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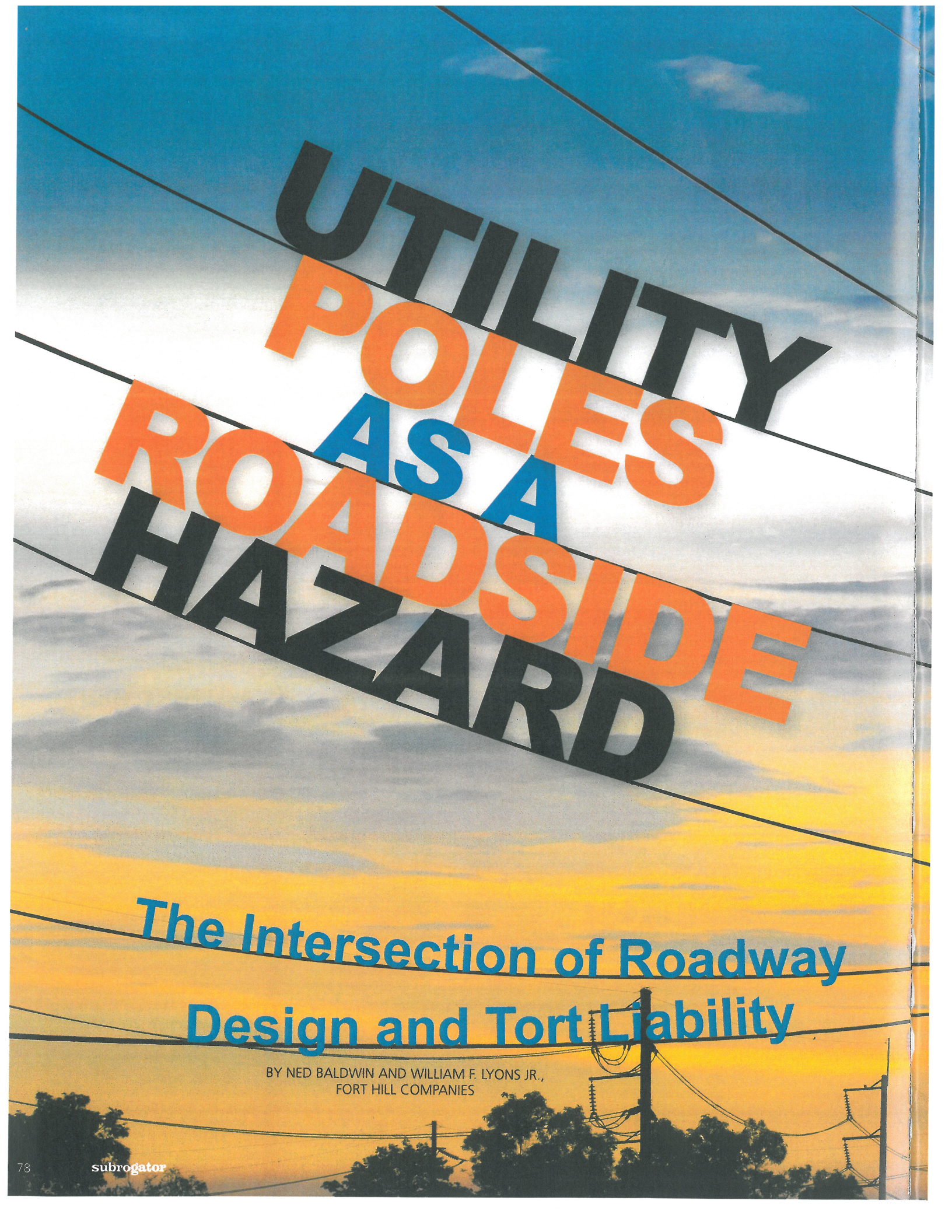
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## AUTO SUBROGATION

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# UTILITY POLES AS A ROADSIDE HAZARD

