerial acts will only be shielded if a special duty was owed to the plaintiff. A discretionary act is conduct involving the exercise of reasoned judgment which typically could produce different acceptable results. One example of a discretionary act is the placement of barriers at public events to manage traffic in furtherance of public safety. *See Devivo v. Adeyemo*, 70 AD3d 587 [1st Dept 2010]. Another example of a discretionary act is the posting of a deer sign. *See Ufnal v. Cattaraugus County*, 93 AD2d 521 [4th Dept. 1983]. Since these acts involve the exercise of reasoned judgment which could typically produce different acceptable results, they are discretionary acts that are protected by government immunity.

Ministerial acts are acts that do not require the exercise of discretion. Ministerial acts include docketing a judgment, retiring warrants, or reporting child abuse to the proper county CPU. *See Flagstar Bank, FSB v. State of New York*, 114 AD3d 138 [2d Dept 2013]; *Glowinsky v. Braun*, 105 AD2d 1153 [4th Dept 1984]; *Boland v. State*, 218 AD2d 235 [3d Dept 1996]. A ministerial act can be protected by government immunity, but will not be if the plaintiff can prove the municipality owed them a special duty.

To show a special duty, a plaintiff must show there was a special relationship between themselves and the government entity. To show a special relationship existed, a plaintiff must prove: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking. *Cuffy v. City of New York*, 69 NY2d 255 [1987]. The fourth element which requires "justifiable reliance" is "critical" in determining whether a special relationship exists.

The Law Before *Valdez*

In 1929, Section 12-a of the Court of Claims Act was enacted. This section waived New York's sovereign immunity. Courts determined that this waiver was not absolute, and decided a string of cases to articulate this.

In earlier cases, the Court of Appeals decided that discretionary acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found. *Tango v. Tulevech*, 61 NY2d 34 [1983]; *Lauer v. City of New York*, 95 NY2d 95 [2000]. Later on, the Court of Appeals took a different approach, deciding that if a plaintiff can show a special relationship with the municipality, this was an exception to the rule that municipalities are immune from tort liability for discretionary acts. *Pelaez v. Seide*, 2 NY3d 186 [2004]; *Kovit v. Estate of Hallums*, 4 NY3d 499 [2005].

In deciding these cases, the Court of Appeals had issued two lines of decisions that represented conflicting ideas. The earlier cases of *Tango* and *Lauer* concluded the special duty exception applied only to ministerial acts, while the later *Pelaez* and *Kovit* concluded the special duty exception applied to discretionary acts. The Court of Appeals attempted to resolve this inconsistency in *McLean v. City of New York*, 12 NY3d 194 [2009]. In that case, the Court

declared *Tango* and *Lauer* were correct, and the special duty exception applied only to ministerial acts. Against this backdrop, the court was confronted with *Valdez*.

Valdez v. City of New York, 18 NY3d 69 [2011]

In this case, Plaintiff had an order of protection against her estranged boyfriend, Perez. One day, Perez called Plaintiff threatening to kill her. Plaintiff called the police, and the police told her that Perez would be arrested immediately and that she should return to her apartment. The next day, Perez went to Plaintiff's home and shot her.

Plaintiff argued that a special relationship was formed because of the phone conversation between Plaintiff and the officer, and that the City breached its duty of care in negligently failing to arrest Perez. At trial, the jury awarded Plaintiff \$9.93 million in damages, finding that the City was negligent and recklessly disregarded Plaintiff's safety. The City appealed and the Appellate Division reversed, with three judges finding there was not enough evidence to establish a special relationship. Plaintiff appealed to the Court of Appeals.

The Court of Appeals recognized that even after *McLean*, there was still some confusion in the law, and used this case as an opportunity to make further clarifications. First the court reiterated that when both the public duty and government immunity doctrines emerge in a case, the rule is that government action, if discretionary, may not be a basis for liability, while ministerial actions may be only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.

The Court then turned to clarifying government immunity and its protection of discretionary acts. The Court stated that for governmental immunity to protect a discretionary act, the municipality cannot "merely allege that its employee was engaged in activities involving the exercise of discretion." Determining whether an act is discretionary "requires an analysis of the functions and duties of the actor's particular position and whether it entails some exercise of discretion or judgment." Further, the conduct giving rise to a plaintiff's claim must be related to that exercise of discretion. If the municipality can establish this, then governmental immunity is available and will shield the municipality from liability.

Next, the Court sought to clarify the public duty rule. Specifically, the Court made it clear that the public duty rule and governmental immunity are separate and distinct from one another. When bringing a negligence claim against a municipality, a plaintiff must overcome a threshold burden of demonstrating the defendant owed the requisite duty of care. If the plaintiff can overcome this burden, only then will the court address whether a government immunity defense attaches.

With these clarifications, the Court addressed the facts of *Valdez* and held that the Appellate Division was correct. The court reasoned no special relationship was formed by the phone call between Plaintiff and the officer because here was no indication that Plaintiff knew where Perez was calling from or that she gave police any information about his whereabouts. For the police to have made an arrest, Perez's location would have had to be discovered. The officer's statement could only be viewed as a promise to look for Perez. Further, the critical fourth element required

to prove a special relationship existed was not met. Plaintiff's own testimony undercuts this element, as from prior dealings with the domestic violence unit, she knew they would call her when an arrest was made. She received no such phone call in this case. Since Plaintiff was unable to prove a special duty existed, the Court did not have to determine whether government immunity applied.

