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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IC Transportation Law; II Design; IIIB Materials and Construction; IV Operations and Safety

## Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards

*A report 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 Richard O. Jones. 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 is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law (SSHL)*. Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, inter-governmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Future legal research digests will be incorporated in the rewrite where appropriate.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies,

and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. The intended distribution of the updated *SSHL* will be the same.

### APPLICATIONS

State and local governments are increasingly looking for ways to minimize potential exposure to liability. But it is common practice for public road agencies, federal, state, and local, to formulate written policies, guidelines or standards, and manuals seeking to encourage compliance with accepted professional wisdom and design techniques. In setting out these standards, these agencies may be establishing yard sticks by which their conduct will be measured in tort litigation.

This research should be helpful to policy officials, design engineers, risk managers, safety officials, and attorneys responsible for torts and administrative rulemaking.

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# Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards

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## I. INTRODUCTION

### A. Statement of the Problem

During the past 20 years a series of articles exploring the problem of highway department liability for negligence in the design, construction, and maintenance of highways have been published as National Cooperative Highway Research Program (NCHRP) Research Results Digests (RRD) and Legal Research Digests (LRD). One of the most significant matters addressed is that of government immunity for discretionary activities. The states have generally followed the lead of the United States Supreme Court in adopting the planning and operational dichotomy, with planning considered to be involved with government policy and therefore immune, but with the implementation of planning being considered an operational function not immune from liability. There is a problem, however, in the fact that courts have tended to mechanically focus on the level of government at which a decision was made, rather than on whether the decision was actually a policy decision. For example, while the planning, location, and design of a roadway may be considered discretionary because of all the policy decisions and implications involved, that is not always the case. When the focus of the court, using the planning/operational dichotomy, is on the level of government at which the decision is made, the actor, not the decision, tends to control the outcome. Consider these comments in LRD 14 (June 1990):

Thus, the Court ruled that the design function can be broken down into planning and operational stages, and only that part of the design activity which involved policy formulation (i.e., the decision to build a taxiway suitable for wide-bodied jets such as the Boeing 747) was part of the protected planning state of design... (*Japan Air Lines Co., Ltd. v. State*, 628 P.2d 934 [Alaska, 1981], page 4).

...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. (*Andrus v. State*, 541 P.2d 1117 [Utah, 1975], page 4).

Similarly, the LRD author cites examples from *Stewart v. State* (92 Wash. 2d 285, 597 P.2d 101 [1979]) and *Breed v. Shaver* (57 Haw. 656, 562 P.2d 436 [Haw. 1977]).

Another of the more significant matters addressed in these articles is the common practice of state highway agencies promulgating written policies, guidelines or standards, and manuals seeking to encourage compliance with accepted professional wisdom and proven techniques in highway design, construction, and maintenance. However, in promulgating such material for their employees or program participants, the promulgating agency may be setting a standard of conduct by which the agency may be judged in tort law actions. The legal implications of a highway department's failure to comply with such design, construction, or maintenance guidelines has been discussed in great detail in two NCHRP articles: *Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines*, RRD 129 (October 1981), and *Supplement To Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines*, LRD 26 (December 1992).<sup>1</sup>

The generally accepted rule, as quoted in LRD 26, is that where the manual uses permissive language (should, may, etc.) rather than mandatory language (shall, will, etc.) "...the case will be permitted to go to the jury, which can then consider the issue of negligence...on the basis of determining whether on all the facts adduced at trial, the exercise of reasonable care has or has not been shown." The author cites as an example the interpretation and meaning of "shall" and "should," as they appear in the *Manual on Uniform Traffic Control Devices (MUTCD)*. Use of the mandatory language "shall" may result in taking the case from the jury and the court ruling on the issue of negligence as a matter of law, i.e. negligence per se, but violation of the directory language "should" merely constitutes some evidence of negligence for consideration by the jury.<sup>2</sup>

The two matters discussed above would seem to be unrelated, but an examination of the cases on governmental immunity for discretionary activities reveals scores of decisions where the determination of immunity was based upon an examination of whether certain written policies, standards, guidelines, and manuals used mandatory language or permissive language. Where the conduct in question involves compliance with the mandatory language of statutes, regulations, written policies, standards, guidelines, or manuals, the court will usually find that there was no discretionary function being performed and therefore no immunity, but where the language is permissive, the governmental immunity will usually be sustained upon a showing that it authorized a discretionary decision that was based upon public policy considerations.<sup>3</sup>

While the theoretical basis of these matters has been thoroughly discussed, very little is known about the practical effect such standards and manuals have had on highway agencies. Highway risk management agencies and legal departments would benefit from knowing how each state has dealt with these issues and the results of their actions. To learn about such state experiences and the practical effect of their use of such written guidelines as design and performance standards, a survey of the 50 states was conducted in the summer of 1996, requesting responses to a questionnaire. The questionnaire, attached as Appendix A, sought the following information:

- (1) The extent, effect, and procedure for legal review of written design and performance standard guidelines;
- (2) Illustrative instances where liability was imposed due to the adoption or imposition of such guidelines;
- (3) Illustrative instances where the encouraged compliance in such guidelines was not forthcoming, but liability was still avoided;
- (4) Suggested techniques of expression by which compliance may be encouraged, but liability avoided in the event of failure to comply, or deviation from a guideline;
- (5) Examples of the use of disclaimers in written guidance that have influenced or may influence liability;
- (6) Examples of when the evidence or lack of evidence of written justification for design exceptions influenced liability, and of suggested language/terms used in such justification to enhance defense; and
- (7) Whether the 1991 U.S. Supreme Court decision in *Gaubert v. United States*, *infra*, has been followed/rejected by state courts or offers any precedential value for extending discretionary function immunity to actions taken under permissive language in guidelines.

The survey was completed in August 1996, with 26 state highway agencies responding. The responses are on file with the author. This paper reports on the responses to the survey questionnaire and discusses the practical effect on state and local highway agencies of their use of such written guidelines as design and perfor-

mance standards, as well as the potential for the applicability of the discretionary function exception to judgment calls under such guidelines.

## B. Background on Highway Agency Tort Liability

### 1. Erosion of Sovereign Immunity

Sovereign immunity, the traditional and longstanding wall of defense protecting state governments from tort liability, began to erode 40 years ago.<sup>4</sup> Based in some measure on the precedent established by passage of the Federal Tort Claims Act of 1946 (FTCA),<sup>5</sup> in a 20-year period between 1957 and 1976, 29 state supreme courts took judicial action to abolish "large chunks" of sovereign immunity, and at least 34 states enacted statutes reducing immunity.<sup>6</sup> The trend toward reduced immunity continued into the early 1980s with a mixture of judicial action and legislative action.<sup>7</sup> While continuous legislative change in the immunities and procedures for establishing claims blurs the precise picture today,<sup>8</sup> the categories of immunity into which state tort claims acts can be placed are as follows:<sup>9</sup>

- Full retention of sovereign immunity;
- Technical retention of immunity from suit, but provision of an administrative claims procedure;
- Waiver of immunity in some limited class of cases; and
- Abrogation of immunity in a substantial or general way.

The largest number of states fall into the last category above.

A survey conducted in 1983 by the American Association of State Highway and Transportation Officials (AASHTO) on the status of sovereign immunity in the states reported that only seven states at that time still retained full sovereign immunity.<sup>10</sup> Another survey conducted in 1992 reflected that only six states still retained full sovereign immunity as to torts.<sup>11</sup> One more state, North Dakota, lost sovereign immunity in 1994.<sup>12</sup>

### 2. Discretionary Function Exception

More than half of the states, by statute or judicial decree, have retained immunity for "discretionary functions," following the language and/or the example of the FTCA.<sup>13</sup> The first case to reach the Supreme Court of the United States under the FTCA was *Dalehite v. United States*,<sup>14</sup> which upheld the Government's claim of immunity based upon the discretionary function exception. The Court said: "Where there is room for policy judgment and decision there is discretion." The Court went on to add: "The decisions held culpable were all responsibly made at a planning rather than operational level." As noted by Vance in LRD 2 (December 1988):

Because State legislation has so closely pursued the language of the Federal [Tort Claims] Act the natural consequence has been that State courts have in general followed the lead of the United States Supreme Court in adopting the planning and operational dichotomy, announced in *Dalehite* as a useful tool in distinguishing between those activities that are protected by the discretionary exemption and those that are not so protected.<sup>15</sup>

While there is disagreement in defining and applying the discretionary function exception, the federal and state decisions do indicate a broad consensus with respect to the nature of the exception:

- The basic purpose of the discretionary function exception is to ensure the separation of powers.
- The cases in which judicial restraint is to be exercised in order to preserve the separation of powers are those that involve policy decision making by a coordinate branch of government.

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- Although the word "policy" cannot be precisely defined, there is broad agreement that it includes within its umbrage social, economic, and political considerations.

- It follows that in the application of the widely used planning/operational test, the word "planning" is to be given the restricted meaning of evaluation of social, economic, and political policy considerations.

