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THE GOVERNMENTAL FUNCTION IMMUNITY
DEFENSE
IN PERSONAL INJURY CASES; AN ANALYTICAL
TEMPLATE

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The landmark 2009 case of *McLean v. City of New York*¹ fortified the shield of governmental immunity. In the wake of *McLean*, several Appellate Division and even Court of Appeals cases have continued to refine the contours of this multi-layered defense, which is far more complex than most defenses in personal injury cases. Its complexity cries out for a clear, orderly analytic tool for testing whether the defense does or does not apply on a particular set of facts.

The step-by-step template below is meant to serve as such a tool. Although the steps can be analyzed in almost any order, most cases easily lend themselves to the logical and sequential analysis outlined below.

STEP ONE: Governmental or Non-Governmental Defendant?

The first step in analyzing whether the governmental immunity defense is applicable is deciding whether the defendant is a governmental entity or a non-governmental entity. Only governmental entities can assert the governmental immunity defense. “Government” includes New York State and all its subdivisions and agencies, including “public corporations”, which includes municipal corporations (county, city, town, village and school district) district corporations and public benefit corporations (General Corporations Law § 66). If the defendant is not a governmental entity, the governmental function immunity defense must fail. If defendant is a governmental entity, move to step two.

STEP TWO: Acting in Proprietary or Governmental Capacity?

Even where the defendant is clearly a governmental entity or actor, the governmental immunity defense raises its head only when the government is acting in its “governmental” function as opposed to its “proprietary” function. Step Two consists of determining whether the governmental defendant (or its employee) was acting within its “**proprietary**” or “**governmental**” capacity when it allegedly caused the injury or harm.

What is a “**proprietary**” function? Modern governments have assumed many functions that in “the old days” were performed by private enterprises. As one Court has put it,

governmental agencies engage in “functions . . . as proprietor and operator of a number of activities formerly and in some instances still carried on by private enterprise”.² A government entity acts in a proprietary capacity when the “governmental activities essentially substitute for or supplement ‘traditionally private enterprises’”.³ Examples of well-established “proprietary” functions of government include owning and renting out real property, in which case the government is wearing its *landlord* hat⁴; providing medical or psychiatric care, in which case the government wears a *physician* hat⁵; owning and operating a school, in which case it wears a *parent* hat rather than a governmental one *vis-à-vis* its students⁶ and driving motor vehicles⁷.

The list of proprietary functions is seemingly endless. In addition to those listed above, for example, these acts by government have been deemed proprietary functions: The failure to lock the dormitory's doors⁸ and the failure to protect those in a city hospital from intruders.⁹

In contrast, most traditional governmental functions involve – in one form or another – *public* security (not just security that a landlord would provide). A governmental agency or actor will be deemed to have been engaged in a **governmental** function when its acts are “undertaken for the protection and safety of the public pursuant to the general police powers”.¹⁰ Examples of well-established “governmental” functions include the exercise of police authority¹¹; providing firefighting services¹²; issuing building permits and certificates of occupancy and other such certificates indicating inspections for public safety¹³ and boat inspections for private tour boats;¹⁴ providing security to the public by removing juveniles from the community and placing them in public confinement;¹⁵ security/anti-terrorist operations at the World Trade Center¹⁶; certifying compliance with fire safety codes;¹⁷ and garbage collection.¹⁸ In addition, the following actions have been deemed “governmental”: governmental decision to retain a city park employee with a criminal past¹⁹ and the allocation of security resources at a government-owned airport.²⁰

If it is found that the alleged negligent act or omission that caused plaintiff’s injury was among the government’s “proprietary functions” then the government stands in the same position as a private defendant.

Yet it is not always clear which hat (proprietary or governmental) the government is wearing. **The fuzzy area between “governmental” and “proprietary” functions is particularly troubling for our courts in cases of criminal assaults at government owned properties.** In such “mixed” cases, the Courts employ a "continuum of responsibility" test, which is described like this:

A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions.

This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.²¹

The relevant inquiry is not whether the governmental entity *generally* acts in a governmental or proprietary capacity, but, rather, whether the *particular act or omission* that allegedly caused injury or death arose from a proprietary or a governmental function of the entity.²² To pinpoint a spot along the proprietary-governmental continuum where a complained-of act should be categorized, courts must examine “the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred”.²³ Depending on the facts, courts have found similar acts or failures to act either “governmental” or “proprietary” in nature.²⁴

If the government is acting in its proprietary capacity, then there is no governmental immunity. If, on the other hand, the government or its employee or agent is acting within his or her governmental capacity, move to Step Three.