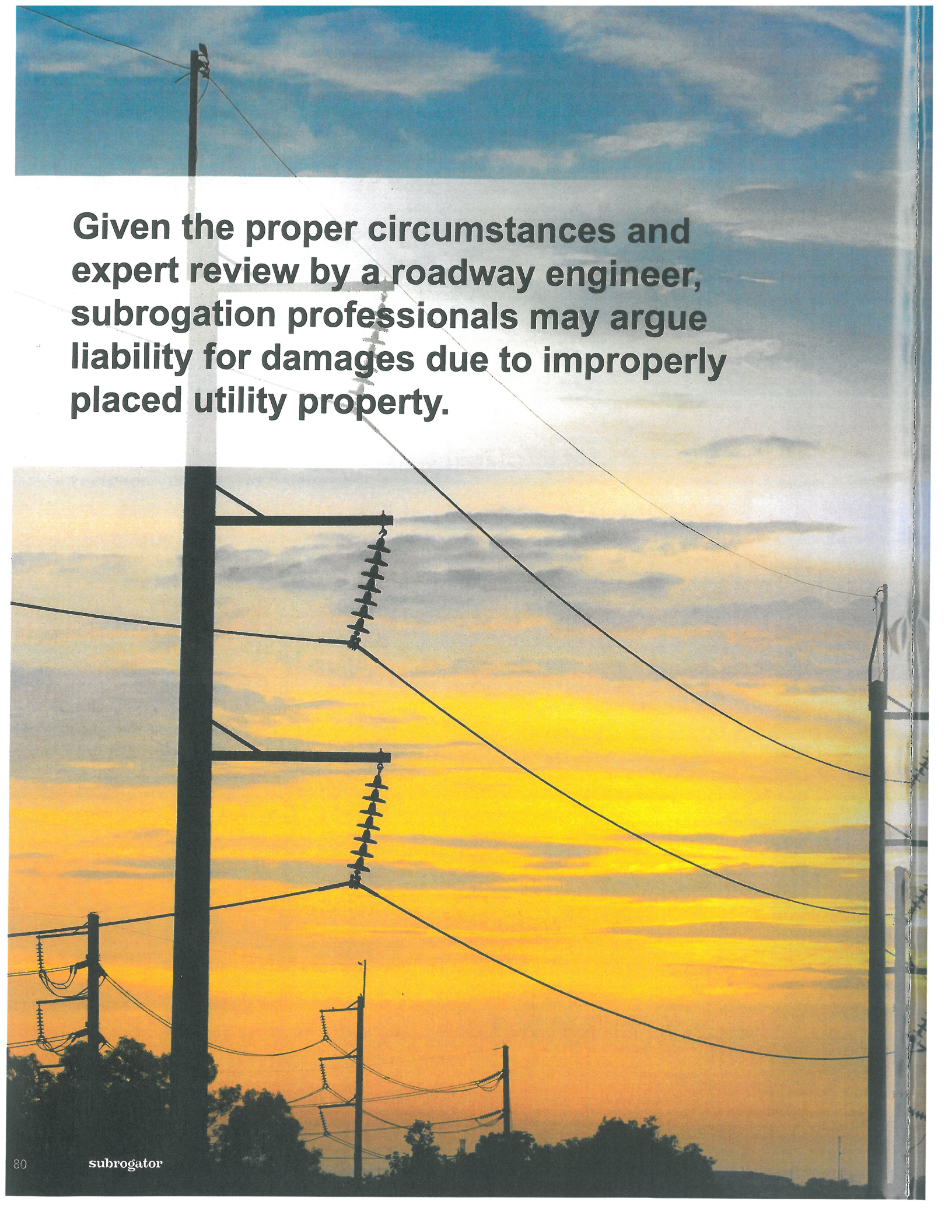
## The Intersection of Roadway Design and Tort Liability

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## **INTRODUCTION**

**Automobile collisions with roadside utility poles are a frequent form of accident resulting in property damage, bodily injury and death. In many cases, the collision resulted from negligent driving or adverse weather. But, there are instances where improper placement of the pole creates a hazardous condition that contributes to the accident. Many subrogation professionals are not aware of the potential for assigning contributory negligence on the part of the utility company.**



**Given the proper circumstances and expert review by a roadway engineer, subrogation professionals may argue liability for damages due to improperly placed utility property.**

## LEGAL FRAMEWORK

Courts have concluded that “frequent and inevitable contingency of normal automobile use will result in collision and injury producing impacts.” *Larsen v. General Motors Corporation*, 391 F.2d 495 (1968). Because automobile accidents are considered an unavoidable part of normal activity, courts have also concluded that there is a legal duty to provide safe roadways that are clear of undue hazards: “Where such hazards exist, the duty to maintain the roads in a safe condition means much more than merely an obligation to preserve the roads in their original condition. It includes the duty to make the roads safer.”<sup>1</sup> Court opinions can be found stretching back more than a century that identify the duty of States and Municipalities to keep streets in a safe condition. See, e.g., *Pettengill v. Yonkers*, 116 N.Y. 558 (1889); *Jefferson v. Chapman*, 723 F.2d 911 (6th Cir. 1983); *Smith v. City of St. Joseph*, 45 MO 449 (2013); *Talarico v. Bonham*, 168 Pa.Commw. 467 (1994); *Hoffman v. Vernon Township*, 97 Ill. App.3d 721 (1981). As such,

“obstacles or devices capable of causing collisions resulting in injury or death should not be placed so close to a highway that a driver cannot stop before hitting them.”<sup>2</sup>