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."<sup>16</sup> The most recent U.S. Supreme Court decision involving the discretionary function exception under FTCA is *United States v. Gaubert*.<sup>17</sup> The opinion by Justice White, joined by seven other justices, with Justice Scalia in separate opinion concurring in part and concurring in the judgment, arguably explains away the "planning and operational" dichotomy.

In *Gaubert*, the chairman of the board and largest shareholder of a Texas thrift institution commenced suit against the United States under the FTCA, alleging negligence by regulators from the Federal Home Loan Bank Board and the Federal Home Loan Bank—Dallas in their role as supervisors of the thrift. The Fifth Circuit held that the discretionary function exception did not apply and did not immunize the actions of the federal officials. Relying on *Indian Towing Co. v. United States*,<sup>18</sup> that court held that the discretionary function exception protected the officials' actions only until their actions became operational in nature. Thus, as soon as the officials began to participate in management decisions and assumed a role in the day-to-day affairs of the institution, the Fifth Circuit held their actions could no longer be protected. The Supreme Court reversed, however, concluding that the actions of the federal officials did merit protection under the discretionary function exception despite the fact that they were participating in the daily operation of the thrift. In doing so, the Court focused on the Fifth Circuit's erroneous interpretation of *Indian Towing* and sought to abolish the perpetuation of a "nonexistent dichotomy between discretionary functions and operational activities." The Court stated:

A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy making or planning functions....Discretionary conduct is not confined to the policy or planning level. 499 U.S. 315 at 325.

....But the distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy...The Court of Appeals misinterpreted *Berkovitz's* [*Berkovitz v. United States*, 486 U.S. 531, 100 L. Ed. 2d 531, 108 S. Ct. 1954] reference to *Indian Towing* as perpetuating a nonexistent dichotomy between discretionary functions and operational activities. 499 U.S. 315 at 326 (emphasis added).

The Court again emphasized its statement in *Varig Airlines*<sup>19</sup> that:

"It is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies (at 322)...The focus of the inquiry is not the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis. At 325 (emphasis added).

Even though the *Gaubert* decision is based upon facts involving a federal regulatory program, not readily comparable to decisions in the design, construction, and maintenance of highways, it has significant precedential value. Probably the most important feature of the opinion is the clarification and amplification of the Court's earlier decisions on the discretionary immunity exception and the principles previ-

ously established. The decision in no way dispenses with the need to establish that social, economic, and political policy considerations are present in the challenged activity in order to successfully invoke discretionary function immunity. However, the Court makes crystal clear that such policy considerations may take place during day-to-day activities at the operational level and still fall within the discretionary function exception.

Another extremely important principle emerging from the opinion is that there is a presumption that an agent's acts are grounded in policy when exercising discretion, if that discretion is allowed by established policy expressed or implied by statute, regulation, or agency guidelines. The Court places the burden of initially overcoming this presumption on the plaintiff. The Court stated:

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred, but on the nature of the actions taken and on whether they are susceptible to policy analysis. 499 U.S. 315 at 324.

The Fifth Circuit Court of Appeals, in *State of Louisiana v. Public Investors, Inc.*,<sup>20</sup> referred to this *Gaubert* presumption as setting a "high hurdle" for a complaint to overcome when challenged with a motion to dismiss.

The number of recent decisions following *Gaubert* would indicate a trend away from the planning/operational test in favor of a test that recognizes discretionary function as attaching to all conduct involving the balancing of policy considerations. Consider these decisions:

- *Aguehounde v. District of Columbia*.<sup>21</sup> (Injured pedestrian alleged negligence in setting timing of signal lights):

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 [citing *Gaubert*]. "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."

- *Rick v. Louisiana Department of Transportation and Development (DOTD)*.<sup>22</sup> (Survivors of auto/train collision alleged DOTD's use of 1974 data to formulate 1986 hazard index for the crossing was "operational negligence," and DOTD raised discretionary function immunity in defense.) The court, citing *Gaubert*, noted that "[d]ecisions at an operation level can be discretionary if based on policy." The court held the DOTD liable since the decision to use old data "was not based upon any policy considerations."

- *DOE v. Coffee County Board of Education*.<sup>23</sup> (Challenge of school board's teacher hiring policy by sexually abused students.) The court, in remanding case for further development of facts, noted that "[n]ow, 'discretionary function immunity attaches to all conduct properly involving the balancing of policy considerations' or to 'operational act[s]...where...the operational actor is properly charged with balancing of policy considerations'.... Thus, the focus has shifted from the decision-maker to the decision itself" (citing *Gaubert*).<sup>24</sup>

- *Harry Stoller Co. v. City of Lowell*.<sup>25</sup> (Owner of premises destroyed by fire alleged negligence by firemen exercising discretion not to use building's sprinkler systems.) The court's opinion on discretionary function noted:

The important lesson from the opinions of the Supreme Court is that governmental immunity does not result automatically just because the governmental actor had discretion. Discretionary actions and decisions that warrant immunity must be based on considerations of public policy.... Even decisions made at the operational level, as opposed to those made at the policy or planning level, would involve conduct immunized by the discretionary function exception if the conduct were the result of policy determinations. (citing *Gaubert*).<sup>26</sup>

- *Tracor/MBA, Inc. v. United States*.<sup>27</sup> (Suit by munitions manufacturer to recover worker's compensation benefits paid to employee injured in fire arising out of alleged "operational level" negligence of government inspectors in munitions plant in failing to comply with the government safety procedures checklist.) The court, relying on *Gaubert*, found that all points on the checklist merely stated "a very general course of conduct for the inspectors to follow... accordingly, the inspector's conduct was discretionary and protected by the discretionary function exception." The court held:

Here, most of the items on the safety review checklist, and all of the items upon which *Tracor* relies, allowed the inspectors discretion in conducting their safety review. The items on the checklist do not specifically prescribe a course of action for the inspector to follow in checking compliance, or in deciding what to do if an inspector discovered a problem... For these reasons, we conclude the discretionary function exception applies.<sup>28</sup>

Also consider a recent Minnesota Court of Appeals decision, *Woods v. Ladehoff*.<sup>29</sup> (Negligence action against county for failure to timely replace rumble strips in advance of a stop sign; delay in replacement was due to engineer's decision to do this and several other replacements with county crews when they were available, out of economic necessity.) The court held:

The implementation of an established policy in a particular fact situation is not usually within the discretionary function exception, even if the application calls for specialized knowledge, expertise, and professional judgment. In some cases, however, implementing a policy may involve the balancing of public policy considerations, and thus be protected by the discretionary immunity exception. [Citing *Holmquist v. State*, 425 N.W.2d 230, 234 (Minn. 1988)] The allocation of the limited resources of government requires evaluation of the financial and political effects of a given plan and is therefore protected conduct. See *Wesala v. City of Virginia*, 390 N.W.2d 285 (Minn. App. 1986), appeal dismissed, 401 N.W.2d 73 (Minn. 1987). It follows that setting priorities for road repair work and deployment of county maintenance crews... is a discretionary function of government.

The clarification of the law defining discretionary governmental functions by *Berkovitz* and *Gaubert* went beyond merely dispensing with the planning/operational dichotomy. The court settled upon a two-tier analysis for identifying discretionary functions.<sup>30</sup> The first inquiry is whether the government action "involves an element of judgment or choice."<sup>31,32</sup> In other words, is the challenged conduct the subject of any mandatory statute, regulation, or policy prescribing a specific course of action? If so, then there is no discretion to violate the mandate, and no immunity is available. However, if there is no such mandatory prescription, then the second inquiry is made, asking whether the choice or judgment involved is one "based on consideration of public policy."<sup>33, 34</sup> This two-tier analysis is summed up in *Gaubert* as follows:

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation [citing *Dalehite*]. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to



policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act... involves consideration of the same policies which led to the promulgation of the regulations... In addition, an agency may rely on internal guidelines rather than on published regulations. ( 499 U.S. at 324) (emphasis added).

Applying this two-tier test in *Baum v. United States*,<sup>35</sup> the U.S. Fourth Circuit Court of Appeals in a 1993 decision found that the U.S. Park Service's choice of materials used in construction of parkway guardrails, in a claim for negligent construction and design, was protected by the discretionary function exception, and that its decision regarding replacement of guardrails was also protected from a claim for negligent repair. The focus of the court's inquiry was "not on the agent's subjective intent in exercising the discretion conferred... but on the nature of the actions taken and on whether they are susceptible to policy analysis."<sup>36</sup>

The Utah Supreme Court in *Keegan v. State*<sup>37</sup> cited *Baum* with approval in holding that the Utah Department of Transportation's (UDOT) decision not to raise the concrete barrier on Interstate-70 surface overlay projects was a discretionary act shielded from liability under the state Governmental Immunity Act.<sup>38</sup> It is noteworthy that in *Keegan*, the court focused on the fact that UDOT's safety engineer had carried out a comprehensive safety study covering several policy considerations before making the ultimate design decision. Thus, unlike the *Andrus* decision, *supra*, where the Utah Supreme Court approved leaving the "dangerous" design condition to the jury as a negligence issue, the court here considered design exceptions as being based upon policy, and therefore immune from liability as a matter of law.<sup>39</sup>

The two-tiered test of *Gaubert* was also applied in *Cope v. Scott*,<sup>40</sup> where the court found discretionary function exemption in a challenge to the government's maintenance of a roadway where the Park Service manual titled *Park Road Standards* made the skid resistance and surface type standards applicable only "to the extent practicable."<sup>41</sup>

The North Dakota Supreme Court followed *Berkovitz* and *Gaubert*, and relied on *Baum* and *Cope*, in *Olson v. City of Garrison*,<sup>42</sup> where it held the City immune under the discretionary function exception for operation and maintenance of its water main system. The court's focus was on the absence of any mandatory statute, regulation, or policy "that prescribes a course of action for the City's operation and maintenance of its water mains,"<sup>43</sup> as well as how the factors that the City considered in making decisions about such maintenance were economic considerations grounded in policy.

