

Context-Sensitive Design

Will the Vision Overcome Liability Concerns?

R. Jones

Context-sensitive design (CSD) has been described as “among the most significant concepts to emerge in highway project planning, design, and construction in recent years” (1). What is envisioned is a process that results in a transportation project reflecting community consensus on purpose and need, with project features addressing equally safety, mobility, and preservation of scenic, aesthetic, historic, and environmental resources. It involves policy judgments in the balancing of competing interests. The concept also has been described with other terminology: “flexibility in design,” “place-sensitive design,” “thinking beyond the pavement,” and, most recently, “context-sensitive solutions (CSS)” (1). This CSD/CSS concept is seen as a major paradigm shift emerging from strong cultural trends that began in the 1960s. The public began to demand projects with less impact to the community and its environment, even at the cost of reduced safety and mobility. As a result of these trends and mounting public pressure, Congress began to enact laws and establish public policy objectives to protect and enhance our environmental and cultural resources.

More recently, Congressional language in the Intermodal Surface Transportation Act of 1991 (ISTEA) and the National Highway System Act of 1995 has encouraged flexibility in highway design to accomplish those policy objectives. Publications such as the 1997 AASHTO *Design Flexibility Case Study Report* (2) and the 1997 FHWA report *Flexibility in Highway Design* (3) advanced these policy objectives. These efforts led to the 1998 national conference “Thinking Beyond the Pavement: A National Workshop on Integrating Highway Development

with Community and the Environment.” Later regional workshops have focused on “Design Excellence: Simultaneously Advancing the Objectives of Safety, Mobility, Enhancement of the Natural Environment, and Preservation of Community Values.” This process of melding design with policy objectives came to be called context-sensitive design.

It is important to note that CSD/CSS does not attempt to create new design standards but builds on the flexibility in current design standards and guidelines. Such flexibility is nothing new; it has been around at least as long as the AASHTO 1984 publication, *A Policy on Geometric Design of Highways and Streets* (commonly called the Green Book) (4). The foreword to the latest edition of the Green Book (5) makes clear, and it must be emphasized, that it is not a publication of design standards:

The intent of this policy is to provide guidance to the designer by referencing a recommended range of values for critical dimensions. Sufficient flexibility is permitted to encourage independent designs tailored to particular situations. Minimum values are either given or implied by the lower value in a given range of values. The larger values within the ranges will normally be used where social, economic and environmental (S.E.E.) impacts are not critical. (5, p. xliii)

While the vision of excellence is strong, there has continually surfaced a nagging concern, even fear, that increased exposure to tort liability would result should design standards or guidelines be “flexed,” because it would mean compromising safety. Underlying this concern seems to be a belief that safety must be paramount, because it is such a primary consideration in both transportation design and tort law. Some believe that only by using typical cross sections

composed of the highest Green Book values will safety be assured and tort liability avoided. So the question before us is this: Will the vision of design excellence invoked by CSD/CSS overcome liability concerns? I believe it will.

This lecture addresses this liability concern together with the challenge of balancing safety with other considerations in the design process. It is my intent to show that Congress, through legislative enactments stretching over a period of several decades, has established statutory requirements and public policy clearly demonstrating that safety, while a primary consideration in design, need not be a paramount consideration and that safety, as a primary consideration in design, should be balanced with mobility, protection and enhancement of the natural environment, and preservation of community values. I suggest that such public policy, because it reflects the public interest, will influence changes in tort law to better accommodate CSD/CSS processes, reducing liability exposure in both the short term and the long term. Long-term changes will require appellate decisions favorable to CSD/CSS, but winning such appeals will require solid documentary evidence showing that CSD/CSS design decisions were a conscious balancing of public policy factors. I suggest that, in the short term, such documentation can be used in individual cases either to establish design immunity or to explain and prove the reasonableness of design decisions based on the context within which they were made.

CONTEXT MATTERS

CSD/CSS would not have been developed, and I would not be giving this lecture, if context did not matter. But the American public and our elected representatives believe context does matter. This was clearly demonstrated to me by the first environmental impact statement I ever reviewed

and later defended in court. The proposed project was to complete construction of I-70 through Glenwood Canyon, Colorado.

Glenwood Canyon has been described as one of America's most spectacular scenic attractions. This narrow gorge, carved by the Colorado River, has depth ranges between 3,000 and 4,000 ft with sheer walls in some places and steep slopes and flat areas of vegetation in others. A century before, the Denver and Rio Grande Railroad had been pushed through the canyon. A half century before, US-6 was constructed to upgrade a very crude road, but construction left cut scars and talus material throughout the canyon.

Upgrading the highway posed a major challenge to Colorado Department of Transportation engineers, but it was a challenge they would meet while remaining true to the belief of Colorado citizens that context mattered. According to former Federal Highway Administrator, Thomas D. Larson, because context mattered, the engineers would give these citizens and the country "a marvelous piece of environmentally and aesthetically sensitive engineering" (6).

Back then, the accident rate on existing US-6 through the canyon was unacceptably high, more than twice the national average for similar roads. Safety and mobility concerns dictated an upgrade, but Interstate design standards would not permit the upgrading without destroying much of the canyon's natural beauty and recreational assets. In 1976, Colorado Senators Haskell and Hart, urging the balancing of safety and environmental protection, introduced legislation to grant an exemption from the Interstate highway standards. Instead of the four-lane, extensively wide standards of normal interstates, required by Title 23, U.S.C., section 109(b), the bill would permit the Secretary of Transportation flexibility to approve reduced standards.

There was precedent for such a waiver in Section 158 of the Federal-Aid Highway Act of

1973 (Public Law 93-87, Aug. 13, 1973), when Congress authorized the waiver of the geometric and construction standards mandated by Section 109(b) of Title 23, U.S.C., allowing the balancing of safety with environmental protection and economic concerns in the construction of I-93 through Franconia Notch State Park, New Hampshire. The waiver allowed the Secretary of Transportation to approve standards “which the Secretary determines are necessary for the safety of the traveling public, for protection of the environment, and for the preservation of the park-like and historic character of the Franconia Notch area.” During the House debate on Section 158, the House managers stated:

This is to provide the maximum flexibility in designing the facility and controlling its use to achieve the economic and environmental compromise which all interested parties agree is our common objective.

Based on the Franconia Notch precedent, and in response to Senators Haskell and Hart, Congress, in Section 152 of the Federal-Aid Highway Act of 1976, addressed the Glenwood Canyon problem as follows:

Sec. 152. Notwithstanding section 109(b) of title 23 of the United States Code, the Secretary of Transportation is authorized ... to approve construction of [I-70 through 17.5 miles of Glenwood Canyon] ... to provide for variations from the number of lanes and other requirements of said section 109(b) which the Secretary determines are necessary for the safety of the traveling public, for the protection of the environment, and for preservation of the scenic and historic

values of the Glenwood Canyon. The Secretary shall not approve any project for construction under this section unless he shall first have determined that such variations will not result in creation of safety hazards and that there is no reasonable alternative to such project.

Here, Congress allowed design exceptions from Interstate design standards to allow a balancing between safety, mobility, and protection of the environment. What it did not authorize in granting design flexibility was the creation of safety hazards.