STEP THREE: Did defendant have a “duty” to plaintiff?

“Lack of duty” is not technically part of the “governmental function immunity” defense, but rather a defense grounded in the very basic tort law proposition that an injured plaintiff may sue only if the defendant owed her a duty. The Court of Appeals has stated that it will examine “duty” before examining the governmental immunity defense proper.²⁵

In most cases, in Step Three you will need to decide whether the government owed a “special duty” to the plaintiff beyond the general duty to the public at large. The “special duty” can be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official’s voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.²⁶

The second method of establishing a “special relationship” with a governmental actor is the most commonly litigated. To succeed, the plaintiff must meet all of four requirements: (1) an

assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise.²⁷

A pre-*McLean* line of cases, including Court of Appeals cases, drew a distinction between governmental *misfeasance* and *nonfeasance*. If a government's agent (e.g., police officer, clerk, housing inspector) caused harm to a plaintiff through his or her *misfeasance* (such as, for example, a police officer shooting his gun off in a crowd) the government could be held liable for the officer's negligence regardless of whether a "special" duty was established. If, on the other hand, the alleged negligent act amounted to *nonfeasance*, in the sense of negligently failing to provide governmental services or to enforce a statute or regulation (for example, failing to provide police protection or firefighting services or to enforce housing regulations) then plaintiff had to show a *special* duty. This distinction, however, appears to have been annihilated by a footnote in the Court of Appeals in *Applewhite v. Accuhealth, Inc.*, which states that, "contrary to the parties' arguments, our precedent does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis."²⁸ Thus, both nonfeasance and misfeasance are now subject to the same "special duty" requirement.

If a special duty to the individual plaintiff is found, then the actions of the government officer will be examined. And so you must pass to Step Four.

STEP FOUR: Was the Complained of Action or Failure to Act Ministerial or Discretionary?

The next step is to decide whether the government actor's action or failure to act was "ministerial" or "discretionary". If you are representing an injured plaintiff, you want the governmental actions or omissions that caused the injury to be deemed "ministerial". That's because if the governmental actions or omissions were "ministerial" then the governmental immunity defense fails, but if they were "discretionary" (and the government exercised that discretion) the immunity defense *always* applies, even if the governmental actor was acting in bad faith or maliciously.²⁹

Deciding whether the governmental actions or omissions are "ministerial" or "discretionary" can be taxing, even more so than deciding whether the government functions were proprietary or governmental. Even the definitions of "ministerial" and "discretionary" from the case law are thorny: "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory

result”.”³⁰ “If [the] functions and duties are essentially clerical or routine” then they are “ministerial”.³¹

Yes, the line between discretionary and ministerial is blurry.³² There are no hard and fast rules, only guidelines. One must consider: (1) Whether the decision or action appears to require an exercise of choice based on expert judgment or matters of policy and (2) whether the decision or action requires the exercise of reasoned judgment of which there are different acceptable results. If such judgment is required, then that act or decision will probably be deemed discretionary, and thus cloaked in governmental immunity.³³

Another way of looking at it is this: If the actor's decision was not capable of producing different "acceptable" results, but rather required adherence to a strict governing rule or standard with a compulsory result, then the act is likely to be deemed ministerial.³⁴

Be careful, however, when conducting this discretionary/ministerial analysis: In one sense, all decisions and actions can be said to be “discretionary” in that there are alternatives to choose from. But in a legal sense, decisions or actions are not "discretionary", for governmental immunity purposes, when there is really only one acceptable alternative. In marking the distinction between discretionary and ministerial acts, the Court of Appeals has noted that: “[e]ach case must be decided on the circumstances involved, the nature of the duty, the degree of responsibility resting on the officer, and his position in the municipality's table of organization.”³⁵

Examples of governmental actions found to be “discretionary” include: a supervisor of the Probation Department's Intake Unit refusing to detain children for appearance before a Judge and instead releasing them to their mother;³⁶ issuance of burning permits;³⁷ issuance of concert permits;³⁸ wrongful discharge of civil service employee;³⁹ filing a certificate of incorporation by Secretary of State's employees;⁴⁰ and decisions made by police or firefighters regarding where and how to deploy their resources.⁴¹

Examples of governmental actions that have been deemed ministerial, i.e., actions where the government actor was held to have no discretion, include: prison official's duty to revoke the right of a corrections officer to carry a weapon based on prior misconduct in use of a weapon and violation of internal police⁴², court clerk's duty to retire an arrest warrant;⁴³ a prison official's duty to follow mandated protocols regarding delivery of medical care to prison inmates;⁴⁴ police department's duty to terminate employment of alcoholic and dangerous police officer;⁴⁵ court stenographer's transcript taking and filing duties;⁴⁶ duty to issue marriage license;⁴⁷ duty of Judge to certify a record.⁴⁸

It helps to look for some hard-and-fast rule that the government actor violated. The rule can be embodied in a statute, regulation, or even an internal agency policy.⁴⁹ A rule that must be followed is by definition “ministerial”, leaving the government actor no discretion.