These cases demonstrate a trend toward recognizing that the important focus relative to discretionary immunity is policy choice, not who makes it, or at what level. They also demonstrate a trend toward recognizing the right of government officials at the policy level to delegate to or leave open for lower level employees the authority and discretion to make additional policy decisions that involve social, economic, and political considerations. Of course, using the *Berkovitz* and *Gaubert* test, if the statute, regulation, manual, or guideline mandates particular conduct, then policy and discretion are exhausted and the state should be sheltered from liability only if the standard is met. But if the regulation, manual, or guideline is written in permissive language so as not to mandate the decision, then it seems that the state should be allowed to present evidence and argue that the decision actually made was based upon policy considerations, whether prescribed and enumerated or implied, and sheltered by discretionary immunity.

### 3. Tort Liability Crisis and Response

By the mid 1980s, this nationwide movement away from sovereign immunity combined with the doctrines of comparative negligence and joint and several liability and an explosive growth in damage awards to produce a nationwide tort liability crisis.<sup>44</sup> The 1983 AASHTO survey, *supra*, reflected that pending tort liability claims reported by 40 states totaled over \$6.4 billion (reliable authority estimates that the number of claims and suits filed against state departments of transportation has risen at the rate of 16 percent per year).<sup>45</sup>

The states mounted an impressive response to this crisis, with 30 states appointing commissions or task forces to study the problem.<sup>46</sup> Late in 1985, the U.S. Attorney General established the Tort Policy Working Group to examine the crisis. The resulting report called for immediate legislative tort reform by the states.<sup>47</sup> In 1986 alone, more than 40 states enacted tort reform legislation, some of which provided ways for state and local governments to undertake risk management alternatives.<sup>48</sup> LRD 2 (December 1988) reviewed 10 states that had enacted new tort claim statutory provisions, some directly relating to tort liability of state highway departments.<sup>49</sup> One of these states, Wyoming, went so far as to restore full immunity for design, construction, and maintenance of highways.<sup>50</sup> A 1989 decision of the Wyoming Supreme Court rejected a challenge to this statutory provision of immunity, holding that immunity for design, construction, and maintenance of highways bore reasonable relation to legitimate legislative objectives of conserving public funds and did not violate substantive due process and equal protection guarantees of the Wyoming Constitution.<sup>51</sup>

### 4. New Focus on Risk Control and Risk Management

As a result of this tort liability crisis, minimizing liability exposure became an imperative for transportation agencies.<sup>52</sup> There developed a new focus on "risk control" and "risk management." One area of risk management focused upon was the public road agency practice of formulating written policies, guidelines or standards, and manuals that seek to encourage compliance with accepted professional wisdom and proven techniques in the design, construction, and maintenance of public roads. Typically, agency practice was to encourage employee compliance by describing the practice as recommended or perhaps even mandatory. However, aside from any issue of discretionary immunity, in establishing these written standards of conduct, whether permissive or mandatory, the promulgating agency could be setting a legal standard of care by which the agency would be judged in tort litigation.<sup>53</sup>

One of the early products that synthesized the tort liability problems faced by state departments of transportation and the current practices of risk management was the 1983 report by the Transportation Research Board (TRB): *Practical Guidelines for Minimizing Tort Liability*.<sup>54</sup> Among the risk management activities recommended to transportation agencies by this report were the legal review of written policies, guidelines or standards, and manuals, and the selection of appropriate terminology:

A systematic review should be undertaken of all the agency's relevant policies, guidelines, and manuals. Such documents essentially define the manner in which various activities are to be performed. With such information in hand, it is relatively easy for a plaintiff's attorney to establish what a reasonable and prudent person would do—simply follow the agency's written instructions.

In the past, manuals were often written with strong language to force an upgrading of procedures... The strong language that previously served a useful purpose may now make an agency extremely vulnerable to lawsuits.

...[A] procedure should be established that provides for the review of all such new written material that may affect the agency's tort liability. It is recommended that these reviews be performed by the legal office. The attorneys may need to confer with the agency's engineers to ensure that wording is acceptable from both viewpoints.

Engineering tools, such as standards and warrants, are not intended to serve as a cookbook nor a substitute for engineering judgment. Because these terms serve as potential traps, the use of words such as 'standards' and 'warrants' should be carefully scrutinized and in most instances avoided.<sup>55</sup>

In the 1994 synthesis of highway practice, *Managing Highway Tort Liability*, NCHRP Synthesis 206, an extensive appendix provides procedures for reviewing agency documents, including suggested "appropriate terminology."<sup>56</sup>

### 5. Negligence: Duty and Standard of Care

An action against a public entity based upon a theory of negligence requires the showing of a duty of care to the plaintiff on the part of that public entity. A duty, in negligence cases, may be defined "as an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."<sup>57</sup>

As to highway department liability with respect to public highways, the general rule of law is that they owe a duty to highway users to construct and maintain such facilities in a reasonably safe condition.<sup>58</sup>

Ordinarily, in the absence of any provision establishing a different rule, the duty and liability resting upon the public authority in this respect are to exercise reasonable care and diligence, in view of all the circumstances, including climatic conditions, to keep the street, road, or walk in a reasonably safe condition for travelers who are themselves using due care. [However] [t]he public authority is not an insurer of the safety of those who use the public ways.<sup>59</sup>

But where a reasonably safe condition has not been or cannot be provided, there generally exist additional duties to warn and/or take safety measures:

It is the duty of the responsible public authority to exercise reasonable care to warn travelers of defects, obstructions, and unsafe places in its streets, highways, and bridges, of which it has or is chargeable with notice, by barriers or guardrails, lights, warning signs, or other means, which are reasonably sufficient for that purpose, and if it fails to do so it will be liable to one injured by reason of such failure, assuming an exception to its sovereign immunity from responsibility for its torts.<sup>60</sup>

As previously noted, a great many of the states patterned their tort claim statutory language after the language of the FTCA.<sup>61</sup> These waivers of sovereign immunity permit suits against the public entity under circumstances where the public entity, if a private person, would be liable to the injured party in accordance with the law of the state where the act or omission occurred.<sup>62</sup> However, in other states, such as California, a public entity only has a duty to ensure that its property does not present a substantial risk of harm to persons exercising due care (e.g. nonnegligent or careful user of property).<sup>63</sup> Whereas a private landowner has the additional obligation to provide for the safety of foreseeably negligent users as well (e.g., Restatement Second of Torts, Section 449).<sup>64</sup>

Another potential exception to these general rules of duty is the "public duty defense doctrine." Kenneth G. Nellis in LRD 17 (December 1990)<sup>65</sup> notes that the

public duty doctrine "is a rule which provides that in order for an injured person to recover in tort against a public entity or an officer or employee thereof, he must show the breach of a duty owed to him as an individual and not merely the breach of a duty owed to the public as a whole."<sup>66</sup> However, he points out that 10 states have rejected the doctrine outright and concludes his paper with this statement: "Although the public duty doctrine is recognized in a majority of jurisdictions and its use is widespread in police and fire protection cases as well as in building and safety inspection cases, it has not been raised as frequently nor has it been as successful in highway litigation."<sup>67</sup>

### 6. Admissibility into Evidence of Standards, Manuals, and Guidelines on the Question of Duty and Standard of Care

One of the major battles in any tort litigation is over the issue of "duty" and what evidence will be allowed to establish that duty and the standard of care required to satisfy such duty. Most often, the reason a public agency's code, manual, standard, or guideline is sought to be introduced into evidence is to establish the applicable standard of care on a given issue. The following observation by Breland C. Gowan in *Transportation Research Circular 361* (July 1990) is noteworthy:

One of the most fruitful areas of inquiry for a plaintiff consists of the policies, guidelines and manuals of the public entity. These publications, often called "bibles" by engineers, carry the imprimatur of governmental authority and mandate.... If a plaintiff can find a discrepancy between what a manual prescribes and what exists in the field, he is halfway home. His expert can then explain to a jury why the manual is correct and why variance from it increases the hazards to the driver and consequently is the cause of the accident.

