

LIABILITY

Big Impacts

foreseeability of collisions imposes responsibility to address risks

By William S. Thomas

In March of this year, an unimaginable disaster unfolded in Baltimore Harbor as a massive cargo ship brought down the 47-year-old Francis Scott Key Bridge, the third longest span in the world, which carried over 34,000 vehicles a day. It is estimated the cost to rebuild could exceed \$1 billion. The tragedy was a result of a perfect storm of events, one of which was an older “truss” bridge with no redundancies to compensate for loss of a support structure, or any static protection, such as fenders, to prevent or deflect the collision.

America’s critical infrastructure is aging, with bridges, levees, and dams reaching an average age ranging from 43 to 56 years old. More troubling is that, in most instances, this exceeds these improvements’ life expectancies. Further, due to dated construction materials and changes in the way people travel, the way goods are shipped, and the incredible speed of things, unanticipated stress is placed on these roads, waterways, and bridges.

RESPONSIBILITY FROM FORESEEABILITY

The concept of foreseeability is essential in determining negligence and liability, especially in incidents where moving vehicles collide with stationary objects. Dating back to the seminal case of *Palsgraf v. Long*

Island Railroad, “foreseeability” of injury is a prerequisite to determine whether the alleged incident was proximately caused by the breach of some duty. The increasing frequency of collision events in urban settings underscores the urgency of addressing the foreseeability of these harms. It is often argued in litigation over such occurrences that a duty exists to protect property and persons due to an overwhelming base of knowledge that such events are not only possible, but increasingly probable. Yet, the solutions surrounding the prevention of vehicle-related harms through the strategic implementation of guardrails, bollards, and innovative protective measures seems to lag.

ADDRESSING THE HARMS

To mitigate the risks associated with vehicle collisions, a variety of protective measures can be implemented across urban landscapes and high-risk zones. Guardrails and bollards, commonly used for their robustness, are specifically engineered to absorb impacts or prevent vehicles from encroaching into pedestrian spaces or vulnerable structures like utility poles, storefronts, and building façades. Their placement and material selection are critical. Steel bollards are effectively used in pedestrian-heavy areas or in traffic-exposed storefronts, providing

a sturdy barrier against potential vehicular attacks or accidents.

Beyond these conventional solutions, energy-absorbing crash cushions or fenders like those installed at freeway exits could be employed. These devices, made from layers of resilient materials, are designed to gradually decelerate a vehicle upon impact, reducing the risk of injury for the occupants and structural damage. Vehicle-arresting systems present another layer of innovation, especially useful in protecting critical infrastructure and high-security areas. Moreover, in urban settings, the introduction of retractable bollards controls vehicle access during specific times or events without permanent alteration to the streetscape.

Implementing these protective measures is not without challenges. However, the legal implications of failing to detect vulnerabilities, to retrofit or originally design such measures, or to install or properly maintain such barriers can result in complex liability issues.

PROSPECTIVE REGULATIONS ARE NOT ENOUGH

In the United States, the regulations concerning protection systems for bridges, pedestrians, and street-facing businesses vary widely and are governed by a combination of federal, state, and local guidelines. The primary focus of these regulations is on

enhancing safety and minimizing the risk of vehicular accidents. However, they generally do not impact buildings constructed before their implementation. Existing structures may be "grandfathered" into older regulatory frameworks or may not be subject to current regulations at all. Unless these structures undergo significant updates or modifications, they are not legally required to implement the latest safety measures mandated for newer developments. This regulatory gap can lead to inconsistent safety standards, where older, potentially less safe structures coexist alongside new constructions adhering to stringent modern requirements. As a result, older structures might lack these protective enhancements, potentially increasing risk to pedestrians, vehicles, and patrons.

WHAT CAN BE DONE

For stakeholders from property owners to design professionals, there is a critical need for proactive risk management to mitigate potential liabilities and enhance safety. Stakeholders must adopt a forward-thinking approach. It is

no longer a defense to the lawsuit to say, "we met the minimum code requirements." Building owners, particularly those with older properties that fall under outdated regulatory schemes, should consider voluntary safety assessments and upgrades. By implementing modern safety features such as bollards, crash cushions, and other protective barriers, these owners can significantly reduce the risk of vehicle-related accidents. Furthermore, documenting these voluntary upgrades can serve as evidence of due diligence, potentially reducing liability in the event of an accident.

Contractors and developers also play a crucial role in advancing safety standards. They should prioritize the integration of the latest safety technologies and designs, even in projects involving the renovation of older buildings. This includes advocating for and adhering to the newest guidelines and best practices from industry-leading organizations, even when not strictly required by law. Additionally, providing clients with clear, data-driven recommendations about the benefits of incorporating advanced safety measures

can help shift the industry toward higher standards across all types of construction. Regular training and updates on the latest safety innovations and legal requirements for all team members will ensure that safety is not only a compliance issue but a foundational aspect of all project planning and execution. This proactive approach not only enhances public safety but also protects businesses from the reputational and financial damages associated with accidents and litigation. ■

about the author

William Thomas is a principal at Gausnell, O'Keefe & Thomas, LLC in St. Louis, where he focuses his practice on construction claims and loss prevention. He is a member of the International Association of Defense Counsel, serving on its Construction Law Committee, an AAA Panel Arbitrator, Fellow with the Construction Lawyers Society of America, and a member of the ABA Forum on Construction, AIA, and ASCE. He can be reached at wthomas@gotlawstl.com.

Half Horizontal