If the action was *ministerial*, the governmental function immunity defense must fail. That’s because the *raison d’etre* of the defense is to allow government to exercise *discretion* without fear of lawsuits. Ministerial acts are non-discretionary and thus are not protected by the doctrine. If, on the other hand, the action or failure to act was *discretionary*, pass to Step Five.

STEP FIVE: Did the Government Exercise its Discretion Or Fail to Do So?

If the government actor had discretion *but did not exercise it*, then there is no governmental immunity at all.⁵⁰ That’s because the main purpose of the governmental immunity defense is to allow government to exercise its discretion -- its judgment -- without fear of being sued. But if the government is not going to even bother exercising its discretion, there is no useful purpose in applying the doctrine.⁵¹ Think of this as a “use it or lose it” rule.

You might assume that if the government agent *has* discretion to do something he or she would always *exercise* it. You’d be wrong. For example, in *Haddock v. City of New York*, the Court of Appeals held that governmental function immunity was unavailable to a municipality that failed to establish that the asserted negligence—the retention of an employee with a dangerous criminal background — was the consequence of an actual decision or choice. Instead, the proof showed that the municipality had failed to adhere to its own employee retention procedures and had not “made a judgment of any sort” upon learning that the employee had a criminal record and had lied about it.⁵² By failing to exercise the discretion it had, the City defendant had forfeited its governmental immunity defense.⁵³

A Note on Qualified Governmental Immunity: There is a little *cul de sac* to the issue of governmental immunity that I have not yet discussed. Not all governmental discretionary decisions are afforded wholesale governmental immunity. Such immunity applies only to acts deemed of a judicial or quasi-judicial nature (as are, for example, actions regarding police protection). Some governmental actions are not deemed to rise to the level of judicial or quasi-judicial, such as highway planning and design. But such decision-making is nevertheless entitled to some degree of protection -- called *qualified immunity*⁵⁴ -- from judicial second-guessing. The seminal case is *Weiss v. Fote*.⁵⁵ Unlike *absolute* immunity, the *qualified* immunity shield can be pierced by a showing of bad faith or lack of any reasonable basis for the action.⁵⁶ The rationale for this partial immunity is judicial deference to the expertise of coordinate branches of government in their performance of planning and design decisions.⁵⁷ The “qualified immunity” line of cases has apparently survived the *McLean* shake up of the governmental function immunity doctrine. In *Madden v. Town of Greene*⁵⁸, a defendant argued that *McLean* and its progeny applied to *all* governmental discretionary actions, including highway planning and design, so that if the highway planners exercised discretion, there could never be liability, and if their planning was ministerial, there had to be a special duty to the injured plaintiff for liability to attach. The Court disagreed, and re-affirmed the long-standing

lesser “qualified immunity” standard of review in such cases.⁵⁹ **Thus, at least for now, the *Mclean* germ has not contaminated the *Weiss v. Fote* “qualified immunity” line of cases.**

CONCLUSION

In deciding whether the governmental function immunity defense is likely to prevail in any given case, a careful analysis of the facts and the law is required. The five-step analytical tool above is likely to aid in this complex analysis. In summary, the recommended template is:

STEP ONE: Is the defendant a governmental or a non-governmental entity? (If non-governmental, defense fails. If governmental, proceed to Step Two.)

STEP TWO: Was the government acting in its proprietary or governmental capacity? (If proprietary, defense fails. If governmental, proceed to Step Three.)

STEP THREE: Did the governmental actor have a “special duty” to plaintiff? (If no special duty, plaintiff loses. If special duty, proceed to Step Four.)

STEP FOUR: Was the government’s complained of action or failure to act ministerial or discretionary in nature? (If ministerial, defense fails. If discretionary, proceed to Step Five).

STEP FIVE: Did the government actually exercise its discretion? (If yes, defense will prevail. If not, plaintiff has overcome the governmental function immunity defense.)

¹ 12 N.Y.3d 194, 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167 (2009).

² *Bass v. City of New York*, 38 A.D.2d 407, 411, 330 N.Y.S.2d 569 (2d Dep’t 1972).