.... Thus, ... manuals are fertile ground for plaintiffs and their experts to uncover evidence to build a case against a public entity. They can no longer be viewed as "cookbooks," mere in-house directions to staff so that the job of running a highway program can get done. Depending upon the state jurisdiction, these manuals may have the force of law.... Since engineers deviate from the manuals at their peril, their standards and warrants must be attainable.<sup>68</sup>

In *Commonwealth Department of Transportation v. Weller*,<sup>69</sup> the court considered the Department of Transportation's (DOT) appeal in a wrongful death action arising out of an accident on a snow-covered bridge when the decedent lost control of his vehicle and vaulted over the bridge railing. Plaintiff contended that the DOT negligently piled the snow and ice so as to form a "ramp" over the berm and guardrail, but the DOT denied creating the ramp, asserting that it did not have time to remove snow and ice from the berm and guardrail after clearing the roadway. One of the issues considered on appeal was whether the trial court erred in charging the jury that the DOT's winter maintenance manual, which covered, *inter alia*, snow removal from major highways, was a regulation providing the minimum standard of care. Testimony by the DOT assistant maintenance manager referred to the manual as the "Bible." Specifically, he stated "[i]t's what we are to follow." The court noted that the manual was not a formal regulation adopted under the Commonwealth Documents Law and that in context the trial judge had used the word "regulations" in the generic sense, labeling the manual's contents simply as "policies and procedures," not as provisions of law. The court went on to hold that because the DOT's own witnesses testified as to the definitive authority of the manual, the charge was not prejudicial, and no new trial was warranted.<sup>70</sup>

As previously noted, the cases seem to hold that if the code, manual, standard, or guideline permits the exercise of discretion, not directing conformance to a manda-

tory standard, the alleged deviation may be considered to be some evidence of negligence but not negligence per se.<sup>71</sup> In LRD 26 (December 1992), Vance reviews the case of *Townsend v. State*,<sup>72</sup> which illustrates the difference between the mandatory term "shall" and the directory or advisory language "should." There, by avoiding the term "shall" in a manual and employing instead the advisory language "should," the case was permitted to go to the jury for a determination of "reasonable care."<sup>73</sup> In *Yager v. State of Montana*,<sup>74</sup> the Supreme Court of Montana had occasion once more to consider the effect of the word "should" in a Montana Department of Highways maintenance manual. The manual provided that "careful inspection and routine maintenance [of right-of-way fences] should not be neglected" (emphasis supplied). The court held that the manual did not require the state to maintain fences in such a way as to prevent livestock from gaining access to the roadway—the "should" did not create a duty.<sup>75</sup>

The Idaho Supreme Court considered the legal implications of using the word "may" in the Idaho Transportation Department's *Right-of-Way Use Policy Manual* in *Esterbrook v. State*.<sup>76</sup> The manual stated that: "Failure to comply with [sight distance] requirements and/or recommendations may be sufficient cause for the Department to deny an approach application, prohibit specific approach usage, or remove an existing approach." The court held that the trial court's instruction to the jury that "[a] violation of this provision by the Department is negligence as a matter of law" was error, stating that "the word 'may' clearly indicates that the Department had discretion in implementing this provision." The court also found that the trial court erred in certain jury instructions because they "implied that optional provisions in the [MUTCD] were mandatory and that a violation of those provisions was negligence as a matter of law." The court clarified earlier decisions relating to the MUTCD, stating:

In these decisions, we did not intend to imply that all provisions in the MUTCD were mandatory; or that the Department did not have discretion to implement the optional provisions in the Manual. In order to constitute negligence as a matter of law, a statute or regulation must clearly define the required standard of conduct.<sup>77</sup>

The admissibility into evidence of codes, standards, and guidelines promulgated by voluntary organizations, such as AASHTO, as well as by government agencies, such as state highway departments, has been discussed in detail in earlier LRD papers.<sup>78</sup> The following statements by John C. Vance in the 1992 LRD 26 are instructive:

Thus it is seen that the recent trend of the case law is clearly in favor of the admissibility into evidence of codes, standards, and guidelines promulgated by voluntary associations, provided (a) that a proper foundation for the introduction thereof is laid through testimony of an expert witness; and (b) it is shown that the codes, standards, and guidelines sought to be introduced, are accepted in the particular industry, business, trade, or profession to which they relate, as being reliable and authoritative.

The trend of the recent law toward greater admissibility of publications would seem virtually to guarantee the same result in cases involving manuals, standards, and guidelines adopted by governmental agencies. This is for the reason that such publications are marked by the imprimatur of governmental authority, which presumptively is objective and designed to express the truth without bias...

...Not only has no recent case been found in which such a document was rejected on traditional hearsay grounds, but the same appear to be admitted, as a general rule, without the hearsay objection being raised. For example, when the MUTCD, widely adopted by

state highway departments, is sought to be excluded, it is generally on grounds of lack of relevance or materiality, not on grounds of preclusion as hearsay.<sup>79</sup>

## II. SURVEY RESULTS—PROGRAMS EMPLOYING WRITTEN GUIDELINES AS DESIGN AND PERFORMANCE STANDARDS

### A. Legal Review of Design and Performance Standard Guidelines (Questions 1-3)

The collective responses to the survey questionnaire are analyzed in this section.

The initial series of questions dealt with the extent to which state legal departments were afforded the opportunity to review written design and performance standard guidelines, including amendments, prior to their issuance; the effect of any such practice; and the procedure followed, if any. As to the opportunity afforded for legal review, 3 states responded "never," 17 responded "infrequently," and only 6 responded "always." In connection with those responses, the states were asked what effect they considered their legal review practice to have on their state highway agency tort liability experience. All six states that were always afforded opportunity for legal review responded that it had a "positive" effect on their agencies' tort liability experience. Four states, one that was never afforded legal review opportunity and three that were afforded only infrequent review opportunity, considered their practice to have a "negative" effect on their agencies' liability experience. Thirteen states responded that the absence or infrequency of legal review opportunity had "no effect," had "minor effect," or was simply "not an issue." When asked to describe the practice or procedure, if any, for recommending reevaluation of problematic language in such written guidelines, 20 states described it as "informal," usually involving a meeting with engineer-writers, and six states responded that they had no such practice or procedure.

The responses obviously show that the recommendations of TRB Report 106, *Practical Guidelines for Minimizing Tort Liability*, for establishment of a procedure providing legal review of written material that may affect an agency's tort liability are less than universally heeded. However, the fact that the six agencies who followed this recommendation find it to have had a positive effect on their liability picture is a strong endorsement of this practice. The responses of three states that absence of legal review produced negative effects should be taken as further endorsement of providing legal review. The thirteen responses saying "no effect," "minor effect," or "not an issue" could indicate that legal review doesn't matter, but this is doubtful because most of those states have no exposure or very limited exposure to liability.

### B. Examples of Liability/Nonliability from Guidelines

Two key questions of the survey focused on illustrative instances where liability was imposed due to the adoption or imposition of written design and performance standard guidelines and other illustrative instances where compliance, though encouraged by such guidelines, was not forthcoming, but liability was still avoided.

#### 1. Liability Imposed (Question 4)

When asked for illustrative instances where liability had been imposed because of adoption/imposition of such guidelines, 14 states responded "none/unknown/not applicable." Three states listed the following liability problem areas as frequently arising due to written guidelines not being met, but supplied no case examples:



- Allowing excessive edge of pavement dropoffs;
- Untimely spot repair of unpaved shoulders;
- Using shoulder width not as specified in manual;
- Using a guardrail not of specified height; and
- Lack of adequate documentation and engineering justification.

Six states (Minnesota, Nebraska, Nevada, Ohio, Washington, and Wisconsin) provided 10 cases as examples of the imposition of liability because of the adoption or imposition of standards/guidelines. In the following seven cases the written guidance involved was the *MUTCD*.

(1) *Nusbaum v. County of Blue Earth and State of Minnesota*, 422 N.W. 2d 713, (Minn. 1988). (State traffic engineers' application of six factors, set forth in *MUTCD*, for setting speed limits held not to be protected by discretionary immunity. Engineers' failure to suggest warning signs to the county based on MDOT *Traffic Engineering Manual* also not protected by discretionary immunity and constituted negligence.)

(2) *Maresh v. State of Nebraska*, 241 Neb. 496, 489 N.W.2d 298 (Neb. 1992). (Failure of state to require contractor to properly place edge marking devices to warn of shoulder dropoff during construction, in accordance with mandatory provision of Nebraska DOT *MUTCD*, Sec. 3C-3, was actionable negligence not protected by discretionary function exception immunity because a course of conduct was mandatorily prescribed.)

(3) *Lumbermens Mutual Casualty Co. v. Ohio Department of Transportation*, 49 Ohio App. 3d 129 (1988). (Ohio DOT failed to keep highway in reasonably safe condition by not using an advisory speed sign in conjunction with rough road and bump signs as mandated by the Ohio DOT *MUTCD*; the word "shall" represented a mandatory condition that must be met when a particular traffic device is installed.)