I believe Congress used the term safety hazards advisably. It recognized, as should we, that it is one thing to moderate or balance safety to accomplish other objectives, but the creation of safety hazards is not only bad engineering, it is labeled gross negligence in tort law. While it is a general rule of law that the state is not an “insurer of the safety of travelers using the highway,” the state is required to exercise reasonable care to make and keep the roads in a reasonably safe condition (7). Even where the state has design immunity, it seldom applies in a situation in which the fault in the plan or design is so great that it may be held dangerous, hazardous, or defective as a matter of law (8). So while I stress the need to balance safety with other important considerations in the CSD/CSS process, it should never lead to the creation of safety hazards.

After I-70 through Glenwood Canyon was completed it was clear that the CSD was a success. Aspen architect Sam Caudill, Chairman of the Citizens Advisory Committee for the project, lifelong environmentalist, and one of the earliest opponents of a four-lane highway, said about the new four-lane Interstate: “It’s incredible what they’ve done here—engineering-wise. It’s going to be a prototype for others who want to do the same thing all over the world. The whole citizen involvement process was fabulous—very intense—it’s a beautiful canyon.”

Colorado Department of Transportation Project Manager Ralph Trapani, added: “The citizens of this state decided this canyon was a resource they wanted to preserve and protect. Because of them, we have this project, and its spectacular.”

Edgardo Contini, inspired designer for the project, concluded: “I think it’s important to identify what the project, in essence, consisted of. It was not a matter of designing a highway; it was not a matter of creating a recreation environment; it was the issue of resolving very real, conflicting demands.”

This was my first experience with CSD, but it made me a true believer that context matters. The resolution of conflicting demands on this project resulted in design excellence simultaneously advancing the objectives of safety, mobility, enhancement of the natural environment, and preservation of community values.

A more recent project in Colorado, State Highway 82, entrance to Aspen, convinced me that the lessons learned from the I-70 Glenwood Canyon project were still being applied but also being advanced. I was an environmental consultant for several years on this 2-mi project, beginning in 1995. Citizen involvement leading to community consensus on purpose and need went beyond anything I had experienced before and demonstrated once again that context matters.

The 40 mi of US-82 from Glenwood Springs to Aspen had been developed as a four-lane highway, but the Aspen citizens had rejected a four-lane solution and wanted their needs and desires included in the project’s objectives. Based on these desires, 10 project objectives were developed by the affected agencies, elected officials, concerned members of the public, and a technical advisory group consisting of the various local governments and state and federal agency staff.¹ The process of developing these objectives took place over a period of 1½ years

during which community focus groups, community leadership workshops, and meetings of the technical advisory committee reached consensus on purpose and need. I will not list all 10 objectives, but several are noteworthy for our purposes:

1. Community-based planning: "... with special attention focused on limiting vehicle trips into Aspen to create less congested downtown core."
2. Transportation capacity: "... identify a combination of travel modes, alignments, and transportation management actions to seek to achieve the stated community goal of limiting the number of vehicles in 2015 to levels at or below those in 1994."
3. Safety: "Reduce the high accident rate ... and provide safety improvements for bicyclists and pedestrians ... safe access at all intersections for all movements."
4. Environmentally sound alternative: "Develop an alternative which minimizes and mitigates adverse impacts."
5. Community acceptability: "Develop an alternative which fits the character of the community and is aesthetically acceptable to the public."
6. Livable communities: "Provide a system which reflects the small town character and scale of the Aspen community and which enhances the quality of life for residents and visitors. The system shall provide more accessible transportation which increases the mobility of the community and therefore provides for a more livable community."

As a result of this process, the preferred alternative selected was a combination of two-lane highway and intersection improvements, a light-rail transit system, and an incremental transportation management program meeting community objectives. The objectives developed

by the stakeholders required balancing safety with other important factors. The solution required CSD, which simultaneously advanced the objectives of safety, mobility, enhancement of the natural environment, and preservation of community values—all because context mattered.

In my introductory remarks, I surmised that the use of CSD/CSS processes was being avoided by some because of tort liability concerns related to safety. I get the impression that there are those who believe tort law is somewhat static and not likely to change to accommodate CSD/CSS, either as a general rule of law or on a case-by-case basis. To show you that this is not the case, I would like to focus on the origin and development of tort law to demonstrate how safety, while a primary consideration, was moderated by the courts when the public wanted to reap the economic benefits of better roads and faster travel time. In addition, I want to show the role of public interest and public policy in reshaping tort law.

ORIGIN AND DEVELOPMENT OF TORT LAW

Safety As a Primary Consideration in Tort Law

I want to start with a brief overview of the origin and development of tort law, highlighting safety as a significant consideration. The historical purpose of tort law was social control and not a method of loss allocation (9). Today, while social control remains as one feature of tort law, its primary purpose is loss allocation and its principles determine when a person suffering personal injury and/or property damage may shift that loss to another member of society.

The “primordial seed from which all crime and tort law were to germinate was the blood feud that characteristically prevailed wherever there was a barbaric society organized along the lines of blood kinship” (10). Blood feud was the way the clan defended its honor and collected for injury inflicted on one of its members. The Norman kings made a policy decision to control

this behavior, and enhance the safety of their subjects, by providing a substitute for the blood feud and other self-help actions by injured persons. This “law” substitute, later to develop into tort law, required the injured party to obtain a King’s writ to seek damages in the English courts.

Most legal scholars agree that until the 19th century a person committing a tort was, with few exceptions, subject to legal liability even without fault (11). In other words, the common law began by making people act at their peril if physical harm to another might result (12). The law, to ensure safety and reduce the risk of bodily harm and damage to property, offered only strict liability, based on an inflexible standard of care.

The earliest cases dealt with dangerous agencies such as the escape of fire, while later cases included the mishandling of firearms. These perils, and others, caused fear in the medieval community, and a plea of inadvertence was not acceptable. It seems clear that avoiding harm and promoting safety were overriding considerations in the development of tort law principles. It has been suggested that strict liability is the public response expected when society of a given time and place must deal with specific perils it has come to recognize as serious threats to its safety and welfare.² Strict liability was what society wanted and that is what the courts gave them.

The concept of liability based on a flexible standard of care came into being when society reached a stage where diverse economic and social values emerged and seriously competed with each other. Such a competition began in the second half of the 18th century when several developments to facilitate traffic and transportation invited a major adjustment to the law of torts.³

The foremost of such transportation developments leading to a major adjustment of tort law was the formulation of a scientific method for road construction. This was accomplished in the early 1800s by a Scotsman named John L. McAdam, who developed the macadam system of

using crushed rock road base with broken gravel surfacing, revolutionizing the construction of highways. From this improvement emerged the turnpike system and the use of the stagecoach and other horse-drawn vehicles capable of faster speeds. Obviously, the strict liability applying to collisions on the limited and inadequate roads of the past would not be acceptable to a society that wanted to reap the economic benefits of better roads and faster travel times.⁴ Safety would have to be compromised in favor of speed, but this required a departure from the inflexible standard of care in favor of a less protective flexible standard of care.