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- ³ *Sebastian v. State of New York*, 93 N.Y.2d 790, 793, 698 N.Y.S.2d 601, 720 N.E.2d 878 (1999), quoting, *Riss v. City of New York*, 22 N.Y.2d 579, 581, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968).
- ⁴ *Miller v. State of New York*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984).
- ⁵ *Schrempf v. State of New York*, 66 N.Y.2d, 289, 496 N.Y.S.2d 973, 487 N.E.2d 883 (1985).
- ⁶ *Lawes v. Board of Educ.*, 16 N.Y.2d 302, 266 N.Y.S.2d 364, 213 N.E.2d 667 (1965).
- ⁷ *Morell v. Balasubramanian*, 70 N.Y.2d 297, 520 N.Y.S.2d 530, 514 N.E.2d 1101 (1987).
- ⁸ *Miller v. State of New York*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984).
- ⁹ *Platovsky v. City of New York, et al.*, 199 A.D.2d 373, 605 N.Y.S.2d 368 (2d Dept 1993).
- ¹⁰ *id.*
- ¹¹ *Balsam v. Delma Eng'g Corp.*, 90 N.Y.2d 966, 968, 665 N.Y.S.2d 613, 688 N.E.2d 487 (1997).
- ¹² *United Services Auto. Ass'n v. Wiley*, 73 A.D.3d 1160, 904 N.Y.S.2d 436 (2d Dep't 2010).
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- ¹⁴ *Metz v. State*, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3rd Dept 2011), *rev'd on other grounds*, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).
- ¹⁵ *Sebastian v. State of New York*, 93 N.Y.2d 790, 793, 698 N.Y.S.2d 601, 720 N.E.2d 878 (1999).
- ¹⁶ *Matter of World Trade Ctr. Bombing Litig.*, 17 N.Y.3d at 450, 933 N.Y.S.2d 164, 957 N.E.2d 733 (2011).
- ¹⁷ *See, Garrett v. Holiday Inns*, 58 N.Y.2d 253, 460 N.Y.S.2d 774, 447 N.E.2d 717 (1983).
- ¹⁸ *Nehrbas v. Incorporated Vil. of Lloyd Harbor*, 2 N.Y.2d 190, 159 N.Y.S.2d 145, 140 N.E.2d 241 (1957).
- ¹⁹ *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990).
- ²⁰ *Singh v. Rodney*, 13 Misc.3d 137, 831 N.Y.S.2d 356 (1st Dept App Term 2006).
- ²¹ *Miller v. State of New York*, 62 N.Y.2d 506, 511-512, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984).
- ²² *Crosland v. New York City Transit Authority*, 68 N.Y.2d 165, 498 N.E.2d 143, 506 N.Y.S.2d 670 (1986); *Miller v. State of New York*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984); *Weiner v. Metropolitan Transportation Authority*, 55 N.Y.2d 175, 448 N.Y.S.2d 141, 433 N.E.2d 124 (1982).
- ²³ *Miller v. State of New York*, 62 N.Y.2d 506, 512, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984), quoting, *Weiner v. Metropolitan Transportation Authority*, 55 N.Y.2d 175, 448 N.Y.S.2d 141, 144, 433 N.E.2d 124 (1982).
- ²⁴ *Miller v. State of New York*, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984).
- ²⁵ *Metz v. State*, 20 N.Y.3d 175, 179, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).
- ²⁶ *Pelaez v. Seide*, 2 N.Y.3d 186, 195, 778 N.Y.S.2d 111, 810 N.E.2d 393 (2004).
- ²⁷ *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372, 505 N.E.2d 937 (1987).
- ²⁸ 21 N.Y.3d 420, 995 N.E.2d 131, 972 N.Y.S.2d 169 (2013) (FN 1).
- ²⁹ *McLean v. City of New York*, 12 N.Y.3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167 (2009).
- ³⁰ *Tango v. Tulevech*, 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983); *Lewis v. State of New York*, 68 A.D.3d 1513, 892 N.Y.S.2d 583 (2009).
- ³¹ *Mon v. City of New York*, 78 N.Y.2d 309, 313, 579 N.E.2d 689, 574 N.Y.S.2d 529 (1991).
- ³² *See, Tango v. Tulevech*, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983).
- ³³ *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990); *Arteaga v. State*, 72 N.Y.2d 212 N.E.2d 1194 (1988); *Tango v. Tulevech*, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983); *Rodriguez v. City of New York*, 189 A.D.2d 166, 595 N.Y.S.2d 421 (1993).
- ³⁴ *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990); *Arteaga v. State*, 72 N.Y.2d 212 N.E.2d 1194 (1988); *Tango v. Tulevech*, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983); *Rodriguez v. City of New York*, 189 A.D.2d 166, 595 N.Y.S.2d 421 (1993); *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112, 733 N.E.2d 184 (2000).
- ³⁵ *Tango v. Tulevech*, 61 N.Y.2d 34, 40, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983).
- ³⁶ *Id.*
- ³⁷ *Charles O. Desch, Inc. v. State of New York*, 60 A.D.2d 678, 400 N.Y.S.2d 28 (3d Dep't 1977), *affd.* 45 N.Y.2d 882, 410 N.Y.S.2d 811, 383 N.E.2d 113 (1978).
- ³⁸ *Burgundy Basin Inn v. State of New York*, 47 A.D.2d 692, 364 N.Y.S.2d 610 (3d Dep't 1975), *mot. for lv. to app. den.* 37 N.Y.2d 706, 374 N.Y.S.2d 1027, 337 N.E.2d 146 (1976).
- ³⁹ *Van Buskirk v. Bleiler*, 46 A.D.2d 707, 360 N.Y.S.2d 88 (3d Dep't 1974).
- ⁴⁰ *Gross v. State of New York*, 33 A.D.2d 868, 306 N.Y.S.2d 28 (3d Dep't 1960).
- ⁴¹ *Howe v. Village of Trumansburg*, 199 A.D.2d 749, 605 N.Y.S.2d 466 (3d Dep't 1993).
- ⁴² *Wyatt v. State*, 176 A.D.2d 574, 575 N.Y.S.2d 31 (1st Dept 1991).
- ⁴³ *Glowinski v. Braun*, 105 A.D.2d 1153, 482 N.Y.S.2d 395, *app. dismissed*, 65 N.Y.2d 637 ().
- ⁴⁴ *Kagan v. State of New York*, 221 A.D.2d 7 (2d Dept 1996).
- ⁴⁵ *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947).
- ⁴⁶ *Waterman v. State of New York*, 35 Misc.2d 954, 232 N.Y.S.2d 22, *mod.* 19 A.D.2d 264, 241 N.Y.S.2d 314, *affd.* 186 *sub nom. Williams v. State of New York*, 14 N.Y.2d 793, 251 N.Y.S.2d 30, 200 N.E.2d 212 (1964).
- ⁴⁷ *Puffer v. City of Binghamton*, 59 Misc.2d 856, 301 N.Y.S.2d 274 (Broome Co. Sup. Ct. 1969).
- ⁴⁸ *Luckie v. Goddard*, 171 Misc. 774, 13 N.Y.S.2d 808 (Monroe Co. Sup. Ct. 1939).