(4) *Kitt v. Yakima County*, 93 Wn.2d 670, 611 P.2d 1234 (1980). (Collision at uncontrolled intersection where Cross Road signs were placed in all directions. These signs, under *MUTCD*, are "intended for use" only on "through" highways. The court held that since only one of the highways could be a "through" highway, placement of Cross Road signs on both roads violated the mandatory provision of *MUTCD* that a standard sign shall be displayed only for the specific purpose prescribed, and that the county's overreliance on the "advisory" nature of "intended for use" was not warranted and constituted negligence per se.)

(5) *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673 (Wis. 1973). (Wisconsin DOT employees were sued for placing advance warning sign too close to an intersection, which allegedly violated the *MUTCD*. The court held that "official immunity" is not applicable to ministerial duty and the issue of negligence was remanded to trial court.)

(6) *Pavlik v. Kinsey*, 81 Wis. 2d 42, 259 N.W.2d 709 (Wis. 1977). (Wisconsin DOT employees sued for failure to reroute highway with proper signs. The court held that "official immunity" is not available for ministerial duty and issues of negligence were remanded for trial.)

(7) (Unreported case—Nevada) (Construction contractor's taper lane not in accord with "typical applications" and formula of *MUTCD*.)

These cases are typical of the human error or oversight often found in attempting to get compliance with the *MUTCD*, particularly in the placement of construction signs. While the number of responses to this survey question is disappointing, it is not surprising that a majority of the cases furnished on liability concerned with the adoption/imposition of guidelines involve the *MUTCD*.

The other three cases demonstrating liability issues based upon such written standards/guidance are as follows:

(1) *Schaeffer v. State*, 444 N.W.2d 876 (Minn. Ct. App. 1989). (Specification for blunt-end guardrail treatment was replaced by twisted-end design under supplemental agreement in order to comply with state/federal standards. The trial court denied the state motion for summary judgment on the grounds of design immunity since no clear evidence was presented as to who would make a decision concerning the guardrail end treatment or how it would be made, leaving open the question of whether it was an immune planning [policy] decision, or an operational decision not immune from liability. The court held that case law suggests the state must be more specific in explaining its decisions if it is to prevail on a discretionary immunity claim. Trial court denial of summary judgment affirmed.)

(2) *Semadi v. Ohio Department of Transportation* (1996) 75 Ohio St. 3d 128. (Adoption of protective fencing policy was the only basic policy decision afforded immunity, but failure to implement its policy within a reasonable time was actionable negligence, rendering Ohio DOT liable. Court rejected Ohio DOT's contention that decisions as to time/manner of implementing basic policy are also immune.)

(3) *Treese v. City of Delaware v. Ohio Department of Transportation* (1994) 95 Ohio App. 3d 536. (Agencywide directive issued during construction project that provided for upgraded standards for guardrail design was not followed. The court held that even though Ohio DOT had no duty to upgrade the old guardrail, the failure to follow the new standards was not an exempt discretionary decision. Ohio DOT had a duty to comply with standards in effect at the time guardrail construction was performed and should have incorporated the upgrades in the exercise of ordinary care.)

All three of these cases deal with implementation of a basic policy decision issued by a higher authority that impacted ongoing projects or established budgets. It would appear that the outcome of these cases could have been different if the basic policy had expressly provided a realistic effective date for compliance or delegated the discretionary authority to lower level management to establish a realistic schedule for implementation.

## 2. Compliance "Encouraged," but Liability Avoided (Question 5)

When asked to provide instances where compliance of agency participants was encouraged in such guidelines, but was not forthcoming, and where liability was still avoided, five states responded (Minnesota, Missouri, Ohio, Texas and Wisconsin), providing the following 15 case examples:

(1) *Woods v. Ladehoff* (Minn. Ct. App. 1993, C9-92-1279 [unpublished]). (Delay in replacing rumble strips in advance of stop sign following reconstruction was due to decision to use county crews to replace these and other rumble strips at one time as an economy measure. The court held that while implementation of policy is usually not within the discretionary exception, the allocation of limited resources and setting of priorities in deployment of county crews are discretionary policy functions immune from liability.)

(2) *McEwen v. Burlington Northern Railroad and State of Minnesota*, 494 N.W.2d 313 (Minn. Ct. App. 1993). (Corridor review system establishing "standards" and "guidelines" for examining need for railroad crossing protective devices did not establish a duty to install such devices and could not be read to impose liability on state for failing to immediately upgrade every crossing meeting the description of crossings to be upgraded. Also, a delay in painting pavement markings at a railroad

crossing in order to allow new pavement to cure was a policy decision involving financial considerations that were immune from liability as "discretionary actions.")

(3) *Hennes v. Patterson*, 443 N.W.2d 198, (Minn. Ct. App. 1989). (State's snowplows plowed snow to right side of bridge, creating a "ramp" over the guardrail. The court held that the state was immune from negligence suit because plowing travel lanes prior to clearing bridge decks was in accordance with state policy and the delay in removing the snow "ramp" over a weekend was in accordance with a policy balancing several factors.)

(4) *Indianhead Truck Lines v. Zenith Dredge Co. and State* (Minn. Ct. App. 1993, C4-93-1037 [unpublished]). (Repaved highway not painted with edge line nor shoulder gravel installed until pavement cured, notwithstanding provisions in *Traffic Control Devices Manual* and *Traffic Engineering Manual*. The court held that the state was not liable for the accident because the delay involved policy decisions immune from liability as discretionary actions.)

(5) *Realm / Clarkson Construction Co. v. Missouri Highway & Transportation Committee* (Cole County Circuit Court No. CV195-628CC, 1995 [unpublished]). (Disadvantaged Business Enterprise guidelines in construction manual held to be legally unenforceable because they were not adopted as enforceable rules in accordance with state administrative procedure statute.)

(6) *Leskovac v. Ohio Department of Transportation* 71 Ohio App. 3d 22 (1990). (Decision to install flashing beacon over stop sign was made in June, but beacon was not activated until October. This decision was discretionary, not mandatory under *Ohio MUTCD*, and Ohio DOT engineers acted reasonably in weighing the utility of a flashing beacon.)

(7) *Rhodus v. Ohio Department of Transportation* (1990) 67 Ohio App. 3d 723 (*Ohio MUTCD* permitted placement of Type III barricade sign in the middle of the roadway, so a placement there by Ohio DOT engineer could not be negligence per se. However, since the traffic control plan called for placement to the side of the road, the failure to properly implement was negligence, not a protected discretionary act immunity.)

(8) *Balbach v. Ohio Department of Transportation* (1990) 67 Ohio App. 3d 582. (Use of asphalt for temporary median instead of concrete median barrier for two-way construction operation did not subject Ohio DOT to liability because *Location and Design Manual* language did not mandate concrete barrier if length of project was more than 2,000 feet, but allowed the decision to be based upon engineering judgment, a planning function involving a high degree of official discretion that is immune from liability.)<sup>80</sup>

(9) *Bellnoa v. City of Austin*, 894 S.W.2d 821 (Tex. App.—Austin 1995). (*Texas MUTCD* does not establish a nondiscretionary, mandatory duty to install a traffic signal and crosswalk, but leaves the decision to engineering judgment. The city's *School Safety Manual*, likewise, specifically provided that policies and practices are intended to be "guidelines," not intended to replace engineering judgment. Under both manuals and the Texas Tort Act, these were discretionary decisions immune from liability.)

(10) *State Department of Highways and Transportation v. King*, 808 S.W.2d 465 (Tex. 1991). (The lane use control sign, while worded in mandatory language ("shall"), is not mandatory in the legal sense because it is subject to Section 1A-4 of the *MUTCD*, which calls for use to be based upon an engineering study of location. In addition, the statute adopting the *MUTCD* states that the department "may" place signs, deemed necessary.)

(11) *Villarreal v. State*, 810 S.W.2d 419 (Tex. App.—Dallas 1991). (Suit by survivors of driver killed when another driver went the wrong way down an exit ramp. The court held that failure to place discretionary traffic control devices on an exit ramp does not give rise to claim under Texas Tort Claims Act.)

(12) *Shives v. State*, 743 S.W.2d 714 (Tex. App.—El Paso 1987). (State could not be held liable for manner in which it installed stop sign since decision was discretionary in nature and therefore immune from liability.)

(13) *Johnson v. Texas Department of Transportation*, 905 S.W.2d 394 (Tex. App.—Austin 1995) (Statute required every stop sign to conform to *MUTCD* and to be located as near as practicable at the nearest line of the roadway. A DOT engineer placed a stop sign some 22 feet from the roadway where it became obscured by vegetation. The court held that "Just as the guidelines established in the Manual do not abridge the Department's discretion to exercise engineering judgment in design....so too the statutory guideline 'as near as practicable to the road' confirms that engineering judgment is essential to determine the proper placement of signs." This was a design decision shielded by the department's sovereign immunity.)

(14) *Pullen v. Nickens*, 310 S.E.2d 452 (Virginia 1983). (Action against Virginia DOT highway workers engaged in the maintenance operation of "pulling shoulders." The court held that private rules intended for the guidance of employees are inadmissible in evidence either for or against a litigant who is not a party to such rules—the trial court erred in admitting the Virginia DOT manual *Typical Traffic Control for Work Area Protection*.)