How Have Courts Treated *Valdez*?

Since *Valdez*, other New York state and federal courts have generally followed its ruling with no criticisms. While all courts have adopted the holding and clarifications made in *Valdez*, not all courts have properly followed the analysis set forth.

First Department

The First Department has adopted the holding from *Valdez*, as shown by *Ivan D. v. Little Richie Bus Serv., Inc.* and *Hephzibah v. City of New York*. In *Ivan D.*, Plaintiff was walking to school when he was struck by a school bus owned by the defendant. Normally, there was a crossing guard on duty at that intersection, but the crossing guard called out sick that morning. The court found that no special duty existed because there was no direct contact between the city and plaintiff before the accident. Further, the crossing guard's greetings to Plaintiff and the fact that Plaintiff relied on the guard's instruction was insufficient to create a special duty. As articulated in *Valdez*, the court did not address whether government immunity applied and the claim was dismissed. *Ivan D. v. Little Richie Bus Serv., Inc.*, 162 AD3d 587 [1st Dept 2018].

In *Hephzibah*, Plaintiff alleged she suffered injuries when she was knocked over on a crowded sidewalk during a police chase. The plaintiff alleged the police action was negligent and in reckless disregard for the safety of pedestrians. The court first identified police action as a discretionary act which was protected by governmental immunity. However, the court went on to say that even if this was a ministerial act, Plaintiff failed to show a special relationship existed. The claim was dismissed. *Hephzibah v. City of New York*, 124 AD3d 442 [1st Dept 2015]. In this case, the court did not exactly follow *Valdez* as they did not first look to whether a special duty existed.

Second Department

The Second Department has also generally followed the holding in *Valdez*. In *Graham v. City of New York*, Plaintiff went to the police station to report her husband for violating an order of protection she had against him. Her husband was taken to jail and released two days later. When Plaintiff learned of his release, she went back to the station to request a police escort to her apartment, saying she was afraid for her life. The police denied her request, and when she went home her husband was in the apartment and attacked her. Plaintiff's friend called 911 and the police arrived. The police shot and killed Plaintiff's husband while he was attacking her with a knife. The Court followed the analysis set out in *Valdez* and first looked to whether a special duty existed. The court found there was no special relationship, and the claim was dismissed. *Graham v. City of New York*, 136 AD3d 747 [2d Dept 2016].

In *Lewery v. City of New York*, Plaintiff was an employee of the NYC Department of Sanitation and was working to clean up debris from Hurricane Sandy. In the course of this work, Plaintiff stepped on a downed power line and collapsed. The court followed *Valdez*'s two part analysis and found that since an employer-employee relationship existed, Plaintiff was not a general member of the public. Therefore, a triable issue of fact existed as to whether a special duty existed. The court also found this did not seem to involve discretionary actions. Plaintiff's claim was able to go forward. *Lewery v. City of New York*, 191 AD3d 855 [2d Dept 2021].

Third Department

The Third Department has also followed the analysis in *Valdez* since its decision. In *Feeney v. County of Delaware*, the Plaintiff was assaulted and injured by a man police officers brought to the hospital. The court found first that there was no special duty because the man was not in police custody at the time of the assault. The court continued to the second step of the analysis anyway, noting that the act of not restraining the man was discretionary, protected by government immunity. *Feeney v. County of Delaware*, 150 AD3d 1355 [3d Dept 2017].

In *Trimble v. City of Albany*, the fire department put out a fire in Plaintiff's home, but did not fully extinguish some embers. This caused the fire to rekindle and destroy Plaintiff's home. The court found Plaintiff raised a triable issue of fact as to whether a special duty existed. The court then noted that this could not be dismissed based on government immunity because, focusing on the conduct on which liability is predicated, the court cannot conclude that the conduct involved the exercise of reasoned judgment which could produce different acceptable results. *Trimble v. City of Albany*, 144 AD3d 1484 [3d Dept 2016].

Fourth Department

Valdez has also been followed by the Fourth Department. In *Maldovan v. County of Erie*, Plaintiff sued to recover damages for Plaintiff's decedent after she was killed by her mother and abused by her half-brother. The court found no special relationship existed because the fourth "critical" element of justifiable reliance was not proven. Plaintiff could not have relied on any affirmative undertaking by the county. Alternatively, the court stated the county was entitled to the protection of government immunity because the actions of caseworkers are discretionary. *Maldovan v. County of Erie*, 188 AD3d 1597 [4th Dept 2020].

Federal Court

In *Ferreira v. City of Binghamton*, Plaintiff was shot in the stomach while the police executed a no-knock search warrant. The Second Circuit reiterated the holding from *Valdez*, acknowledging that the special duty rule operates independently of government immunity. In this case, the court found immunity did not apply because although police action is discretionary, these actions violated acceptable police practice. *Ferreira v. City of Binghamton*, 975 F3d 255 [2d Cir 2020].

