

Tort Liability, Public Policy, and Accountability

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AASHTO
Subcommittee
on Design

2012 Annual Meeting
June 12, 2012
Portland, Maine

AMERICAN ASSOCIATION OF
STATE HIGHWAY AND
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Feudal England



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The King Can Do No Wrong

- No suit or action can be brought against the King ... even in civil matters, because no court can have jurisdiction over him.”
- To take action against the King, you had to petition him in his court of chancery, where his chancellor will administer right as a matter of grace though no upon compulsion.”

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Magna Carta

- Originally issued in the year 1215 and reissued later in the 13th century in modified versions.
- The 1215 charter required King John of England to proclaim that his subjects had certain rights.
- The first document forced onto an English King by a group of his subjects, the feudal barons, in an attempt to limit his powers by law and protect their privileges.

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An Important Beginning

- In practice, Magna Carta in the medieval period did not in general limit the power of kings.
- By the time of the English Civil War it had become an important symbol for those who wished to show that the King was bound by the law.
- Influenced the early settlers in New England and inspired later constitutional documents, including the United States Constitution.

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King John Saves King John



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Virginia Leads The Way

“That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.”

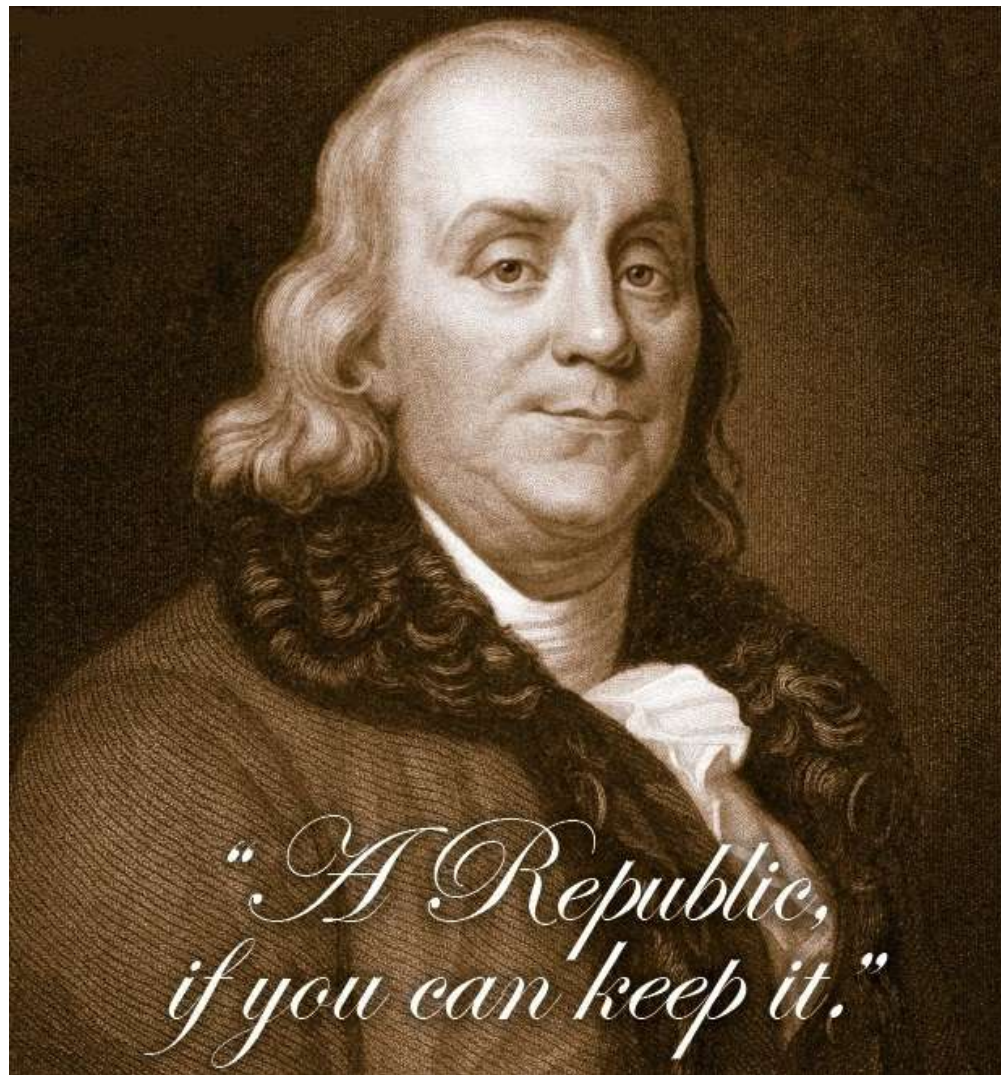
Virginia Declaration of Rights, June 12, 1776.