(15) *Hjerstedt v. Schultz*, 114 Wis. 2d 281, 338 N.W.2d 317 (Wis. 1983) (In a suit against engineers for the negligent placement of stop signs, the court held that even if engineers were mistaken, their exercise of judgment was protected under the official immunity doctrine for discretionary decisions in official capacities.)

The first observation about these 15 cases is that just over half involve the *MUTCD*, repeating the pattern found in cases from Question 4. A second observation is that in the great majority of the cases the agency "guidance" was being reviewed based upon a defense of discretionary function immunity or "official immunity," usually on a motion for summary judgment. This was also true of the cases furnished to Question 4.

The Texas decisions reflect a very liberal interpretation of "discretionary," even equating it to "engineering judgment." The Ohio decisions reflect a very conservative interpretation of "discretionary," usually limiting immunity to the basic policy decision. However, the *Balbach* case demonstrates that discretionary immunity will be upheld where the guidance (*Location and Design Manual*) allowed the planning decision to be based upon engineering judgment. The Minnesota decisions seem to fall somewhere in between Texas and Ohio. However, the *Minnesota Woods* case and *Indianhead* case demonstrate an openness to extending discretionary immunity to instances in implementing policy decisions where the court finds the decision to be based upon public policy considerations.

Many of these cases demonstrate the importance of carefully worded policy issuances, especially the preservation of discretionary immunity by authorizing further policy decisions at lower levels.

### 3. Terms/Techniques of Expression to Avoid Liability (Question 6)

As a follow-on question, the states were asked to identify terms or techniques of expression used in agency guidelines by which compliance was encouraged, but liability avoided in the event there was a failure to comply with or a deviation from



those guidelines. Nine states provided suggestions and comments. Two states suggested use of "may" and "should" in place of "shall" in the guidelines in order to avoid the mandatory duty argument and the opportunity for jury argument on the standard of care. Three states believed that *MUTCD* Section 1A-4, "Engineering Study Required," and Section 1A-5, "Meanings of 'Shall,' 'Should' and 'May,'" had been the most helpful to them in defending suits and constituted the best example of appropriate language.<sup>81</sup> The State of Indiana provided the following revision of Section 1A-1 of the *MUTCD* as an example of techniques of expression used to encourage compliance, but avoid liability.<sup>82</sup>

#### 1A-1 Introduction and General Provisions

This Manual has been published as a *guide* and the contents herein shall be used by state and local officials in determining the necessity for any traffic control device in their respective jurisdictions. It may also serve as a guide for private roadways where the use of traffic control devices are needed.

The principal purpose of the Manual is to give the size, shape, color, etc. of the signs, markings, and devices which *may* be used under varying circumstances.

One of the primary purposes of this Manual is to *promote uniformity* in the type of devices used throughout the State. The *devices suggested* in this Manual and their application are to be used in conjunction with field investigation and engineering judgment; however, *these devices are not a substitute for the exercise of reasonable care on the part of the highway user. This Manual shall not be construed as an instrument to mandate the use of any of the control devices or procedures at a particular location. It is not intended to specify as a legal requirement any maximum or minimum standards as to size, number, location, or type of traffic control device.*

*Any reference to warrants or standards are considered to be discretionary on the part of the investigator. Any reference to distances or measurements or locations as referenced herein shall be construed to be typical in nature and shall be used only as a guide for field application.* (emphasis supplied)

Three states (Michigan, North Dakota and Washington) suggested language for general use in manuals, whether they be for design, construction, or maintenance:

- "Factors to be considered," "discretionary," and "subject to exceptions where good engineering judgment requires otherwise"
- "Should generally"
- "When resources permit"
- "When consistent with your other duties"
- "If reasonable"
- "Employees may"
- "It is usually preferred"
- "Should consider"
- "Employees must determine"
- Use language stating that "these are guidelines to be used by engineers but that final judgment on application and extent of use is up to the engineer's discretion." Also sometimes add that guidelines "are for assistance of engineers, but are not meant to be applied in litigation or to resolve legal disputes." (This doesn't bind the court, but it helps.)

Two states (New York and Texas) provided the following language from their maintenance manuals:

- "To provide guidance toward uniformity of maintenance throughout the state...Highway maintenance guidelines specify the chart...below can be used as a guide to determine the need for shoulder maintenance."
- "The Safety and Maintenance Operations Division has prepared this manual to establish uniform procedures. It is not intended to establish legal standards of func-

tion or responsibility...Changes in available funds, equipment or personnel will require that the level of maintenance be adjusted from time to time by trained *maintenance personnel*. Consequently, these standards *do not establish legal standards* as they are meant to function primarily as a guide in pursuing projects of a like nature." [emphasis added].<sup>83</sup>

The terms/techniques of expression suggested should all prove useful in providing permissive, flexible guidance for implementing action that, when it becomes the basis for a tort claim, will afford counsel the opportunity to raise the defense of discretionary immunity and/or argue the issue of care. The Montana *Yager* case and the Idaho *Esterbrook* case are good examples of court treatment of the words "should" and "may." The Texas cases of *Bellnoa* and *Johnson* both demonstrate the defensive value of appropriate language that leaves discretion to engineering judgment. Some states felt that the best example of appropriate language, and often the most helpful, is that found in the *MUTCD*: "Engineering Study Required" and "Meanings of 'Shall,' 'Should' and 'May.'" The cited decisions of the Idaho Supreme Court in *Esterbrook* and *Lawton* are demonstrative.

#### 4. Examples of Disclaimers (Question 7)

"Disclaimer" language used in written guidance that has influenced or may influence tort liability was provided by the states of California and Nebraska and is included in Appendix B.

### C. Justification of Design Exceptions

#### 1. Written Justification (or Lack Thereof) Affecting Liability (Question 8)

A very significant area of liability exposure is in the failure of design engineers to provide written justification for design exceptions. Eleven states provided the following examples of when evidence or lack of evidence of written justification for design exceptions influenced or may have influenced liability.

California: "In our infamous 'Red Onion case,' the Department was found liable and paid close to \$10 million for failing to justify in writing its decision to utilize a paved shoulder as an additional lane. A section of highway in Southern California was overcapacity, and the engineers failed to document in writing their decision prior to construction. This failure resulted in a loss of our motion for summary judgment based on design immunity. The case was tried and a jury verdict in plaintiff's favor was obtained."

Indiana: "One area of significant difficulty is guardrail placement. The criteria for guardrail warrants has not been consistent either here or nationally. This has resulted in suits both for placing or not placing guardrail. Typically these decisions, to the extent that they were conscious ones, are undocumented."

Maryland: "In one case where the State Highway Agency (SHA) was held liable for failing to adequately warn that a road dead-ended, there was no written justification why certain measures were not taken. If there had been written justification, SHA may not have been held liable because it would have been clear why the decision to use signs rather than break-away barricades was made."

Michigan: "In the past, defense has been difficult where plans call for certain features but the "as built" construction plan gives no indication why changes were made and there is nothing apparent from site review."

Minnesota: See *Schaeffer v. State*, 444 N.W.2d 876 (Minn. Ct. App. 1989), *supra*, p. 38. (Lack of evidence of written justification for guardrail location was basis for

denial of summary judgment to State.) [Also see LRD 14 (June 1990) for a review of Schaeffer.]

Nebraska: In *Symington v. State* (district court decision against the State, settled on appeal), roadway design personnel did not articulate policy considerations involved in designing a particular configuration of drainage curb that was used on the outside edge of paved shoulders. If the design utilized would have been part of a standard design plan and if an explanation of policy considerations involved in the adoption of that configuration could have been offered to the court, it is possible that it may have affected the outcome. See also *Richardson & Gillispie v. State*.<sup>64</sup>

Nevada: Metal storm drain cover case. Rectangular metal storm drain cover was installed by contractor in a raised median on heavily traveled Flamingo Boulevard in Las Vegas. The storm drain cover was located in a midblock area not intended for any pedestrian use. Plans and specifications called for screws at each corner of the storm drain cover. While holes were drilled in the cover by the manufacturer, no receptacles for the screws were installed in the metal frame surrounding the cover. Twenty years later, a jaywalking pedestrian stepped on the storm drain cover, left askew by unknown persons, and the cover flipped up, causing a fall and a fractured ankle. Nevada DOT maintenance personnel said they never used screws to hold down storm drain covers in medians, since during frequent flash floods, the cover itself was under water and had to be opened for access to the storm drain system. The plaintiff's attorney alleged that Nevada DOT violated its own design plans and specifications. The case is still pending, but plans may cause problem at trial since there was no change order or written explanation of why the screws were never installed.

New York: Lack of evidence of a reasonable study of dangerous rock outcrops resulted in court-imposed liability.

Ohio: In *Lopez v. Ohio Department of Transportation* (1987), 37 Ohio App. 3d 69, it was alleged that the Ohio DOT was negligent in defectively designing and constructing a flexible steel plate guardrail. Plaintiff relied on an inter-office communication indicating that Ohio DOT would eliminate flexible steel plate and shallow beam guardrail from new construction projects, as evidence that the flexible steel plate was defective. The court rejected the contention that the memorandum was an admission of defect.