With respect to special duty, the Second Circuit correctly rejected Plaintiff's attempt to conflate the discretionary immunity analysis with the special duty analysis. However, the court found conflicting guidance as to Plaintiff's second argument – that special duty did not apply because the injury was inflicted by the municipality as opposed to a third party. The Second Circuit also

struggled with the City's suggestion that a special duty was required, finding that such an extension of the special duty requirement could essentially return the law to sovereign immunity.

Therefore, the Second Circuit certified the question of whether special duty applies when the injury is inflicted by the municipality to the Court of Appeals, which accepted the certification in October 2020. The appeal is fully briefed and awaiting argument.

Takeaways from *Valdez*

Before *Valdez*, the state of the law of government immunity and the special duty rule was unclear, particularly as to whether the doctrines were separate or intertwined. *Valdez* clarified that the doctrines operate independently of one another, and that if a special duty does not exist the inquiry can end there.

Valdez also clarified what it means to perform a discretionary act. A discretionary act has to involve some kind of exercise of judgment to be afforded protection. Most courts cite to the language from *Valdez* that a discretionary act may be protected by government immunity if it can typically produce different acceptable results.

However, it is unclear if *Valdez* really clarified the law. While courts have adopted the holding and have begun following the clarifications made in that case, not all courts have properly followed the analysis from *Valdez*. *Valdez* requires a plaintiff to overcome a threshold burden of proving the requisite level of care existed by showing that there was a special duty. However, in *Hephzibah* and *Ferreira*, the courts did not do this, and instead first determined whether the act was discretionary or ministerial. As more courts address negligence lawsuits against municipalities, it will become clearer whether *Valdez* truly clarified the law of government immunity.

Government Immunity Analysis

When a court is faced with a negligence suit that raises issues of government immunity and special duty, the court will likely follow the analysis from *Valdez*. First, the court will categorize the act as governmental or proprietary. If the act is proprietary, the court will continue with a classic negligence analysis.

If the act is governmental, *Valdez* is triggered. The court will first determine whether the plaintiff met their threshold burden of showing the requisite level of care existed. If the plaintiff fails to meet this burden, the inquiry into the claim ends there.

If there is a special duty, the court will determine whether the act is discretionary or ministerial. If the act is discretionary, the municipality will be protected by government immunity and the claim will be dismissed. However, if the act is ministerial, the municipality may not be protected if a special duty existed.

Governmental versus Proprietary Acts

An important initial distinction in a government immunity analysis requires a determination of whether an act is governmental or proprietary. Government functions are generally those that

benefit the public at large. One example of a government act is a medical examiner's performance of autopsies and preparation of reports. *Lauer v. City of New York*, 95 NY2d 95 [2000]. The placement of children in foster care or group homes is also a governmental act. *Kochanski v. City of New York*, 76 AD3d 1050 [2d Dept 2010]. Other examples of government acts include a municipality's control and management of education matters, the rendering of emergency services such as ambulances, firefighting, the issuance of permits, and control of street lights.

Certain proprietary acts are non-governmental by nature. For example, medical care given in public hospitals is a proprietary act. The operation of motor vehicles is also a proprietary act. It is a proprietary function of government entities to maintain their buildings in a reasonably safe condition. Finally, the maintenance of sidewalks, roads, trees, water mains and sewers have been considered proprietary functions. A negligence claim resulting from proprietary acts is subject to a normal negligence analysis.

What if the act was discretionary, but no discretion was exercised?

Sometimes, an act itself may be considered discretionary, but there was no exercise of discretion performed. This situation is illustrated by *Haddock v. New York*, a case decided before *Valdez*. *Haddock v. New York*, 75 NY2d 478 [1990]. In *Haddock*, Plaintiff was attacked by Johnson, an ex-convict working as a park employee for the City. Johnson lied to the City and said he was never convicted of a crime. The City eventually got hold of his criminal history and learned he had been convicted of multiple crimes. However, the city did nothing with this information.

The Court of Appeals began its analysis by noting that it was a governmental act to retain an employee. The court then began a government immunity analysis and found the city could not be protected because there was no exercise of discretion. There was no indication that before the attack on the plaintiff the city made any effort to comply with its own procedures for hiring employees or made any judgment at all when it learned Johnson had a criminal record and lied about it. The city was liable for negligence.

Haddock reveals that where there is no exercise of discretion, the court will look to normal negligence law to determine whether the city is liable.

Limits on Governmental Acts

Some governmental acts have certain laws and requirements that limit their ability to receive immunity. For example, pothole law requires that there be written notice of a hazard. If there is only constructive notice, a municipality may not be covered by governmental immunity. Similarly, roadway design is not a government function, so the ability to receive immunity is limited.

Conclusion

Before *Valdez*, the law of governmental immunity and the special duty rule was confusing and inconsistently applied across New York courts. *Valdez* sought to clear up this confusion and make final clarifications as to how government immunity and the special duty rule relate to one

another and when the immunity can apply. In understanding the analysis set forth in *Valdez*, municipalities can effectively prepare to defend against negligence claims.