Three American courts were the first to adopt the flexible standard of care—the principle that liability would not result unless the responsible party was guilty of some fault or neglect (13–15). The Massachusetts case of *Brown v. Kendall* (15) became the leading case establishing the necessity of proving negligence to establish liability for accidental injury. The flexibility of this new standard of care resulted because negligence, and liability, were determined on a case-by-case basis, depending on the circumstances of each case. Legal authorities agree that adoption of the flexible standard of negligence and abandonment of strict liability coincided with the transportation and industrial revolution (16). It is here that we see the overriding emphasis of the common law to direct tort law along lines that will achieve a desirable social result for the present and the future.

Perhaps more than any other branch of the law, tort is a battleground of social theory because the central idea is that liability must be based on conduct that is socially unreasonable—conduct that puts life, property, or relationships at unreasonable risk. Legislatures and courts, over time, balance broad societal trends and incrementally shape the face of tort law. Peter H. Schuck, a leading authority on tort law, says: “The master ideas that drive tort doctrine—reasonableness, duty of care, and proximate cause—are as loose-jointed, context-sensitive, and

openly relativistic as any principles to be found in law. They do not simply accommodate social change; they *invite* the law to adapt to it” (17).

The tort law process seeks to compensate for injuries as they are understood in light of changing social and economic conditions. The law is in continuous development, adapting to the changing times and conditions. Ultimately, the law must coincide with public opinion and public policy to be in the public interest. Will tort law come into line with the public opinion and public policy driving CSD/CSS? It is my opinion that it must do so to be in the public interest, and I expect it will.

Role of Public Policy in Reshaping Tort Law

Public policy plays a significant role in influencing court-made substantive law. Legal scholars tell us that “a court may look to statutes not only as mandates on issues directly addressed but also as sources of ‘establishment of policy [that] carries significance beyond the particular scope of each of the statutes involved.’”⁵

Broadly speaking, public policy consists of the principles and standards regarded by Congress, state legislatures, and the courts as being of fundamental concern to the state and the whole society (19). The law of torts is heavily influenced by such public policy. A very large part of tort opinions tries to strike a balance between the rights of the parties in litigation and the interest of the public at large. In this balancing process, the court is influenced by statutory law and by public policy (18). This means courts may look to environmental statutes and the policy mandates behind them in reshaping tort law principles.

Based on the foregoing, we can predict that many courts, when considering liability issues involving CSD/CSS, will be open to an examination of the statutorily established public

policy giving rise to CSD/CSS processes and objectives. This is because CSD/CSS clearly reflects the fundamental social concerns and public policy objectives outlined in a range of national and state legislation on environmental and cultural resource protection. We can further predict that such public policy will influence some courts to strike a favorable balance between the rights of the parties in litigation and the interest of the public at large as reflected in CSD/CSS. Let us examine some of the key legislation involved and the public policy it established.

I will start with the legislative policy on safety as a primary factor in federal approval of standards for design and construction of federal-aid highways, highlight the legislative policy on protecting environmental and community resources, and then cover the recent legislative emphasis on design flexibility to protect such resources. My premise here is to show that safety, while a primary consideration in design, is not to be a paramount consideration; that safety, as a primary consideration in design, should be balanced with mobility, protection and enhancement of the natural environment, and preservation of community values, as envisioned by CSD/CSS.

SAFETY AS A PRIMARY CONSIDERATION IN FEDERAL AID

The first real interest in traffic crash prevention as a national problem was expressed through the National Conferences on Street and Highway Safety beginning in 1924. In 1935, Congress addressed highway safety by enacting the Motor Carrier Act of 1935, authorizing the establishment of federal requirements for safe operation of vehicles by interstate motor carriers. Then, in 1938, Congress began to address highway safety as a primary factor to be considered in federal approval of highway plans and specifications in the federal-aid highway program. The Federal-Aid Highway Act of 1938, Section 12, provided, in part, as follows:

Hereafter the Secretary of Agriculture shall approve only ... such plans and specifications of highway construction for the type or types proposed ... conducive to safety, durability and economy of maintenance. (20)

I find the adjective conducive a little lightweight when used with safety, but that is the word Congress chose to use. It means helpful or favorable to. I believe this is our starting point for safety policy in the Federal-Aid Highway Program.

Twenty years later, in 1958, the 85th Congress codified the 40 separate federal laws on highways into Title 23, U.S.C., “Highways” (21). Codification is the process of compiling, arranging, and systematizing the laws of a discrete branch of law into an ordered code. The language I quoted from the 1938 Act was combined with portions of the Highway Acts of 1921, 1936, 1944, 1950, and 1956 to become section 109 of that Code, titled: “Standards.” It is noteworthy, but not surprising, that Congress deliberately embedded safety as a primary consideration in highway design standards. Most of the new sections of Title 23, U.S.C., giving rise to CSD/CSS have become amendments to Section 109. Later, I will call attention to these amendments.

Subsection (a) of Section 109 is worded essentially the same today as it was in 1958, except that, in 1995, Congress substituted the word criteria for the word standards:

(a) In general. The Secretary shall ensure that the plans and specifications for each proposed highway project under this chapter provide for a facility that will—

(1) adequately serve the existing and planned future traffic of the highway in a

manner that is conducive to safety, durability, and economy of maintenance;

and

(2) be designed and constructed in accordance with criteria best suited to accomplish the objectives described in paragraph (1) and to conform to the particular needs of each locality.

Therefore, based on this key provision of law, we start with the basic mandate that plans and specifications, to serve existing and planned future traffic needs, shall be designed and constructed in accordance with criteria best suited to promote safety, durability, and economy of maintenance, while conforming to the particular needs of each locality. Nothing in this language directly or indirectly mandates that safety is to be paramount. On the contrary, the language suggests that safety is to be balanced with the particular needs of each locality. I will expand on that later.

PROTECTION OF ENVIRONMENT AND COMMUNITY VALUES

Section 4(f) of Department of Transportation Act

The 89th Congress, in establishing the U.S. Department of Transportation in 1966, proclaimed:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. (22)

To implement this national policy it enacted Section 4(f) to protect public parks,

recreation areas, wildlife/waterfowl refuges, and historic sites from use or damage by transportation projects, unless there was “no feasible or prudent alternative,” and, unless the action includes “all possible planning to minimize harm” (23).

The U.S. Supreme Court interpreted Section 4(f) in its 1971 decision in *Citizens to Preserve Overton Park v. Volpe* (24), which involved a challenge to Secretary Volpe’s approved use of parkland to build a six-lane interstate highway across Overton Park in Memphis, Tennessee. The Supreme Court decision found that preservation of parkland, not safety, was of “paramount importance” (25).

Public Hearings and Community Involvement

When I joined the Bureau of Public Roads in 1965, I became aware of mounting public pressure demanding more public involvement and greater protection of the natural and human environment in the highway program. Such public pressure continued throughout the 1960s, and we saw the result when Congress enacted Section 4(f). Then, during consideration of the Federal-Aid Highway Act of 1968, the Senate Committee on Public Works made the following observations:

The public hearings held by the States, under the requirements of Section 128, Title 23, United States Code, have been less than adequate in performing the intended functions of informing the public and allowing those affected to adequately voice their opinions, recommendations, and suggestions. ... It is important that those who participate in the hearings believe that the views they express will be considered and weighed in decisions relating to highway location

and design. (26)

During the Senate debate, Texas Senator Yarborough, made the following comments:

At long last, this bill begins to look at highway planning not only from a perspective of traffic, but from a human perspective as well. ... At last we are adopting a more human approach that brings together the engineers, the architects, the sociologists, the urban planners, the economists, and others into a coordinated team to consider the total impact of highway construction. But most important, this bill assures that there will be more consulting with those who are most directly affected by highway construction—the community. (27)

The additional language on hearings recommended by the Senate became an amendment to subsection (a) of Section 128, Title 23, U.S.C., requiring that not only would hearings be required to consider the economic effects of highway location, but also the “social effects of such location, its impact on the environment, and its consistency with goals and objectives of such urban planning as has been promulgated by the community” (28).

