

Decisions, Documentation & You

Why It Matters

Mike Fleming, P.E.
WSDOT Design Office
June 2026

Julie Meredith, Secretary of Transportation



Tort Basics

- What Is Your Duty?

The [county] [city] [town] [state] has a **duty to exercise ordinary care** in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a **reasonably safe condition for ordinary travel**.

Washington Pattern Jury Instructions—Civil

Washington State Supreme Court Committee on Jury Instructions

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 140.01 (6th ed.)

Tort Basics

- Breach of Duty
 - Standard of Care
 - Notice of Condition
 - Unintentional



The Professional Engineer

- What is reasonable standard of care?
 - Following accepted industry practice within constraints (context)
 - Relatively similar response to similar situation
 - Work within the realm of what is feasible and practical
 - Value added proposition
 - To take action or not – risk based decision making (GFE)
- Engineering Judgement
 - Official definition (looks an awful lot like PE statutes)
 - Professional discretion
 - Intentional flexibility/latitude baked into our processes
 - Right thing, right time, right location, right reasons
 - Criteria/Std's etc... not a one size fits all

Dreaded Documentation...But

- Captures your entire design/operations story
- Foundation for future decision making
- Demonstrates practical & logical decision making
- Consistency
 - Inconsistency can quickly establish a breach
 - If a particular document (decision process) is missing then there is a gap in telling your design story
- Context is critical

Why Care?

- You Are The One's Making These Decisions & Documenting Them
 - Case integrity depends on it
 - The right thing(s) for the right reason(s)
 - What you say matters
 - Minimize the litigation pain

What's Said & Written Matters

THE WORD GAME

GOOD, BAD, DEPENDS

SAFETY

POSSIBLE

PRACTICAL

SAFEST

ROAD SAFETY AUDIT

REQUIRED



**What
does this
mean?**

Back To Why It Matters

- Case Outcomes Rely On
 - Facts
 - Opinions
 - Emotions

Liability Neutral Language

“These slopes generate more rockfall than any other slopes within the state. Vehicular accidents have already occurred, and public outcry over these dangerous conditions is prevalent within the community.”

Liability Neutral Language

~~These slopes generate more rockfall than any other slopes within the state. Vehicular accidents have already occurred, and public outcry over these dangerous conditions is prevalent within the community.~~

The slopes from MPxx to MPxx have documented rockfall on the following dates and times. Within the same milepost limits there are XX crashes that are currently being analyzed for further consideration.

Comments Out Of Context

Members of the public were upset because a school bus had been struck by a truck and claimed that the intersection did not have appropriate sight distance. The engineer commented that the agency “had lots of those dangerous at-grade interchanges” and that the one at issue was on a list for potential upgrades. When the agency was sued about the accident, those comments were identified in the petition.

Comments In Context

An appropriate response could have been “we have a program to improve at-grade intersections, but our budget only allows a few intersections to be funded in each budget cycle. Therefore, the intersections must be prioritized by level of need for improvement. Other intersections had a higher priority for improvement than the one involved here. This intersection will be addressed when projects at intersections with higher priorities have been completed.”

NCHRP LRD 83

JULY 2020

NATIONAL
COOPERATIVE
HIGHWAY
RESEARCH
PROGRAM

Guidelines for Drafting Liability Neutral Transportation Engineering Documents and Communications Strategies

This digest was prepared under NCHRP Project 20-06, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 24-03, Terri Parker, Parker Corporate Enterprises, Nixa, MO, prepared this digest. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The responsible program officer is Gwen Chisholm Smith.

Background

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. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword

In the legal system, transportation engineering documents drafted by the transportation industry include manuals, studies, research documents, memoranda, and email. These documents are frequently used by litigants and courts as evidence bearing on the standard of care

or duties for transportation agencies sued for alleged negligence in operation of transportation facilities. The documents often use language and phrases such as "hazardous" and "high risk" that have pejorative meanings in the legal system as opposed to more neutral and objective language. Non-neutral language can increase the potential for transportation agencies to be determined to be liable for damages.

This digest presents legal language style and a drafting guide. The digest also addresses how to avoid concepts and language that can have legal implications by promoting clear, direct, objective, and fact-based expression.

This digest may be used as a practical resource for developers and reviewers of engineering documents, researchers, practitioners, and those who implement safety projects.

The National Academies of
SCIENCES - ENGINEERING - MEDICINE

TRANSPORTATION RESEARCH BOARD

Copyright National Academy of Sciences. All rights reserved.

?