STANDARDS—IF WE DON'T SET THEM, JURIES WILL
by David C. Oliver

Introduction

In preparing for this Forum, I began with several purposes in mind, including helping you to understand the changing climate in which highway agencies, in fact, all public and quasi-public entities, are increasingly vulnerable to tort liability litigation. That is not an easy task for a lawyer, because we are often viewed as a cause of the problem, not a solution to it. But the fact is, in twentieth-century America are a litigious society. We sue over physical injury, offenses to our dignity, perceived violations of our rights, and increasingly over mental pain and suffering (what I refer to as the new practice of stress suits).

Once we accept the fact that we can and will be sued, we can devote our attention to the more important matters of providing the highest degree of safety for the traveling public. We can do this with the assistance of tort law, because study of the cases helps us in identifying potential liability situations and in recognizing appropriate actions to reduce liability (including those actions that have withstood legal challenge).

There are many variables with which you should be familiar in discussing liability. (1) The concept of legal duty is the first requisite. In any liability action, it must be established that the agency owes a duty to the public—that duty is generally to keep the highways reasonably safe for travel. (2) Next, you should be aware that the courts will look for a breach of that duty—negligence, by omission or commission, must be established. The negligent behavior must be found to have been the proximate—that is, the most foreseeable cause of the accident. (3) And finally, there must be some damage or injury.

There have been judicial decisions in just the past two years on a variety of issues. The courts continue to review the nature of the duty to maintain, design, and construct highways as this duty is effected by the legislative and judicial grants or withdrawals of immunity. Much has taken place recently in the loss by the states of sovereign immunity, by the limitations placed on discretionary immunity, and by the gradual reintroduction at the legislative level of qualified immunity, requiring strict notice and limiting the amount of awards.

We have seen the development of a changed conditions doctrine, which further limits the discretionary immunity and requires continued review and updating of highways designed and constructed in an earlier time to standards and specifications no longer applicable. We have seen the development of economic defense doctrine, wherein state agencies have become more sophisticated in pleading budgetary impacts on their programs. We have seen the dramatic impact that is had on state programs by virtue of federal money being available and national standards being applied.
We have seen the extension of legal claims to many activities never previously encountered. In just the past two years, cases have been reported dealing with accidents at snowmobile-highway crossings, objects dropped from overpasses, minibike-truck collisions, motorcycle accidents involving vehicular collisions or fixed object collisions, trees and poles alongside the roadway, collisions with construction equipment and the illumination of highways.

In Minnesota, the courts have further limited the policy role immunity in holding that such decisions as a state traffic engineer's determination of a speed for a speed zone which is requested by a county would not be accorded policy decision protection as this is a "professional judgment." Similarly, a county's decision not to place guardrails at a highway accident site is also professional judgment, rather than policy-making. For these courts, a decision must involve a balancing of policy objectives. Contrast this to the policy in Ohio, wherein it has been held that a township decision not to place or maintain safety devices at a railroad crossing (where there is not statutory duty to do so) is entitled to protection as a discretionary decision.

There are many cases we can look at and many areas we could discuss in detail, including discretion, design, work zone traffic control, economics vs. safety, and the danger of railroad crossings. I thought it would be most helpful for this Forum if I focused on two distinct types of cases. One line of cases discusses the need to monitor accident data and reports of hazardous conditions and the duty to take corrective action in reliance on engineering standards and studies. The other line of cases will discuss the growing concerns with the needs and duties surrounding the lighting on our highways. Keep in mind as I discuss these cases that the law is an instrument of precedent—it builds on prior decisions. But, the law also is constantly changing and evolving in response to facts and technical developments.

Duty and Negligence Cases

The case of Molbert v. Toepfer (La., 1989) involved a suit by a passenger critically injured when a car in which he was riding lost control on a curve and ran into a utility pole.

There was much testimony concerning the design and maintenance of the curve. It was determined that the curve was inadvertently constructed with a higher degree of curvature than called for by the design plans. The speed limit on the road was 35 mph. There was no reduced speed limit, although there were chevrons, or curve signs. The design speed of the curve is 27 mph, and a ball-bank indicator test found the comfort speed to be 25 mph. A barricade had been erected in 1981 to protect a house that had been hit twice. The barricade has been hit by cars five times.