Courts have also generally concluded that the municipal responsibility only applies to what could be considered as normal vehicle operations. Speeding, drunkenness and other unlawful behaviors have been ruled as voiding any liability on the municipality. See *Afarian v. Massachusetts Electric*, 866 N.E.2d 901 (Mass. 2007). Less well understood is that the responsibility to maintain safe, unobstructed roads applies to the entire right of way and not just the travel lanes, and that normal vehicle operations can require space along the edge of the road outside the travel lanes. The “public right to use the highway carries with it the right to protection by reasonable care against harm suffered in the course of deviations.”<sup>3</sup> Therefore, locating a pole just outside the travel lanes is not sufficient to avoid a potential hazard.

## STANDARD OF CARE

In the design of outside utility infrastructure, it is standard practice for utility companies to follow the National Electric Safety Code (NESC). The NESC states that roadside poles should be no less than six inches from the curb. This sets a minimum standard; however, from a traffic safety and roadway design perspective, there is another set of standards that must be considered in designing safe roadways.

The American Association of State Highway and Transportation Officials (AASHTO) is the national body that develops the standards for customary and ordinary practice in roadway design. AASHTO standards have been incorporated into the design guidelines of many state departments of transportation, including the Massachusetts Department of Transportation’s (MassDOT’s) Project Development & Design Guide, and are referenced by the Federal Highway Administration (FHWA) as the guiding principles of roadway design. Thus, for measuring reasonable care in avoidance of roadway hazards, AASHTO guidelines can be considered the standard of care. In fact, courts have looked to AASHTO standards as guidance in evaluating negligent roadway design in wrongful death suits. See, e.g., *Marlene V. Martin v. Missouri Highway and Transportation Department* (MO. Ct. App. 1998); *Cay v. State of Louisiana Department of Transportation*, 613 So. 2d 393 (La. 1994).

AASHTO guidelines specify the need for a clear zone “beyond the edge of the traveled way, available for safe use by errant vehicles.” Vertical obstructions should not be located within the clear zone. The width of the clear zone depends on traffic volume, design speed and roadway geometry. The minimum recommended clear zone is seven feet. Roads with higher volumes and faster design speeds should feature wider clear zones. Slopes and curves also influence the size of the clear zone.<sup>4</sup>

AASHTO recognizes that in urban environments rights-of-way are often constricted such that providing a full clear zone may not be practical. AASHTO recommends that in these circumstances there should still be an offset of at least four feet, with at least six feet on the outside of a curve. In addition, since utility poles “can pose a substantial hazard,” AASHTO states that “known utility pole hazardous locations should be avoided” and poles should be as far as possible from travel lanes.<sup>5</sup>

Based on the guidance published by AASHTO and stated by the courts in cases such as *Larsen v. General Motors*, 391 F.2d 495 (1968), the need for a clear zone can be viewed as within the normal operational need of the driving public. As such, the legal principle that the roadway should be free of obstruction should apply to the clear zone as well.

## CONCLUSION

Throughout the United States unsafe roadway conditions exist due to the placement of utility poles within what should be an unobstructed roadside clear zone. Bodily injury and property damage suffered by people traveling the public roads are, in part, caused by the location of these poles. These public nuisances exist due to negligence on the part of the locality and the utility in not taking reasonable

care. Yet, under current practices, compensation for damages to utility property generally rests with the driver and his or her insurer. Given the proper circumstances and expert review by a roadway engineer, subrogation professionals may argue liability for damages due to improperly placed utility property.

### Endnotes:

- 1 The Law and Roadside Hazards, Insurance Institute for Highway Safety, Michie Company, 1974. §1-8, page 26.
- 2 The Law and Roadside Hazards, Insurance Institute for Highway Safety, Michie Company, 1974. §1-6, page 19.
3. The Restatement (Second) of Torts § 368 (1964):
4. Roadside Design Guide, 3-1 The Clear Zone Concept, AASHTO, 2011
- 5 Roadside Design Guide, Chapter 10 Roadside Safety in Urban or Restricted Environments, AASHTO, 2011

### Sources:

- American Association of State Highway and Transportation Officials (AASHTO),
- Roadside Design Guide, 2011
  - Strategic Highway Safety Plan, 2005
  - A Policy on Geometric Design of Highways and Streets, 2004
- Insurance Institute for Highway Safety, *The Law and Roadside Hazards*, 1974
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  - Roadside Improvements for Local Roads and Streets, 1986
- Massachusetts Highway Department, *Project Development & Design Guide*, 2006
- Transportation Research Board of the National Academies,
- *Utilities and Roadside Safety*, 2004
  - *Guidance for Implementation of the AASHTO Strategic Highway Safety Plan*, 2004