Two years later, the Senate Committee on Public Works continued to express concern about the adequacy of hearings (29), so in the 1970 Federal-Aid Highway Act, Congress again amended Section 128 of Title 23, U.S.C., by adding a certification and reporting requirement:

Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of

the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered. (30)

National Environmental Policy Act of 1969

The same 91st Congress enacted the National Environmental Policy Act of 1969 (NEPA), considered by many to be the most important law of the 20th century. In NEPA, Congress declared a new national policy:

... it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (31)

But Congress did not stop with just a policy statement. It went on to authorize and direct that:

... to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.

This mandated, among other things, that Title 23, U.S.C., including Section 109, would be construed so as to be compatible with NEPA and its policies. The Statute continues:

... and (2) all agencies of the Federal Government shall

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making

...

(C) include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement

... on

- (i.) the environmental impact of the proposed action,
- (ii.) any adverse environmental effects which cannot be avoided,
- (iii.) alternatives to the proposed action,
- (iv.) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v.) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (32)

It is this provision, as you know, that for over 30 years has caused us to prepare environmental assessments, environmental impact statements, and records of decisions on thousands of transportation projects. In these 30+ years, we have learned a great deal about the importance of administrative records and how critical they become to show the adequacy of the

decision-making process, particularly in litigation. We need to attach the same importance to the documentation of design decisions if we want to win more tort lawsuits. I will address documentation more later in the lecture.

23 U.S.C. 109(h): Process Guidelines and Action Plans

In tandem with NEPA, the 91st Congress also added a new subsection (h) to Section 109 of Title 23, U.S.C., focusing on design criteria relating to social, economic, and environmental effects. It required the Secretary to:

(h) promulgate guidelines designed to assure the possible adverse economic, social and environmental effects relating to any proposed project on any Federal-aid system have been fully considered and the final decisions made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and costs of eliminating or minimizing such adverse effects and the following:

- (1) air, noise, and water pollution;
- (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and availability of public facilities and services;
- (3) adverse employment effects, and tax and property value losses;
- (4) injurious displacement of people, businesses and farms; and
- (5) disruption of desirable community and regional growth.

During the Senate debate on the Conference Report, Senator Randolph explained this

requirement:

Provisions to improve consideration of economic, social, environmental and other impacts in highway design and construction were expanded by the conferees to implement our belief that highways should enhance communities rather than degrade them. Proper design and engineering practices can, in many instances, avoid, overcome or minimize adverse impacts on people and their surrounding environs. (33)

I think it is significant that Congress chose to place these new requirements in Section 109 of Title 23, U.S.C., the section covering standards. It is significant that Congress did not make safety paramount over other considerations. I am of the view that Congress, in enacting Section 109(h), intended there to be a balancing of safety, mobility, economic, and environmental considerations. A 1995 decision by the U.S. Court of Appeals, Seventh Circuit, in *Rothrock v. United States*, 62 F.3d 196 (7th Cir. 1995), supports this view.

This decision arose from a suit seeking to recover for personal injuries sustained in an accident allegedly caused by the absence of guardrail on an I-65 bridge in Indiana that was resurfaced with federal funds. The issue being addressed by the Court was whether FHWA could properly approve the overlay project without requiring replacement of a section of guardrail on the bridge. Citing 23 U.S.C. 109(h) the Court noted:

Congress directs the Secretary to formulate guidelines for the approval of projects “in the best overall public interest,” taking into account such considerations as

safety, efficiency, and cost. 23 U.S.C. § 109(h). The statute also directs the Secretary to consider [the five factors listed in 109(h)]. ... The sheer number of factors involved suggests that Congress intended these decisions to be made as an exercise of judgment and choice. ... Thus, in deciding whether to fund Indiana's bridge resurfacing project despite the alleged nonconformance with certain AASHTO standards, the FHWA is charged with balancing a mix of factors such as cost and safety. This is inherently a discretionary judgment involving balancing a mix of policy factors ... (at 62 F.3d 199).

ISTEA

In ISTEA, Congress introduced a design-related provision to Section 109, authorizing relaxation of standards to allow for preservation of historic and scenic values. Section 1016(a) amended Section 109 of Title 23, U.S.C., to provide as follows:

If a proposed project ... involves a historic facility or is located in an area of historic or scenic value, the Secretary may approve such project ... if such project is designed to standards that allow for the preservation of such historic or scenic value and such project is designed with mitigation measures to allow preservation of such value and ensure safe use of the facility.

This provision, while ensuring safety, did not make it a paramount consideration.

National Highway System Designation Act of 1995

Next came the National Highway System Designation Act of 1995, where Congress, in Section 304, amended Section 109 of Title 23, U.S.C., to provide that:

A design for new construction, reconstruction, resurfacing ... restoration, or rehabilitation of a highway on the National Highway System (other than a highway also on the Interstate System) may take into account ... [in addition to safety, durability and economy of maintenance]

- (A) the constructed and natural environment of the area;
- (B) the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and
- (C) access for other modes of transportation.

Again, safety, while a primary consideration, was not made a paramount consideration, and the flexibility to balance safety with other factors was clearly intended.

Transportation Equity Act for the 21st Century

Then in 1995 came the Transportation Equity Act for the 21st Century (TEA-21), which included numerous provisions evidencing the continuing emphasis Congress places on environmental, scenic, aesthetic, historic, community, and preservation impacts being considered in the design of highway projects. For example, Section 1221 establishes the Transportation and Community and System Preservation Pilot program, providing a comprehensive initiative for research and grants to investigate the relationships between transportation and the community and system preservation and private sector-based initiatives. Under this program, states, local

governments, and metropolitan planning organizations are eligible for discretionary grants to plan and implement strategies that, among other things, improve the efficiency of the transportation system and reduce environmental impacts of transportation. Again, safety was not made a paramount consideration. It is expected that this same congressional emphasis will continue to be provided in future highway legislation.

This accumulation of legislative enactments and policy declarations makes it crystal clear that safety, mobility, enhancement of the natural environment, and preservation of community values through design excellence is of fundamental concern to the state and the whole of society. Will it cause a shift in our tort law to coincide with public opinion and public policy? I believe that such a shift must occur for the law to be fully in the public interest. I believe the CSD/CSS vision, responsive as it is to public opinion and public policy, will cause such a favorable shift to take place and in so doing will overcome liability concerns.