The DOT was found five percent negligent on a recovery of $1,250,000. The plaintiff suffered a severe head injury with permanent brain damage. He was in a coma for one month, will never be able to live the normal active life he once lived and needs constant care and supervision. His father described him as a 28-year-old with the mentality of a 7 or 8 year old. There was alcohol involved.
Trahan v. State (La., 1988) involved an accident that occurred at approximately 10:30 p.m. The weather was clear and dry. The car was traveling on cruise control at 59 mph. The car negotiated all curves except the last one, which was posted at 45 mph. The driver disengaged cruise and slowed down. However, coming out of the curve he reset the cruise control. At the same time he noticed a 25-mph speed advisory sign and a curve sign. He applied his brakes and began slowing. He became momentarily inattentive. When he looked up, a sharp curve appeared. He was unable to stop, went through the curve, and struck a tree 13 feet away.

The court found that DOT had a legal duty to warn against an exceedingly dangerous curve, extending even to a driver who might be inadvertently inattentive. The degree of curvature of the curve is 28 degrees. The current DOT standards prohibit construction of a curve exceeding 5-1/2 degrees. Although conceding that DOT is not under an obligation to bring an existing substandard road up to current design standards, there is a requirement that such roads be adequately signed.

The curve was dangerous because of curvature and inadequate signing. At the time of the accident there were no signs to delineate the location of the curve. However, in 1968 (some 20 years previous) there were numerous hazardous signs delineating this curve. They were located on the outside shoulder, were fully reflective, and could be seen bi-directionally. These signs were removed because two DOT employees determined they were outdated and also frequently knocked down. These employees did direct the installation of a flat-arrow sign; however, there is no record of follow-up to ascertain if the sign was installed. The sign was not in place at the time of the accident.

A state trooper testified that he had investigated at least six or seven accidents at this location. He related his concern about the problem with this curve to DOT and requested they look into the situation.

There were markings, a curve-advisory sign, a speed plate located 416 feet from the curve, and no-passing stripes. The court found these might have been adequate for a normally cautious driver, but not for one momentarily inattentive.

The DOT was found to be 50 percent negligent on a recovery of $1,700.000 plus.

The plaintiff underwent removal of a bone from his brain and removal of the tip of his left temporal lobe (15 percent of his brain). He has an acrylic plate in his head. His right lung collapsed and he underwent a thoracostomy and tracheotomy. He was treated for gastrointestinal complications and partial paralysis of his left vocal cord. He developed tumors on his hands and fingers, probably the result of taking phenobarbital since his lobectomy. His personality has changed from easy-going to argumentative and temperamental. He is also severely scarred and disfigured.

There was indication of alcohol but no intoxication.

Dill v. State (La., 1988) involved a two-car accident at 12:05 p.m. It was lightly raining and the road was wet. Vehicle 1 entered the curve, slowed, slid, and impacted with Vehicle 2.

The road in question is a two-lane, 20-foot-wide bituminous-surfaced rural roadway, Class 2 arterial highway with 11,000 vehicle traffic volume. The DOT Manual requires a degree of curvature approximately 1/2 of that
existing. The standards also require a 12-foot lane width and 4-foot shoulder, rather than the 10-foot lanes and narrow unsurfaced shoulders at the site. The superelevation was substandard, which produced a wavy surface and fluctuating coefficient of friction. There was considerable wear, pot marks, cracking, and deterioration of the roadway, especially at the right wheel path in the westbound lane.

The ball-bank indicator test showed a correct speed posting of 30 mph under dry weather conditions. The critical speed before sliding was estimated at 45-50 mph by DOT's expert and at 38-41 mph by the plaintiff's expert, assuming a uniform surface and condition. However, the plaintiff's expert said the critical speed would be 30 mph in consideration of the severe degree of curvature, lane width, superelevation, wear of roadway, and wet pavement.

The sheriff's office produced a total of 72 accident reports occurring at this site between 1978 and 1985. Twenty-three of these accidents occurred in 1984 with 10 the same as this accident, three were at 35 mph, one at 15 mph, and one at 25 mph. All reports are forwarded to the state police who, in turn, supply the information to the Highway Safety Commission and DOT.