*Yinger v. Ohio Department of Transportation*. (1992) 66 Ohio Misc.2d 69, involved reconstruction of I-270 where, to facilitate the flow of traffic, the shoulder of the southbound lane was prepared as a temporary driving lane, thereby creating four lanes on the southbound side of I-270. An asphalt divider was installed in the middle, making two lanes northbound and two lanes southbound. The court found no negligence, based upon Ohio DOT's adherence to their *Location and Design Manual*.

Utah: *Keegan v. State*, 896 P.2d 618 (Utah 1995). Action arising out of a single-vehicle accident on I-80 in Parley's Canyon when decedent's eastbound vehicle skidded on black ice, climbed the concrete median barrier separating the eastbound and westbound lanes, slid along the top of the barrier, and collided with a bridge support pillar. Plaintiff alleged that although the barrier had originally been constructed in accordance with safety standards promulgated by AASHTO, two subsequent surface overlay projects had shortened the barrier below AASHTO standards, rendering the barrier unsafe. Utah DOT argued that the decision not to raise the concrete median barrier during the surface overlay projects was a discretionary act shielded from liability by governmental immunity under Utah Code Ann. Sec. 63-30-10(1) (1989). The court held that:

UDOT's decision not to raise the concrete barrier during the surface overlay projects was not an operational decision involving the negligent installation or maintenance of a traffic device, but rather involved a policy-based plan, approved by the 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.

Evidence demonstrated that Utah DOT had focused on the issue, studied it, and weighed the cost benefits of the decision.

Washington: A claim settlement was reached under these facts: A single vehicle accident occurred when plaintiff's vehicle drifted across the edge stripe and hit the end of a guardrail, causing permanent injuries to passenger. The guardrail had been installed in 1951, was not flared away from the road, and did not have a buried end treatment, but rather the old "fish tail" end piece. Although the guardrail was properly installed in 1951, DOT performed a reconstruction project in 1978. The project specifically included upgrading the guardrails. An undocumented engineering decision was made by the project engineer to delete the guardrail upgrade from the project. This decision would have been very difficult to defend at trial, and would have allowed evidence of superior designs into the case. It is undisputed that the more modern design would have resulted in no injuries to any of the plaintiffs. Even 1 percent of finding of fault by the State would have resulted in 100 percent liability. Given the condition of the guardrail and the poor decision on the reconstruction contract it was likely that the State would be found at least 1 percent at fault. A claim settlement of \$514,500 was reached.

## 2. Language / Terms for Use in Design Exceptions (Question 9)

While written justification for design exceptions is vitally important in tort liability defense, the way such justification is worded is also extremely important. For this reason, the states were requested to suggest language or terms of expression for use in design exception justification that were believed to enhance the ability to defend such justification during trial. Thirteen states provided comments or design manuals, but no one suggested any specific language or terms of expression used or to be used in such justification. However, all agreed with the critical importance of having written documentation that provides at least a brief but clearly written rationale justifying the exception being made. One state suggested using language that indicates the exercise of choice or discretion and that can be construed as involving political, social, or economic considerations, in order to qualify the action for discretionary immunity. This is supported by some of the case authority previously reviewed.

Several states provided copies of their procedures for the documentation, evaluation, and approval of exceptions to design criteria. Appendix C contains selected excerpts from two of those design manuals.

While the survey and study produced some excellent examples of cases involving the issue of design exception documentation, none of these cases provide examples of any specific language approved by the court; also, the responses to the survey did not suggest any specific language or terms of expression. This is understandable, and, because of the technical nature of design exceptions, the documentation is not readily susceptible to the use of boilerplate phrases or standard modifying words.

## D. The Precedential Value of *United States v. Gaubert*

The last two questions were prompted by the most recent U.S. Supreme Court opinion in *United States v. Gaubert*, *supra*, where the Court in addressing the dis-



cretionary function exception to tort liability, held that it is the nature of the conduct, rather than the status of the actor, that governs whether the exception applies and that "if a regulation [or internal guideline] allows the employee discretion, the very existence of the regulation [or guideline] creates a strong presumption that a discretionary act...involves consideration of the same policies which led to the promulgation of the regulations [or guidelines]."

#### 1. *Gaubert Followed, Rejected, or Distinguished?* (Question 10)

Question 10, answered by 25 states, was as follows: "Cite or attach, if unreported, any decisions in which courts in your jurisdiction have cited the *Gaubert* decision and whether it was followed, rejected, or distinguished."

There were 19 states responding "none/unknown/or not applicable" to this question. Six states responded by citing a total of 12 cases, none of which involved highway agency negligence or issues of highway agency discretionary decisions. Half of those cited cases were from federal court decisions involving federal programs, the other half were state court decisions. Five of these 6 state court decisions followed *Gaubert* and 1 adopted the view of Justice Scalia's dissent.

Minnesota: *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). (Minnesota Supreme Court adopts view of Justice Scalia's dissent in *Gaubert* that "the level at which the [operational] decision is made is often relevant to the discretionary function inquiry."<sup>85</sup>

Nebraska: *Lemke v. MUD*, 243 Neb. 633, 502 N.W.2d 80 (1993). (Purportedly followed *Gaubert* but found discretionary function exception did not apply). *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42(1992) (Followed, citing language that eliminated the notion that decisions at the operation level do not fall within the discretionary function exception). *First National Bank v. State*, 241 Neb. 267, 488 N.W.2d 343 (Nebraska 1992) (Followed, quoting at length same discussion in *Blitzkie*, *supra*).

North Dakota: *Olson v. City of Garrison*, 539 N.W.2d 663 (N.D. 1995) (followed). *Richmond v. Haney*, 480 N.W.2d 751 (N.D. 1992) (followed).

#### 2. *Prospects of Gaubert Influence?* (Question 11)

Question 11 asked about the precedential value of *Gaubert*: "Notwithstanding your answer to the foregoing question, do you believe the *Gaubert* decision will provide any precedential value to your agency on the discretionary function exception, particularly as it relates to permissive language in agency guidelines and performance standards?"

There were 26 states responding, with 19 states responding "very little/none/unknown/not applicable." Three states responded "possibly," and three states responded "yes." Comments of these six states were as follows.

California: The *Gaubert* decision will provide some assistance to the Department of Transportation in supporting discretionary immunity defense. Due to the similarity between the discretionary function exception language of the State Government Tort Claims Act and the FTCA, the *Gaubert* decision should be given precedential weight. California Government Code section 820.2 provides:

Except as otherwise provided by Statute, a public employee is not liable for an injury resulting from his act or omission when the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused. The discretionary immunity of public employees under this section is made applicable to public entities by California government section 815.2(b).

Mississippi: No line of cases citing *Gaubert* to date. State's Tort Claims Act seems to require that engineering standards in effect during construction must be followed.

Missouri: Possibly, since State Supreme Court is undecided on issues which may effect sovereign immunity.

Nebraska: The Nebraska Supreme Court, which has followed the rationale employed by the United States Supreme Court regarding the discretionary function exception on numerous occasions, has noted that the State Tort Claims Act follows the federal act closely and has looked to federal cases interpreting that act as guidelines in several different contexts. *Wadman v. State*,<sup>86</sup> *Northland Insurance v. State*,<sup>87</sup> *Security Investment Corp. v. State*.<sup>88</sup> This is not expected to change, and adoption of *Gaubert* rationale is likely.

North Dakota: Anticipates that *Gaubert* will be followed; however, expects that it will lead to more protection for the decisions of regional supervisors than for laborers, due to the nature of the decisions.

Ohio: In light of recent Ohio Supreme Court decisions where the court has limited the extension of discretionary immunity to only the initial basic policy decision, the *Gaubert* case may provide some precedential authority for arguing that policy decisions require further discretionary acts and that these subsequent acts are entitled to immunity because they involve the same policy considerations.

Vermont: Untested in Vermont. The *Gaubert* decision is a positive development.

*Shepard's United States Citations*, through the March 1, 1997, supplement,<sup>89</sup> reflects that 14 state courts of appeal and the District of Columbia Appeals Court have now cited *Gaubert* in 26 cases. Three of these cases involve highway agency negligence issues: *Rick v. State*, *DOTD* (La. 1994), *supra*; *Helton v. Knox County* (Tenn. 1996), *supra*; and *Aguehounde v. District of Columbia* (D.C. App. 1995), *supra*. *Shepard's* reflects hundreds of federal cases citing *Gaubert*, including scores of cases decided by all United States Courts of Appeal. The state and federal cases citing *Gaubert* to date, which are pertinent to the problem statement, have been reviewed in this study.