To fully consider that question, let us examine the status of state transportation agency tort liability. Initially, I will discuss the paradigm shift of tort law in the 1960s and 1970s because a majority of state supreme courts abandoned the doctrine of sovereign immunity. This was based in large part on the precedent set by a shift in federal policy reflected in the Federal Tort Claims Act (FTCA). I will allude to another major shift occurring in the 1980s to deal with an insurance crisis, when a vast majority of the states enacted tort reform acts to further limit liability. I will follow this with a discussion of discretionary immunity, including design immunity, with a primary focus on current trends in federal and state case law recognizing immunity for design decisions based on a conscious balancing of policy considerations. Finally, I will discuss the importance of documentation to show the reasonableness of design decisions, where design immunity is not available as a defense. Reasonableness depends on the context and

circumstances of the challenged decision. The contemporaneous documentation should show how the CSD/CSS process coincides with public opinion and public policy and reflects a balancing of public policy factors. My purpose in reviewing this material is to show how arguing the CSD/CSS vision by using documentation of policy-based design decisions will result in winning more lawsuits, cause a shift in tort law principles, and overcome liability concerns. We must start by telling juries the whole story.

TORT LIABILITY OF STATE TRANSPORTATION AGENCIES

Sovereign Immunity

The emergence of the doctrine of negligence did not really affect transportation agencies in the 19th and first half of the 20th centuries because of the doctrine of sovereign or governmental immunity. But to some the doctrine seemed unjust and out of place in a democracy.⁶ The pros and cons of sovereign immunity were debated for over a century before the wall of protection started to crumble. First, in 1946, social pressure caused Congress to pass the FTCA, waiving immunity except for discretionary functions. Then, between 1957 and 1976, there was a paradigm shift in tort law when 29 state supreme courts abolished large chunks of sovereign immunity. State legislatures responded by enacting tort claims acts, sometimes restoring full immunity but usually providing reduced immunity, like the FTCA. Another major shift occurred as a result of an insurance crisis in the mid-1980s, which caused over 40 states to pass tort reform legislation designed to further limit liability exposure, many putting a cap on damage awards (34). Categories of immunity into which the states fall are as follows:

- Full retention of sovereign immunity,

- Technical retention of immunity from suit but allowance of an administrative claim,
- Waiver of immunity in limited classes of cases, and
- Abolishment of immunity in a substantial way.

Discretionary Function Immunity

When enacting the FTCA in 1946, Congress made no attempt to define governmental activities or to exempt them from liability as such. It simply worded the exception to preclude judicial review for governmental activities that are discretionary in nature. Neither did Congress define the term discretionary function, but the standard dictionary definition is “to have freedom to decide or choose—left to one’s own judgment.” The statute exempts the United States from tort liability “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government” [28 U.S.C. 2680(a)].

The FTCA became the precursor of all state legislation embodying the discretionary function exception, with the state statutes either precisely duplicating or following in reasonably close detail the language of the federal statute. More than half the states, by statute or common law judicial rulings, retain immunity for discretionary functions. While there are significant differences among the state decisions as to what constitutes discretionary functions, they do agree that the basic purpose is to ensure the separation of powers. Judicial restraint is to be exercised to preserve policy decision making by the executive branch of government. Although the word policy cannot be precisely defined, there is broad agreement that it includes social, economic, and political considerations, such as are present in the CSD/CSS processes.

The U.S. Supreme Court in its first decision under the FTCA, *Dalehite v. United States*,

(35) upheld the government's immunity based on the discretionary function exception. The Court said: "Where there is room for policy judgment and decision there is discretion."

If the decision had stopped there it would have been great, but the court went on to add: "The decisions ... were all responsibly made at a planning rather than operational level". Because state legislation has so closely followed the FTCA, state courts, while not obligated to do so, take their lead from the U.S. Supreme Court in the interpretation of discretionary function. Thus, many state courts seized on the planning and operational dichotomy language as an easy tool to decide when the discretionary function exception applied under state law, ignoring the other language of the Dalehite opinion. Under this planning and operational dichotomy test, many courts began to focus on the level of government at which the decision was made as an easy way to distinguish exempt discretionary planning decisions from nonexempt operational decisions. This put the emphasis on who made the decision instead of on whether the decision was actually a policy judgment. But the inability of the courts over the intervening years to draw a clear-cut distinction between discretionary and nondiscretionary activities has led to a maze of confusion in the cases (36).

The variation from state to state makes it impossible to provide you with a general rule of law as to how discretionary decisions will be treated, but recent U.S. Supreme Court decisions clearly establish the principle that under the FTCA discretionary function exception is not confined to the policy or planning level, that it is the nature of the decision/conduct, rather than the status of the actor, that governs whether the exception applies. In the most recent U.S. Supreme Court decision on discretionary function, *United States v. Gaubert* (37), Justice White, joined by seven other justices, rejected the planning and operational dichotomy, calling it nonexistent. Many state courts now agree. For example, an Iowa Supreme Court decision in

2002, *Shelton v. State*, 644 N.W.2d 27 (Iowa 2002), noted that “we recognized that our court, and many others, had misinterpreted Dalehite’s scheme, thereby failing to recognize discretionary decisions at the ‘operational’ level.” Even though some state court decisions consider the status/level of the decision maker to be relevant,⁷ more and more courts are now placing the primary focus on whether the decision sought to be exempted was a balancing of policy considerations, whatever the level.⁸ For example, the Tennessee Supreme Court in a 1992 decision in *Bowers v. City of Chattanooga*, 826 S.W. 2d 427 (Tenn. 1992), noted:

We caution that this [planning/operational] distinction serves only to aid in determining when discretionary immunity applies; [such] immunity attaches to all conduct properly involving the balancing of policy considerations. ... [A]n ‘operational act’ is entitled to immunity, where ... the operational actor is properly charged with balancing policy considerations.

The cases now demonstrate a strong trend toward recognizing the right of government officials at the policy level to delegate to or leave open for lower level officials the authority to make exempt discretionary policy decisions that involve social, economic, and political considerations, such as the balancing of safety, mobility, and preservation of scenic, aesthetic, historic, and environmental resources. This is an important trend supporting the practice of CSD/CSS, decreasing exposure to liability, because it expands discretionary exemption to include policy decisions made by lower level officials, such as design engineers, when authorized to make such policy decisions in balancing competing interests.

A 1987 federal appeals court decision in *Bowman v. United States* (38) is an excellent

example of a court's recognition that design decisions require the balancing of many factors, including highway safety. Here is what the Court said:

National Park Service officials have more than safety in mind in determining the design and use of man-made objects such as guardrails and signs along the [Blue Ridge] Parkway. These decisions require balancing many factors: safety, aesthetics, environmental impact and available financial resources. In making each decision these factors must be weighed carefully in accordance with the policies of the National Park Service. ... What is obvious is that the decision [not to place guardrail along an embankment] was the result of a policy judgment. One can argue that another policy, which places greater emphasis upon safety, is more desirable. However, by the discretionary function exception, Congress intended to prevent courts from second-guessing federal policy. ... It is precisely this type of decision which Congress intended to shield from liability because "where there is room for policy judgment and decision, there is discretion." Dalehite 346 U.S. at 36, 73 S.Ct. at 968.

Similarly, a 1996 decision by the Tennessee Supreme Court in *Helton v. Knox County, Tennessee* (39), upheld the county's decision not to install standard guardrails despite a recommendation of state inspectors, because the decision, based on "costs and concern for the preservation of this historic bridge," was a discretionary function that involved weighing public policy considerations.