There was also a 1982 report from the district traffic operations engineer which predicted an increase in accidents and recommended reconstruction to a more favorable alignment. The cost estimate was $164,000. DOT did initiate a project to realign the road and decrease the degree of curvature.

DOT was held to be 100 percent negligent on a total recovery of $230,000. The plaintiff suffered six cracked ribs and a fractured spine. A halo was installed in his skull securing sharp screws through a ring and down into the skull base, then attaching the ring to a chest support. The halo has been removed and replaced by a Philadelphia collar, then a soft collar. She sustained facial scarring.

There was a dissent in this case. The judge acknowledged that the location in question was "not constructed as a modern highway and is in need of repair." However, he noted, the state was aware of this and had reconstruction scheduled. In the meantime, precautions had been taken—large signs were posted (reducing the speed limit from 35 mph to 30 mph) on the mounting for the curve sign; there were large chevrons, and a flashing light to get motorists' attention. There was a yellow "no passing" line in the curve. Also, all the motorists involved in this accident were thoroughly familiar with the location.

The judge stated, "It seems obvious to me from a reading of the entire record that the major fault found with the DOTD was in the failure to reconstruct that roadway to modern-day standards. The record clearly reflects that the department had, in fact, planned to reconstruct certain segments of this roadway, but that this reconstruction had not yet taken place...Meanwhile, the department has taken every considerable step to adequately mark the curve to warn reasonably prudent and attentive drivers of the roadway conditions."

In Van De Bogart v. State (N.Y., 1987) the claimant was injured in a one-car accident which occurred at 5 a.m. The car went off the road at a left-hand curve, continued on a path over the recessed headwall of a culvert, and struck a tree located some 12 feet from the road. The road is a rural, lightly traveled road constructed in 1928 and designated as a Class C highway. It has two 10-foot paved lanes with shoulders partially paved to a distance of
about 3 feet. It had been resurfaced in 1981. The center and edge lines have been repainted. At this curve, the state had installed traffic control and safety measures consisting of a posted 45 mph reduced speed sign, a curve sign, a left arrow sign at the curve, a diamond-shaped culvert marker, and reflectorized delineators.

The left arrow sign had recently been added following an investigation made in response to a complaint from an adjoining property owner, following a fatal accident in 1981.

The claimant's expert contended that in 1981, the state was aware of the dangers at this site and should have reconstructed, rather than repaved, in order to eliminate or improve the curve; failing that, a guardrail should have been erected to shield the culvert, the tree should have been removed, the speed at the curve should have been reduced to 35 mph and chevron signing of the curve rather than the single arrow should have been installed.

The court said, "In maintaining older highways, the state is not obligated to undertake expensive reconstruction simply because highway safety design standards have changed since the original construction . . . . Thus, even though the shape of the road and extent of the 'safe recovery area' adjoining it did not comply with current criteria, no major restructuring was required unless the curve could not safely have been negotiated at moderate speed . . . ."

"The decision not to modify the curve by highway reconstruction and to fix the posted speed at 45 mph was made deliberately after considering a thorough analysis of the accident record of the section of Route 357 involved, the existence of numerous roadside obstacles, the relative costs and fiscal priorities, and appropriate testing establishing the safe speed for negotiating the curve . . . ."

"Such judgmental decisions are precisely the kind that are clothed with qualified governmental immunity . . . ."

"There has been no showing that the state's deliberative process concerning the resurfacing project was inadequate or that its repaving and the resigning plan lacked a reasonable basis.

"With respect to the removal of the tree, a qualified safety engineer, following the 1981 accident, investigated the scene, reviewed the accident history and concluded prior accidents were due to excessive speed and lack of perception of the sharpness of the curve . . . ."

Finally, the court said, "It is also noteworthy that the uncontested evidence was that the aggregate warning signs at the curve conformed to the State Manual of Uniform Traffic Control Devices."

There was alcohol involved.