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Implementation

Meeting Our Customers' Needs



Practical Design

Missouri Department of Transportation

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- Under MoDOT's Practical Design model, a project is structured solely on the basis of its purposes and need, no more, no less.
- Practical Design defines the scope by focusing on achieving the project purpose and need while considering the surroundings of each project.
- It encourages sensitivity to where the project is located, whether it is an interstate or a letter route and allows the surrounding context to help determine the design criteria.

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Practical Design's goal is to produce the best value for the least cost, with three ground rules:

- **Safety:** Every project must get safer.
- **Communication:** There is collaboration in the developing of every practical solution.
- **Quality:** The project must function properly and cannot leave a legacy of maintenance challenges.

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Practical Design provides good solutions across the entire system, as opposed to perfect solutions in isolated locations.

Now, all we have to do is find a successful way to defend the inevitable tort claims that will come!

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- Missouri was not the only DOT thinking about practical design or flexibility in design.
- As early as the 1970s, FHWA was promoting the concept of flexibility to meet the challenges of modern highway systems in sensitive areas.
- After years of training design engineers to stick to the Green Book, attorneys were now faced with a new challenge: **HOW TO DEFEND FLEXIBLE DESIGNS?**

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Legal Research Digest 57

TORT LIABILITY DEFENSE PRACTICES FOR DESIGN FLEXIBILITY

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Terri L. Parker, Esq. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

In response to community and developmental demands, many state transportation agencies have modified their design policies to specifically require staff to consider historical, environmental, and other context-related elements during the design process rather than merely focusing on following "generally accepted" standards. This methodology allows the agency to give equal weight to aspects of the design of the road such as aesthetics, safety, and community concerns relating to parking and economics.

The NCHRP Legal Studies Committee realizes that there have been few if any tort liability cases brought on the grounds of what has been termed "flexible design" or "practical design" and encouraged through the principles of Context Sensitive Solutions (CSS). This is the lingering belief that the threat of tort claims continues in a number of states and that is having a design

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Legal Research Digest 57

TORT LIABILITY DEFENSE PRACTICES FOR DESIGN FLEXIBILITY

This research, which focuses on tort liability defense practices in design, will hopefully provide a framework for determining successful strategies employed when defending design decisions made following the principles of CSS. This digest explores the concept of discretion as a defense to government tort liability, and policy-makers' discretion may be described by terms such as governmental immunity.

20-6, "Legal Problems Arising Out of Design Decisions." The Transportation Research Board is the agency that sponsored the research. The research was prepared by Terri L. Parker, Esq. James B. ... was the principal investigator.

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- Until recently, the threat of tort claims and insurance practices discouraged engineers from trying innovative designs and effectively limited them to using "cookbook" guidelines and standards.
- When defending design defect cases, DOTs typically need to prove that the original design complied with the generally accepted standard that were in place at the time the road was designed and constructed.

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- Digest 57 is intended to assist counsel in advising DOTs how to document the flexible design process and defend design defect cases where generally accepted standards of road design were not strictly followed, but nevertheless the road was reasonably safe.