Design Immunity

One subcategory of discretionary immunity is design immunity. In the 1960 landmark New York decision in *Weiss v. Fote*,⁹ the Court stated that to allow a jury to pass on the reasonableness of a plan or design would “place in inexpert hands what the Legislature has seen fit to entrust to experts.” In a similar vein is the 1999 Supreme Court of Texas decision in *State of Texas v. Miguel (40)*, which held that the State Department of Transportation retained sovereign immunity about highway design decisions. The Court stated:

Whether a governmental activity is discretionary is a question of law. ... The state preserves its immunity for formulating policy because it is a discretionary act. ... Decisions about highway design and about what type of safety features to install are discretionary policy decisions.

Initially, for jurisdictions retaining discretionary function immunity, like Texas, the general rule was that all highway design decisions were protected discretionary functions,¹⁰ but later court decisions declined to give blanket exemption. For example, in 1975, the Utah Supreme Court in *Andrus v. State (41)* held that the discretionary exemption of the Utah Tort Claims Act did not extend to negligence in a design resulting in the dangerous pooling of water in the new roadway. The Court held that:

the decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications ... cannot be labeled discretionary functions.

But in 1995, the Utah Supreme Court in *Keegan v. State of Utah DOT* (42) departed from its 1975 position in *Andrus*, holding that a design decision not to raise a median barrier for an overlay project was an immune discretionary function. The Court relied on a 1993 Federal Appeals Court decision in *Baum v. United States* (43). The Court found that:

UDOT's decision not to raise the concrete barrier during the surface overlay projects was not an operational decision ... but rather involved a policy-based plan, approved by FHWA, which resulted from a considered weighing of the costs and benefits of certain safety and construction policies and which involved the exercise of UDOT's judgment and discretion.

Currently, federal court decisions, like the *Baum* case, hold that design decisions involving policy considerations are exempt from liability as immune discretionary functions. For example, in *Aguehounde v. District of Columbia*, 666 A.2d 443 (D.C.App.1995), the Court stated:

If we were to accept [plaintiff's] argument, the District would be required to justify the policy underlying each of the myriad decisions involved in traffic design. Our case law suggests ... we should ascertain whether the type of function at question is grounded in policy analysis. ... "Discretionary conduct is not confined to policy or planning level ... but on the nature of the actions taken and on whether they are susceptible to policy analysis."¹¹

California and certain other states have enacted a specific design immunity statute. California's Government Code gives design immunity to both public entities and public employees in §830.6, which provides, in part:

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval in conformity with standards previously so approved, if the trial court or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards there for or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards.

Under this statutory scheme, a public entity is not liable for a dangerous condition of public property where it can show: (a) a causal relationship between the plan or design and the accident, (b) discretionary approval of the plan or design before construction or improvement, and (c) substantial evidence supporting the reasonableness of the design. In proving the reasonableness of the design, compliance with design standards usually would prove sufficient, but where the design deviates from such standards, documented approval of design exception, based on sound engineering, would be necessary.¹²

Necessity of Showing Actual Discretionary Decision Was Made

A significant number of courts now hold that to be entitled to design immunity the state must make a showing that the policy decision sought to be held exempt was a conscious balancing of policy factors. For example, in applying this test to a case in which the discretionary immunity doctrine was at issue for alleged negligent design, the Washington Supreme Court in *Stewart v. State* (44) ruled against the state's claim of discretionary design immunity, stating:

There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate.¹³

Thus, documentation by the design engineer of the conscious decisions made in balancing the many policy factors can be critical in proving that an exempt discretionary decision was in fact made.¹⁴ But it is just as critical in proving the reasonableness of a design, when design immunity is not available.

Design Decisions, Negligence, and the Duty of Care

Even though a state has discretionary immunity, design decisions are vulnerable to a challenge of negligence and trial on the merits in several circumstances:

- Where the state has waived sovereign immunity but has not provided a statutory or

common law exception to liability for discretionary functions such as design decisions;

- Where discretionary immunity is provided but narrowly construed by the courts so as to exempt only planning and location decisions, but not design decisions;¹⁵
- Where discretionary immunity, while available to exempt certain design decisions, is not applicable in a particular instance because the alleged design defect resulted from an alleged violation of mandatory regulations or policies that precluded the exercise of discretion;¹⁶ and
- Where design immunity, although generally available, is held by the court to be inapplicable because the challenged design characteristic is so inherently dangerous that it demonstrates a failure to consider the safety of the public.¹⁷

When the defense of design immunity is not available to the state, or the court has ruled against a state's defense of discretionary immunity, the case will go forward for trial on the merits on the issue of negligence. Negligence consists of the failure to do or the doing of that which an ordinary, reasonably prudent person would do or not do under the same or similar circumstances (45). During a trial, the jury or sometimes the judge, decides the issue of negligence. Usually, the legal definition of negligence given to jurors is phrased as "the failure to use ordinary care." In effect, the court is asking the jury to determine a standard of care expected from the ordinary person or the person of common prudence and whether the defendant fell below that standard of care under the circumstances.

The reasonableness of conduct depends on the circumstances. Let me tell you a personal story to illustrate. I left the Texas Attorney General's Highway Law Division to join an insurance defense firm. Later I opened my own practice to specialize in personal injury work. While I was anxiously awaiting clients to crowd into my waiting room, the phone rang. I got it on the first

ring. The voiced asked if this was lawyer Jones. “Yes, sir,” I responded. The voice said: “This is lawyer Knapp, do you need a case?” I said: “Yes, sir, I’ll be right over.”

Lawyer Knapp was a retired Assistant District Attorney who had successfully prosecuted murder cases for years. He said “Do you know anything about torts?” I responded that I knew a lot about torts. He said, “no you don’t, but you’re going to learn—Clyde is going to teach you.” He told me that this Clyde fellow had been arrested and charged with being drunk in a public place. A patrolman had found him passed out in the middle of Main Street, smelling strongly of beer. He found Clyde to be incoherent, with slurred speech.

I said: “Well, it doesn’t sound like much of a tort case, but do you want me to defend him in city court on the drunk charge?” Lawyer Knapp stated emphatically that he would be handling the city court case, but I had better read the police report and get all the facts and circumstances before concluding there was no tort case. He gave me a dollar to cover the cost of the report.

Let me explain what I learned about the circumstances surrounding Clyde’s injuries. He was working nights in a tavern, while recuperating on workmen’s compensation from a head injury received on a construction job. He was not wearing his hard hat when someone dropped a wrench on his head. At the tavern, near midnight, Clyde reminded the only two patrons that he was closing, took their glasses of beer, but spilled them all over his shirt. The man and woman walked out to the street with Clyde, but only Clyde, reeking of beer, stepped down off the curb. He was immediately struck by a late-model Cadillac being driven at a high speed with the lights off. The driver was the wife of the male patron. Clyde was thrown into the air, landing in the middle of Main Street. Everyone but Clyde left the scene. In city court, lawyer Knapp humiliated the arresting officer and won Clyde’s acquittal by showing the circumstances that caused him to be in the middle of Main Street. He convinced the Judge that Clyde was not drunk, but groggy

from the impact, and that his slurred speech was due to a speech impediment.