*Stack v. State (N.Y., 1989)* involved a fatality in a collision between a motorcycle and automobile at an intersection with no three-color traffic light. An engineering study conducted by the DOT in 1979 recommended sign improvements at the intersection by installing dual "Stop Ahead" signs, oversized dual stop signs, and printed "stop bars." The dual oversized signs were installed in 1980. The court held, "It is well established that when a municipality studies a dangerous condition and determines as part of a reasonable plan of governmental services that certain steps need not be taken, that decision may not form the basis of liability."
Challe v. State (N.Y., 1989) involved a fatality when a vehicle left the roadway and hit a tree. Decedent's husband contended negligent construction by failing to remove the trees, both at construction in 1945 and during resurfacing in 1969. The trees were located 6 feet, 4 inches from the pavement.

The claimant argues that generally accepted engineering standards and the state's own standards require an 8-foot shoulder in the accident area. Claimant's engineer testified that the state's plans for initial construction called for an 8-foot shoulder. Those plans also provided that all desirable trees 5 feet or more from the edge of the finished pavement be saved, if possible. The tree struck by the decedent was not within 5 feet and the plans did not call for removal.

The resurfacing plans in 1969 listed specific trees for removal. The tree in this accident was not listed. The removal of trees not on the list was left to the engineer's discretion.

There was testimony that the location of the trees violated generally accepted engineering standards; however, these were certain national guidelines that were not included in the record.

The court thoroughly reviewed the expert engineer's testimony in the context of whether a violation of the relevant standards was demonstrated. The court found there was no requirement that an 8-foot shoulder be provided. Further, as there was no evidence of any prior accident, there was no cause of action for failure to correct an actual or potential hazard.

However, in D'Alessio v. State (N.Y. 1989) the court upheld a judgment for $15,035 for injuries, including a fractured rib, cuts, and permanent scarring. The accident occurred when a vehicle hydroplaned in standing water, lost control, and hit a guardrail. The state contended it had taken adequate measures to correct this situation. Testimony of area residents contradicted this contention. Water had been accumulating in this location for five years, following heavy rains. The court held, "The evidence indicates that the state was aware of or, in the exercise of reasonable care, should have been aware of the continuing water accumulation. No flares or warning signs were used...The constant recurring condition was longlasting. The state...failed to make an adequate study to ascertain the causes of the danger and what could be done to remedy it...."

Illumination cases

In Mullett v. State, (La., 1989) the state was found to be 85 percent negligent on judgment of $7,568,943 (reduced on appeal to slightly over $5 million). Plaintiff's motorcycle collided with another vehicle at the intersection of two state highways. One highway was a four-lane, median-separated road. The other was a two-lane rural roadway. The four-lane terminates at the two-lane, forming a "T" intersection. There is a blinking amber/red light with no other traffic signals. Approximately 200 feet east of the intersection, there was an industrial facility, utilizing a bright white light security system. These lights were installed low to the ground and near a line of view approximating headlights approaching. There were no street lamps near the intersection to illuminate it or reduce the effect of the security lighting upon approaching motorists.
The median on the four-lane highway ends some 12-15 feet before the intersection. The recessed area is paved and unmarked. There were no markings on the roadway to direct the motorist turning from the two-lane onto the four-lane roadway.

At approximately 8:13 p.m., plaintiff was driving on the two-lane with the intent to turn left onto the four-lane. A car was approaching from the opposite direction. Plaintiff became confused as to the actual location of the road and slowed. As he commenced his turn, he collided with the automobile in the opposite lane and then struck a utility pole. There was a problem here with the expert witnesses. Plaintiff's expert was a civil engineer working primarily in highway design and signalization. He was not a traffic engineer. The state failed to challenge his expertise at the trial court level and, therefore, could not do so on appeal. Nevertheless, the Appeals Court found that the witness's credentials supported his qualification as an expert. The trial court accorded greater weight to this witness than to the state's expert witness.

The state's witness regularly testifies on such matters for highway departments around the country. He stated that lighting of a rural intersection is not usually required and that there was nothing wrong with this intersection. The trial court concluded that, "While Dr. ____ was not the typical 'hired gun,' he did lean too heavily toward advocating the position of the DOTD and never gave any plausible reason for this court to believe...that the intersection was not hazardous...."