⁴⁹ *Tarter v. State*, 68 N.Y.2d 511, 503 N.E.2d 84, 510 N.Y.S.2d 528 (1986); *Verizon New York, Inc., Respondent, v. Village Of Athens*, 43 A.D.3d 526, 840 N.Y.S.2d 484 (3d Dep't 2007).

⁵⁰ *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990) (immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making); *see, Tango v. Tulevech*, 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983).

⁵¹ *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987, 554 N.Y.S.2d 439 (1990).

⁵² *Id.*

⁵³ *Id.* *See also, Metz v. State*, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3rd Dept 2011), *rev'd on other grounds*, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012) (State's inspectors failed to exercise their discretion to test, or not test, vessel's passenger capacity).

⁵⁴ *See, Arteaga v. State*, 72 N.Y.2d 212, 532 N.Y.S.2d 57, 527 N.E.2d 1194 (1988), *citing, Weiss v. Fote*, 7 N.Y.2d 579, 586, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960) ((recognizing qualified immunity for highway design decisions), *Friedman v. State of New York*, 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986); *Ernest v. Red Cr. Cent. School Dist.*, 93 N.Y.2d 664, 695 N.Y.S.2d 531, 717 N.E.2d 690 (1999).

⁵⁵ 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960).

⁵⁶ *See, Id* (no basis for liability "absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it"); *Friedman v. State*, 67 N.Y.2d 271, 493 N.E.2d 893, 502 N.Y.S.2d 669 (4th Dep't 2010); *Alexander v. Eldred*, 63 N.Y.2d 460, 466, 483 N.Y.S.2d 168, 472 N.E.2d 996 (1984).

⁵⁷ *See, Weiss v. Fote, supra; Selca v. City of Peekskill*, 333 78 A.D.3d 1160, 912 N.Y.S.2d 287 (2010).

⁵⁸ 36 Misc.3d 852, 949 N.Y.S.2d 326 (Chenango Co Sup Ct 2012).

⁵⁹ *Id.*