Clyde was very pleased with the settlement I got him from the owners of the Cadillac. My next case for Clyde would be when he drove into a ravine after a county bridge washed out. It was night time and some kids had removed the barricade and warning lights. We did not recover anything for Clyde's injuries, but he taught me a lot about sovereign immunity. Clyde was a walking disaster, and he taught me that no one could build a highway facility safe enough to prevent injury to him and others like him. Lawyer Knapp was a great mentor to me and he taught me that context matters—circumstances matter.

In litigation, the circumstances will be fleshed out in detail by oral testimony and documentary evidence introduced during trial. Where the case involves alleged design error, the plaintiff will seek to introduce into evidence the AASHTO Green Book or other state-adopted standards, manuals, or guidelines to educate the jury about the standard level of practice and to establish standard of care. Additionally, expert witnesses will provide opinions about the accepted standard practices. It is in this evidentiary battle that documentation becomes critical in defending design decisions—to explain the circumstances, the very context, in which the decisions were made. Even if the design engineer testifies about the rationale for his or her design decisions, the documentation bears great weight because it was made contemporaneous with the decisions. Without such contemporaneous documentation, the oral testimony is always open to the argument that it is post hoc rationalization.

The documentation should establish that thorough and adequate study was made; that professional judgment was exercised to determine relevant criteria, justifying and explaining the use of any criteria in the lower range of values or any design exceptions used; that the process followed reflects a community consensus on purpose and need, with design features developed to

balance safety, mobility, and the preservation of scenic, aesthetic, historic, and environmental resources. Ideally, the documentation would reference state legislation and/or agency policies adopting or implementing the national policies I have previously outlined, because it is here that we are able to explain how the CSD/CSS process coincides with public opinion and public policy, that we explain how the design decisions were in the public interest and are reasonable. As television commentator Paul Harvey would say: “This is the rest of the story.”

SUMMARY AND CONCLUSION

During the 1960s the American public decided that context matters. The public began to demand transportation projects with less impact to the community and its environment, even at the cost of reduced safety and mobility. Mounting public pressure caused Congress to enact laws and establish public policy objectives to protect and enhance our environment and cultural resources. More recently, Congress has encouraged flexibility in highway design to accomplish these objectives. The development by AASHTO, TRB, state departments of transportation, and FHWA of a process to meld design with these policy objectives came to be called context-sensitive design/context-sensitive solutions. The process envisioned is one that results in a transportation project reflecting community consensus on purpose and need, with project features addressing equally safety, mobility, and preservation of scenic, aesthetic, historic, and environmental resources. This vision requires the exercise of flexibility in design—the balancing of competing interests.

Some are concerned that increased exposure to tort liability will result should design standards or guidelines become too flexible, because it would fail to treat safety as a paramount concern. This assumes that safety is considered a paramount concern in both transportation

design and in tort law. I have tried to show that this is an erroneous assumption and that Congress has established statutory requirements and public policy clearly demonstrating that safety, while a primary consideration in design, is not to be a paramount consideration; that safety, as a primary consideration in design, should be balanced with mobility, protection and enhancement of the natural environment, and preservation of community values.

While existing case law does not currently reflect consideration of formal CSD/CSS processes, as such, some cases, particularly in the federal sector, recognize and grant design immunity to policy judgments that balance competing interests in the design process. Ultimately, tort law must coincide with public opinion and public policy to be in the public interest. Therefore, it is my belief that, in the long term, tort law will be influenced by the public opinion and public policy that has been established and will adjust to accommodate CSD/CSS processes, reducing liability exposure. I strongly believe we must do a better job of documenting our CSD/CSS decisions with a view of telling the whole story to juries in future tort litigation. I believe that, in the short term, such documentation will greatly assist agency counsel in explaining and proving the reasonableness of design decisions and the circumstances, the context, within which they were made. I believe the CSD/CSS vision will overcome liability concerns, both in the short term and in the long term.

ENDNOTES

¹State Highway 82 Entrance to Aspen Final Environmental Impact Statement and Section 4(f) Evaluation. Vol. 1, Colorado Department of Transportation, Aug. 1997, p. I-3–I-5: (1) Community Based Planning; (2) Transportation Capacity; (3) Safety; (4) Environmentally

Sound Alternative; (5) Community Acceptability; (6) Financial Limitations; (7) Clean Air Act Requirements; (8) Emergency Access; (9) Livable Communities; and (10) Phasing.

²W. S. Malone (10, p. 20).

³W. S. Malone (10, p. 21).

⁴W. S. Malone (10, p. 22).

⁵Keeton et al. (18), citing *Boston Housing Authority v. Hemingway*, 1973, 363 Mass. 184, 293 N.E.2d 831, 840, quoting *Morague v. State Marine Lines, Inc.*, 1970, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339. See also: *Moning v. Alfonso* (1977) 400 Mich 425, 254 NW2d 759, where, in adopting a judicial theory of negligent entrustment, the court imposed liability on suppliers for supplying slingshots directly to children, based on statutes and legislative judgments of other states as “a source of common law.”

⁶Jones, R. Sovereign Immunity: Where We’ve Been, Where We Are Now and Where We’re Going. *AASHTO Quarterly*, 1979. U.S. Supreme Court Justice Jay remarked in 1793: “I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.”

⁷See *Rico v. State*, 472 N.W.2d 100 (Minn. 1991), adopting the view of Justice Scalia in *U.S. v. Gaubert*, that “the level at which the [operational] decision is made is often relevant to the discretionary function inquiry.”

⁸Jones, R. O. Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards. *NCHRP Legal Research Digest*, Vol. 38, Aug. 1997, pp. 4–6. See also: Richard O. Jones, Discretionary Immunity and Gaubert. Presented at 36th

Annual Workshop on Transportation Law, Chicago, Illinois, July 21, 1997, TRB, National Research Council, Washington, D.C.

⁹200 NYS2d 409, 167 NE2d 63. *But see Fisher v. State*, 702 N.Y.S.2d 418 (A.D. 3, Dept. 2000), noting that “while the State enjoys qualified immunity with respect to matters involving traffic design engineering, it may be found negligent when the highway planning decision at issue evolved without adequate study or lacked a reasonable basis.”

¹⁰Vance (36, p. 10), citing *Smith v. Cooper*, 256 OR 485, 475 P2d 78, 45 ALR 3d 857. See also annotation at ALR 3d, §3.

¹¹See also *State of Texas v. Miguel*, 2 S.W.3d 249 (Tex. 1999) (held: “Decisions about highway design and about what type of safety features to install are discretionary policy decisions ... entitled to sovereign immunity”).

¹²Brelend C. Gowan, Standards vs. Guidelines: Engineering Tools or Legal Weapons? Presentation for Session No. 322: Flexible Geometric Design Philosophy Versus Rigid Geometric Design Standards. Presented at 77th Annual Meeting of the Transportation Research Board, Washington, D.C., 1998. Updated and presented at Thinking Beyond the Pavement: A National Workshop on Integrating Highway Development with Communities and the Environment, sponsored by the Maryland State Highway Administration, AASHTO, TRB, et al., May 3–6, 1998, University of Maryland University College, College Park. For example, see *Higgins v. State*, 54 Cal.App. 4th 177 (1997), where the State met the standard of proof for design immunity.