Other Testimony at the Trial:

The traffic operations engineer for the area determined that the amber/red signal would be appropriate. He had originally wanted it installed in the exact center of the intersection. The maintenance crew installed it otherwise, but after inspection he agreed this was a better location and approved it. Sometime in 1984, the department received a complaint. A study was made and it was determined that it would be beneficial to place markings on the pavement to guide motorists. He recommended reflective thermoplastic tape for better wear and visibility. The recommendation was made in October, installation did not take place until April (four months after the accident).

Plaintiff's expert said the intersection was defective in having no permanent markings. He also stated that the absence of illumination affected the ability of drivers to make a left turn without delay to locate the highway. He cited an AASHTO Manual to the effect that driver confusion could cause a decision delay of two-five seconds.

He also cited the MUTCD, Section 3A, relative to markings. He stated that because of the unusual nature of the intersection, it was necessary to channel traffic through a left turn to eliminate confusion caused by the design, construction, and ambient lighting conditions.

The trial court concluded, "Whether or not lighting is usually required in a rural intersection, this court finds that this intersection was an unusual one and that lighting of the intersection would have been one method to have reduced the problems which contributed to driver confusion...." The court found that there were several options available to the department, none of them very expensive. They included:

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1. lighting the intersection
2. marking the turn route
3. erecting traffic control signals as originally planned
4. adding another set of caution lights

The plaintiff suffered multiple fractures, brain injury, partial paraplegia. He is unable to speak and has other neurological problems. He has difficulty with balance and needs braces to stand, and is confined to a wheelchair. He cannot breathe, feed, walk, or dress himself. He cannot communicate his needs, thoughts, feelings, and desires. His immediate needs require 124 months in a post-acute institutional care program.

In *Alyward v. Baer* (Mo. 1987) a pedestrian was struck by one car, tossed in the air, then a second car ran over her head and face. The plaintiff claims the accident was caused by inadequate illumination. The court found that the city was immune from suit on the grounds that the installation of lighting is a governmental duty, performed for the good of all. The finding is supported in the Missouri Tort Law Statue, RS Mo. 1985 § 537.600 which provides immunity where the allegation is a defective highway designed and constructed prior to 1977, where there was compliance with standards accepted at the time.

The street lights in question were installed in 1952 and the completed original system was accepted by the city and remained in place without modification until February 7, 1981, when this accident took place.

In *Scheurman v. DOT* (Mich., 1987), decedent was struck and killed in attempting to cross a highway at 10:15 p.m. She was apparently intoxicated. The highway is a State Trunk Line highway. There were no street lights in the vicinity of this accident. The defendant, DOT, argued it was not liable for street lighting within Detroit on "nonfreeway" State Trunk Line highways. However, the state reviews and approves all requests for lighting for safety. The DOT occasionally requests modifications but makes no recommendations as to poles or wattage. The court found that defendant DOT must incur all legal liabilities for State Trunk Line highways, even where a municipality undertakes responsibility for maintenance and repair.

Defendant also argues that its liability extends only to the improved portion of the highway which does not include lighting. The court reviewed prior case law and noted that lighting of a road affects the safety of motorists and may be an integral and necessary part of road design in urban areas. There may be a distinction between ornamental lighting and that integrated into a road plan, but the court here held that although vehicle light poles may be away from the highway, the illumination itself is on the highway and the question then becomes whether this illumination was sufficient to render the road safe for travel and for pedestrians. The case was remanded for further proceedings to address the merits of whether street lighting was actually required. However, in a more recent case (*Alpert v. City of Ann Arbor (DOT)*, (Mich., 1988) in which a pedestrian was injured crossing a State Trunk Line highway at 11:30 p.m.), it was argued that the artificial light provided by street lights was inadequate and below safety standards. The court reversed the decision in this case. The court now concludes that illumination or lack of
illumination does not constitute part of the improved portion of the highway designed for travel.

In *Lemire v. New Orleans Public Services* (La., 1989), an accident occurred at 3 p.m. when decedent motorist struck a Sewerage and Water Board backhoe parked in a left traffic lane of a road on which water main repair had been underway for two weeks. There were a variety of reasons for the backhoe having been left; however, the job supervisor testified that barricades were ordinarily left in place at the construction site. There was evidence that these had been knocked down.