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When a new lawsuit alleges that the roadway is defective because of noncompliance with the Green Book, that presumption can be overcome with documentation from the original design file that shows the thorough analysis the engineer went through to determine the best design.

THE CONTENTS OF THAT FILE WILL BECOME THE BASIS OF THE STATE'S DEFENSE.

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The focus of the Highway Safety Manual is to provide quantitative information for decision making.

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It carries with it, the following lovely legal disclaimer:

The HSM is not a legal standard of care as to the information contained herein. Instead, the HSM provides analytical tools and techniques for quantifying the potential effects of decisions made in planning, design, operations, and maintenance....

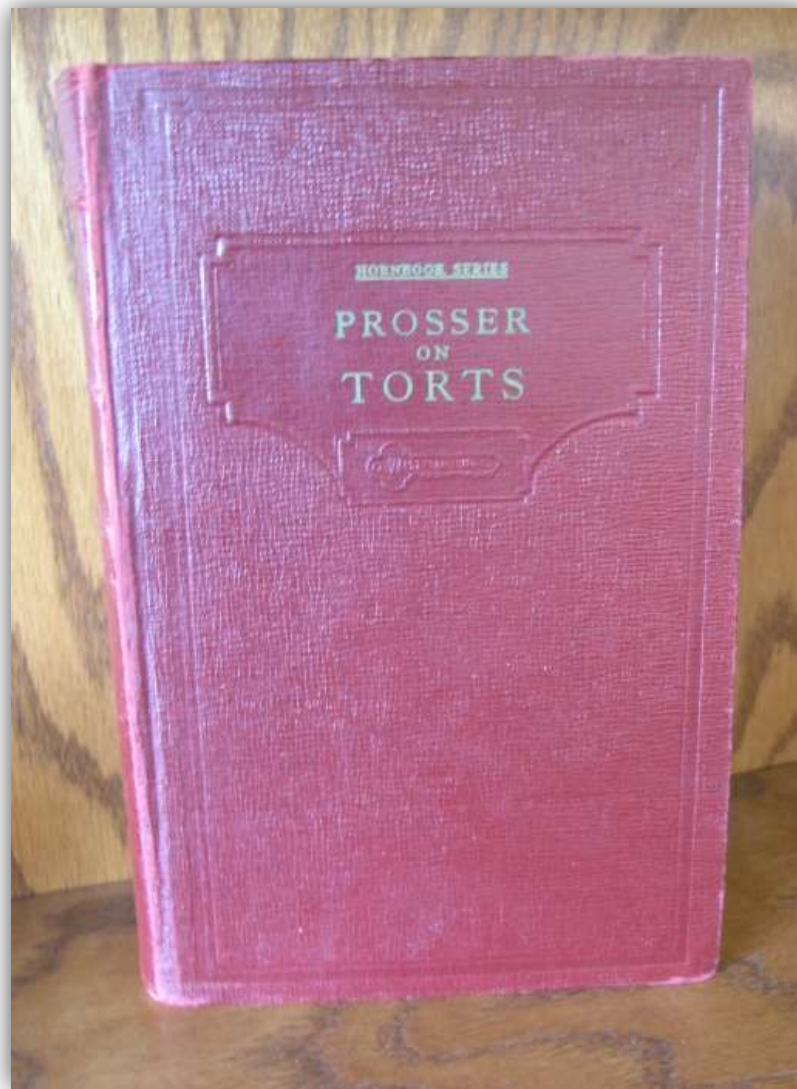
Not surprisingly, the paragraph goes on for many more sentences.

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What is a Tort?

- In highway parlance, a tort is usually a lawsuit claiming that a roadway was dangerous based upon the negligent act or omission by an employee of the DOT.

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Elements of a Tort:

- A Duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
- A failure on his part to conform to the standard required. (Breach of Duty)
- A reasonably close causal connection between the conduct and the resulting injury. (Causation)
- Actual Loss or damage resulting to the interests another.

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These elements of tort from the 1921 First Edition of Prosser on Torts remain the same today.

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