¹³To the same effect is the 1990 decision in *Niver v. South Carolina DOT*, denying the state immunity for a discretionary act, without some evidence of a discretionary decision: “whether the Department is liable in this instance depends on whether its failure ... resulted in fact from

a discretionary decision. More precisely, the Department's immunity is contingent on proof that the Department, faced with alternatives, actually weighed competing considerations and made a conscious choice." 395 S.E.2d 728 (1990). See also *Wooten v. South Carolina DOT*, 511 S.E.2d 355 (S.C. 1999) (suit alleging injuries by pedestrian caused by DOT's negligence in failing to allow adequate time for pedestrian to cross, held: "Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Also see: *McMurphy v. State of Vermont*, 787 A.2d 1043 (Vt. 2000) (alleged violation of MUTCD in designing intersection, held: "Legislature did not intend to retain sovereign immunity from every claim alleging negligent highway design, but only for deliberate design decisions showing 'purposeful' deviation from standards."

¹⁴Such proof was established to the Utah Supreme Court's satisfaction in its 1995 decision in *Keegan v. State of Utah DOT* (43), where the Court held that UDOT exercised "discretionary function" in deciding during surface overlay projects not to raise the median barrier. The evidence showed that the decision was based on a comprehensive safety study report, including study of accident rates, involving a determination of not only the degree of safety that would be provided by various options considered but also what degree of safety would be an appropriate goal given time and cost constraints. Additional evidence was the preparation by the project design engineer of a cost-benefits report, based on the safety study.

¹⁵See *Breed v. Shaner*, 562 P.2d 436 (Haw. 1977); see also: *Andrus v. State*, 541 P.2d 1117 (Utah, 1975). Alleged negligence in design of new highway for creating a "grade sag," or depression, operating as a dangerous catch basin for runoff; held: "The decision to build the highway and specifying its general location were discretionary functions, but the preparing of

plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions.”

¹⁶For example, in *C.J.W. v. State*, 853 P.2d 4 (Kan.1993), the Court stated: “The discretionary function exception to the Kansas Tort Claims Act ... is not applicable in those situations where a legal duty exists, either by case law or by statute, which the governmental agency is required to follow.”

¹⁷See 45 A.L.R. 3d 875, p. 888. For example, see *Missouri Highway and Transportation Commission v. Kansas City Cold Storage*, 948 S.W.2d 679 (Mo.App.W.D.1997), where the Court noted that “The Commission ... is entitled to sovereign immunity [but] ... two exceptions listed in the statute (motor vehicles and dangerous conditions) constitute ‘absolute’ waivers of immunity.” p. 682.

REFERENCES

1. Neuman, T. R., M. Schwartz, L. Clark, and J. Bednar. *NCHRP Report 480: A Guide to Best Practices for Achieving Context Sensitive Solutions*. TRB, National Research Council, Washington, D.C., 2002, p. 2.
2. *Design Flexibility Case Study Report*. AASHTO, Washington, D.C., 1997.
3. *Flexibility in Highway Design*. FHWA-PD-97-0062, FHWA, Washington, D.C., 1997.
4. *A Policy on Geometric Design of Highways and Streets*. AASHTO, Washington, D.C., 1984.
5. *A Policy on Geometric Design of Highways and Streets*. AASHTO, Washington, D.C., 1994.
6. Larson, T. D. A Thing of Beauty. *Federal Highway Administrator’s Note*, Vol. 4, No. 6,

- Oct. 16, 1992.
7. Thomas, L. W. Liability of State Highway Departments for Design, Construction and Maintenance Defects. In *Selected Studies in Highway Law*, Vol. 4, Chapt. VIII, TRB, National Research Council, Washington, D.C., p. 1788.
 8. 45 ALR 3d 875, 887.
 9. *American Law of Torts*. Lawyers Coop, Bancroft Whitney, West Group, St. Paul, Minn., 1983.
 10. Malone, W. S. Ruminations on the Role of Fault in the History of Torts. In *The Origin And Development of the Negligence Action*. U.S. Department of Transportation, Washington, D.C., 1970, p. 1.
 11. Peck, C. J. Negligence and Liability Without Fault in Tort Law. In *The Origin and Development of the Negligence Action*. U.S. Department of Transportation, Washington, D.C., 1970, pp. 51–52.
 12. W. Prosser, Wade, & Schwartz. *Cases and Materials on Torts*, 8th ed. West Group, St. Paul, Minn., 1988, p. 2.
 13. *Vincent v. Stinehour*, 7 Vt. 62 (1835).
 14. *Harvey v. Dunlop*, 39 NYCL Rep. 193 (Hill and Denio Supp. 1843).
 15. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).
 16. Fleming, J. Analysis of the Origin and Development of the Negligence Action. In *The Origin and Development of the Negligence Action*. U.S. Department of Transportation, Washington, D.C., 1970, p. 36.
 17. Schuck, P. H. *Tort Law and the Public Interest*. W.W. Norton & Company, New York, 1990.

18. Keeton, W. P., et al., *Prosser and Keeton on the Law of Torts*, 5th ed. West Group, St. Paul, Minn., 1984, pp. 6, 15–16.
19. *Black's Law Dictionary*, 7th ed. West Group, St. Paul, Minn., 1999.
20. P.L. 89-564, 23 U.S.C. §401, et seq.
21. Aug. 27, 1958, P.L. 85-767, §1, 72 Stat. 894.
22. Public Law No. 89-670, Oct. 15, 1966, Section 2(b)(2).
23. 49 U.S.C. 303; 23 U.S.C. 138.
24. 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).
25. 401 U.S. 412–413.
26. Senate Report No. 1340, on S. 3418, June 28, 1968, pp. 10–11.
27. Senate debate on S. 3418, DCR Vol. 114, July 1, 1968, p. S8061.
28. Public Law 90-495, 82 Stat. 815. 23 U.S.C. §128, Aug. 23, 1968.
29. Senate Report No. 1254, on S. 4418. Sept. 30, 1970, p. 5.
30. Public Law 91-605.
31. Public Law 91-190, 42 U.S.C. §4331(a). Jan. 1, 1970.
32. Public Law 91-190, 42 U.S.C. §4332. Jan. 1, 1970.
33. Senate debate on H.R. 19504, DCR, Vol. 116. Dec. 19, 1970, p. S20771.
34. U.S. Department of Justice. *Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, Vol. 30. U.S. Government Printing Office, Washington, D.C., Feb. 1986.
35. 346 U.S. 15, 73 Sup.Ct. 956, 97 L.Ed. 1427, 1953.
36. Vance, J. C. Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments. *NCHRP Legal Research Digest*, Vol. 6, p. 9.

37. 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335, 1991.
 38. 820 F.2d 1393 (4th Cir. 1987).
 39. 922 S.W.2d 877 (Tenn. 1996).
 40. 2 S.W.3d 249 (Tex. 1999).
 41. 541 P.2d 1117 (Utah, 1975).
 42. 896 P.2d 618 (1995).
 43. 986 F.2d 716 (4th Cir.1993).
 44. 92 Wn.2d 285, 597 P.2d 101, 1979.
 45. Restatement (Second) of Torts §283.
-

1090 South Foothill Drive, Lakewood, CO 80228-3405.