An award of $200,000 was made. Fault was apportioned at 25 percent to decedent (who had a blood alcohol level of .21) and 50 percent to the Sewerage Board and 25 percent to Public Service. With respect to Public Service, there was testimony that several street lights were out and that poor lighting contributed to the accident. The court found Public Service to be the custodian of the street lights. The fact that they were not operating is a defect. The evidence supports the conclusion that the poorly lit street contributed to the accident. The purpose of street lights is obvious. They are intended to illuminate the pathway of the motoring public. When not functioning, it can be concluded that an unreasonable risk of harm may occur.

Conclusion

Tort law has never been meant to replace insurance. Legal theorists continue to debate whether its purpose is to stimulate remedial behavior, to punish deviant actions, or to compensate. Clearly, there is some of all these purposes in every tort case. But the lessons for us in tort are not that complex accidents do happen; it is that they generally involve motorists or pedestrians who are not the normally cautious people for whom we have been designing, and it is necessary to take these factors into account. The more we do to minimize human suffering, the less of a problem tort law becomes. The highway environment may not be perfect, but we should never stop striving for this goal.

COMMENTS

Oliver:

Concerning tort liability, let me ask a hypothetical question. Suppose you have an 18-year old son who goes out with his friends. He has three cans of beer, is driving home, and runs off the road. Now, he has been drinking beer, maybe he is going 45 mph in a 25-mph zone. He wrecks his car and now you have a kid in a wheelchair who can’t talk for the rest of his life. Are you going to say to yourself, "Highway engineers are doing a fine job out there so I’m not going to bring suit," or are you going to say, "Somebody's going to have to help me with the boy because I can’t carry this burden alone."

There are a number of theories behind tort law. One is compensation and another is deterrence. But, someone’s going to pay the bills. And, unfortunately, it’s going to come out of the highway department's budget. That is just the way society works right now.

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Turner:

If you do any reading at all, you'll see this happens in state after state after state. All of a sudden it impacts us and we are just swept off our feet with suits. If we had've noticed what was going on around us in other states, we could have prevented it. These same suits you're talking about have been going on from New York to California for 40 years.

In the United States, suits are often filed when the plaintiff has no hope of winning, but he is bound and determined to do everything he can to get it off his conscious, to punish someone he thinks was wrong, and to do all he can in the name of the loved one, whether that person is dead or alive. Punitive suits are filed all the time, knowing they can't be won, just to punish the defendant. That's part of the United States legal system.

On the positive side, highway departments are winning the vast majority of suits that are filed. We can win more. When we lose, we can only lose a little bit of money, instead of $500,000.

In those states that are sovereign, the trend is for individual employees, instead of the state, to be sued. Ninety percent of the states have done that. But in some states, the government has made the choice—we'll lose less money if they sue our individual employees instead of the department.

Overall, it is positive because we're winning the great majority of these suits. We can win more, but you've got to be informed by (1) learning what the law does, (2) the grounds upon which you may be sued, (3) the conditions that cause wrecks and suits. That is all part of your duty now. Twenty years ago, you didn't have to worry about it. But, the law is dynamic, it changes.

The unfortunate trends at the present time are that juries tend to overlook alcohol involvement and impairment, as well as speed, and that is unfortunate. But, if I'm an expert witness for somebody, I can certainly testify that a diligent driver would never have had this wreck. The cause of this wreck is not the low shoulder, it's the plaintiff's inattention. I feel we can win cases but we may not win them all.

Oliver:

I don't disagree with Dan's observation that individual employees are being sued. It is a fact of life; anyone can be sued and everyone in this room (if they stay working for the government) probably will be sued sometime in their career. It does not necessarily mean that an individual is going to be found liable or that the courts are going to start imposing additional liability.

We are going through this at the federal level right now in a lot of situations, under the tort claims act, and it is going to permeate down to the state level. It is my strong feeling that if you are acting within the scope of your job, if you are acting within your general guidelines, you are not going to be found liable. That does not mean that it's not going to be expensive. You should have some insurance or you should make sure that the state is indemnifying you because you can be sued. Our own highway administrator has been sued, and if you want to see people get nervous, bring a law suit against the top people in Washington, in their individual capacity, for $12 million. The person is making $65,000 a year and has total assets of $200,000. Sometimes we can get the Justice Department to defend them and
sometimes not. That depends upon an observation of how that person was
performing his job function.

If you are under the influence of alcohol or drugs, if you have a nervous
problem, or a medical disability or something that is going to inhibit the
performance of your job and make you less than diligent, then you are a
prime candidate for personal liability. Other than that, I don’t see it.

Turner:

I completely concur with that. We only differ in the fact that in some
states individuals are targets. There is a tougher side to what David just
said. If you are a manager and one of your employees continuously is
negligent in the work he is supposed to do, is impaired on the job, or has a
physical disability that prevents him from doing his job as he should, you
may find yourself with liability.

Let me be very clear about disability. There’s nothing wrong with having
a disabled person working for you if that job description allows that person to
do his job. There’s nothing wrong at all with your helping a person with
alcoholism or emotional problems to get help, especially if your agency
provides for that. But, if you continually ignore an employee with a problem
like that and allow him to continue in his duties, and you have prior
knowledge of the situation, then you have a possible liability.

I know that there is at least one state that is sovereign and which has
refused to indemnify employees and refused to defend employees and refused
to purchase insurance for them. I would not work for state government in
that state.

Oliver:

We’re talking about dysfunctional, not disabled. Someone mentioned
Dram-Shop Law where the tavern owner is held responsible for serving a
patron that one drink. The person goes out under the influence and then kills
someone. The liability is imputed and turned back to the tavern owner. This
is pervasive in society now. We are heading into an area, particularly at the
public level, where you are responsible for your actions, your brother’s
actions, your sister’s actions, your employee’s actions, and the boss’s actions
also. Nobody said it was easy.

Turner:

Let me emphasize what David said again, if you are doing your duties as
well as you can do them, if you are trying and reasonably understand the
ground rules of your job (the standard of care against which you are
measured), you are in good shape even if you are sued. You are doing what
you can. A plaintiff’s attorney generally prefers not to sue individuals. The
studies show that a lawyer can get 4-1/2 times as much money for his client
(to restore his damages) if he sues a big, nameless company. You can make
more than twice as much money if you sue a government agency than if you
sue an individual person who has a face and a family and a name and sits
there at the table looking at you the whole time.

If you are doing your job and know the ground rules and are fulfilling
your job responsibilities as well as you can, then you are in good shape.
Phillips:

Except—and lawyers like to deal with exceptions—the more you support limitations on state liability the harder it is for someone to get into the state’s pockets and the more likely they are going to be looking back to your pocket. These things swing back and forth and you’ve got to be very careful.

If someone in this room came to me and said, "I have a problem. I have been wronged and I need compensation. I want remedial action, I want someone to pay attention to me." You better believe that I’m going to start turning the chairs over in here, if I have to, to find some way. Don’t think I wouldn’t. You’re going to find whoever is going to pay for your client. As a good lawyer, you have to. If you don’t, you’re going to be sued.

Turner:

The purpose of civil law is to allow damaged parties to be restored. That’s what David just told you. When someone has been damaged, they need a route to be restored to their previous condition.

You are not a special target because you are a public employee. Quite the contrary. For 125 years, you have enjoyed protection that was not available in the private sector. One out of five consulting civil engineering firms in the United States last year carried no insurance. That meant if they were sued, they bellied-up, gave up all their assets and started a business somewhere else.

Oliver:

Whatever you leave with here today, don’t leave with the idea that law is going to motivate or direct or command your performance. The law is something that you have to pay attention to in terms of tort liability, but it is something that should be placed on the back shelf. What you, particularly the younger engineers in this room, should leave here with is that you have got to do your job in accordance with the best education and the best knowledge you have. You’ve got to know and follow the guidelines. You’ve got to pay attention to what your standards are as an engineer, and that’s how you do your job. Tort liability will take care of itself. Don’t let it swing you, don’t blame it, don’t use it as a crutch. Know your profession and do your work.