### III. CONCLUSION

The wide variance in the provisions and interpretations of state tort claims acts make it difficult to recognize any new general legal principles emerging from this survey and study. There seems to be a trend away from using the planning/operational dichotomy of the *Dalehite* decision and towards a test for discretionary immunity that focuses on the decision, not the actor. The fact that some of the recent state decisions rely on the *Berkovitz* and *Gaubert* two-tier analysis is also encouraging. With respect to the use of written guidelines as design and performance standards, the states should position themselves to take advantage of these trends by following the lessons taught by the cases reviewed and the survey results reported:

- To the extent possible, avoid language in regulations, standards/ manuals, and guidelines that mandate particular conduct, using instead permissive language, so as not to foreclose a defense of discretionary function, and avoiding a ruling of negligence per se.
- Where possible, use language that allows the exercise of discretion or judgment, preferably listing a range of alternative actions from which the employee may choose.
- Where decisions/actions are permitted to depart from prescribed standards or guidelines, based upon enumerated policy considerations, mandate that such decisions/actions be in writing, with the documentation retained in a permanent file.
- Train employees to provide written documentation of any departure from plans, specifications, or standard operating practices and procedures.

• Do not issue policy directives adopting mandatory action that is not specific and realistic as to effective date and/or timeframe for implementation (e.g., new guard-rail design applying to projects already under construction; bridge fencing policy establishing priorities, but no time line).

## ENDNOTES

<sup>1</sup> LARRY W. THOMAS, LEGAL IMPLICATIONS OF HIGHWAY DEPARTMENT'S FAILURE TO COMPLY WITH DESIGN, SAFETY, OR MAINTENANCE GUIDELINES (NCHRP Research Results Digest 129, Transportation Research Board, October 1981); JOHN C. VANCE, SUPPLEMENT TO LEGAL IMPLICATIONS OF HIGHWAY DEPARTMENT'S FAILURE TO COMPLY WITH DESIGN, SAFETY, OR MAINTENANCE GUIDELINES, (NCHRP Legal Research Digest 26, Transportation Research Board, December 1992).

<sup>2</sup> Vance, *Id.*, at 8, case cited at n.4. The Idaho Supreme Court considered this issue again in *Lawton v. City of Pocatello*, 886 P.2d 330 (Idaho 1994), where jury instructions on the MUTCD were reviewed and the court stated:

In *Eastbrook v. State*, 124 Idaho 680, 863 P.2d 349 (1993), ...we pointed out that to from the basis of an assertion of negligence *per se*, the statute or regulation must clearly define the required standard of conduct. *Id.* at 682, 863 P.2d at 351 (citing *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986)). Since the provisions of the MUTCD at issue were optional, they did not define any required standard of conduct. Accordingly, we held that the instructions were erroneous and prejudicial...To further clarify the matter, we hold once again that non-mandatory provision of the MUTCD cannot be the basis of a negligence *per se* jury instruction. Page 338. (Emphasis supplied)

<sup>3</sup> The largest body of case law dealing with discretionary function immunity is the federal case law under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 ("FTCA"). The FTCA confers exclusive jurisdiction upon district courts over tort actions, but jurisdiction is not applicable if the claim is based upon "the exercise or performance or the failure to perform a discretionary function or duty." 28 U.S.C. § 2680. Therefore, the issue of discretionary immunity is usually considered

by the court under a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), with the government arguing that the complaint should be dismissed for lack of subject matter jurisdiction. In ruling on a Rule 12(b)(1) motion, the court may look to materials outside the pleadings. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir.1995). Such material may include written policies, standards and guidelines, and manuals. For example, consider the following recent federal cases that reviewed the language of such material to determine the applicability of the discretionary function immunity:

*Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996), (*Management Policies Manual of National Park Service* (NPS), The NPS Loss Control Management System for Yosemite National Park, and the NPS Loss Control Management Program Guideline were reviewed in determining that challenged conduct was within the "discretionary function" exception barring claim by plaintiff that NPS was negligent in failing to warn of the danger of diving off bridge in Yosemite National Park.) *Accord*: *Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995), (NPS Loss Control Management Guidelines and Management Policies, while outlining general policy goals regarding visitor safety, left the means to NPS employees, which necessarily involved an exercise of discretion, barring negligence action by hiker injured in fall based upon failure to warn of danger.)

*Sabow v. United States*, 93 F.3d 1445 (9th Cir. 1996), (*Naval Investigative Service (NIS) Investigative Manual* and the *Judge Advocate General (JAG) Investigative Manual* were reviewed in determining that NIS agents did not violate any mandatory directives; that JAG investigators were performing discretionary acts; and that all NIS and JAG investigative actions involved considerations of social, economic, or po-



litical policy, making applicable "discretionary function" immunity for certain claims. However, claims for negligent infliction of emotional distress by a Marine Corps General were not barred because they did not involve considerations of social, economic, or political policy.)

*Tew v. United States*, 86 F.3d 1003 (10th Cir. 1996), (Federal statutes, Coast Guard regulations, and Army Corps of Engineers Regulations reviewed in determining that neither the Army nor the Coast Guard had nondiscretionary duties to mark or remove private party's unauthorized underwater bridge from river, which caused overturning of raft and subsequent drowning of Tew.)

*Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996), (Mine Safety and Health Adm. Regulations, while containing some mandatory language, gave mining inspectors discretion to determine if a given mine was in compliance, providing "discretionary function" immunity for fall in mine caused by safety violations.) *Contra*: *Meyers v. United States*, 17 F.3d 890 (6th Cir. 1994) (Assessments of mine safety inspectors not protected by the exception because their discretion not grounded in public policy.); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992) (MSHA inspector's offer of technical advice, which was later found to be erroneous, was not protected by discretionary function exception and the challenged conduct was not grounded in policy judgment.) *But see* *Deel v. United States*, 923 F. Supp. 98 (W.D.Va. 1996), where D. Ct. points out that *Meyers* was wrongly decided because the Ct. should not have proceeded to the issue of public policy once it had concluded that the government agent was exercising discretion by policy-driven duties.).

*Rothrock v. United States*, 62 F.3d 196 (7th Cir. 1995), (Federal Highway Administration (FHWA) Regulations

examined on issue of government's liability for failing to ensure, as a condition of funding, that the bridge where plaintiff was injured due to the absence of a guardrail was constructed in accordance with the safety standards referenced for such decisions, including AASHTO standards. *Held*: While FHWA regulations specifically reference AASHTO safety standards, projects may be approved despite non-conformance. The discretionary function exception to FTCA applied since FHWA had discretion to balance a mix of factors in deciding to fund.)

*Domme v. United States*, 61 F.3d 787 (10th Cir. 1995), (Department of Energy (DOE) Orders—one establishing DOE's environmental protection, safety, and health appraisal program for DOE-controlled operations and the second establishing an occupational safety and health program for DOE contractor employees—were reviewed under plaintiff's allegation that DOE safety inspections were inadequate and failed to assure a safe workplace for plaintiff, who was severely burned in an electrical explosion. *Held*: Discretionary action exception barred plaintiff's claim since neither orders specify the precise manner in which employees will conduct safety appraisals, but expressly allow them to use choice and discretion in conducting reviews and inspections; in addition, the record showed that DOE employees in fact based inspection decisions on policy considerations.)

*Tinkler v. United States by FAA*, 982 F.2d 1456 (10th Cir. 1992), (*Federal Aviation Flight Service Manual* found to have established a mandatory, nondiscretionary duty for flight service employee to respond to pilot's request for weather data, making inapplicable the discretionary function exception and constituting negligence to decedent passenger killed in weather-related crash.)

\* L.W. THOMAS, LIABILITY OF STATE HIGHWAY DEPARTMENTS FOR DESIGN, CONSTRUCTION AND MAINTENANCE DEFECTS (NCHRP Research Results Digest 80, Transportation Research Board, September 1975).

<sup>5</sup> 28 U.S.C. 1346, 2671-78, 2680.

<sup>6</sup> K. DAVIS, ADMINISTRATIVE LAW TREATISE, 2d. Ed., § 27:2; L.W. Thomas, *supra*, n.3, provides an overview and analysis of the state statutes waiving sovereign immunity as of the mid-1970s; *but see* RESTATEMENT OF TORTS 2d, §§ 895B, 895C, Appendix (1982), providing an analysis of the state positions on governmental immunity for state and local governmental entities, including case citations and statutory references through the 1970s.

<sup>7</sup> *See* AM. JUR. 2d, *Municipal, County, School and State Tort Liability*, § 129, providing a summary table of jurisdictions with tort claims acts or similar statutes.

<sup>8</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS at 1045 (5th ed. 1984) (new text from 1988 Pocket Part at 148).

<sup>9</sup> *Id.* at 1044-45.

<sup>10</sup> ADMINISTRATIVE SUBCOMMITTEE ON LEGAL AFFAIRS, AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, SURVEY ON THE STATUS OF SOVEREIGN IMMUNITY IN THE STATES (1983).

<sup>11</sup> ADMINISTRATIVE SUBCOMMITTEE ON LEGAL AFFAIRS, AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, SURVEY ON THE STATUS OF SOVEREIGN IMMUNITY IN THE STATES (1992).

<sup>12</sup> *See* *Bulman v. Hulstrand Const. Co.*, 521 N.W.2d 632 (N.D. 1994); *see also* the case note by Grinolds, S.A., 71 N.D. Law Rev. 761 (summer 1995).

<sup>13</sup> 28 U.S.C. 2680(a) of the Federal Tort Claims Act exempts the United States from tort liability for:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not

such statute or regulation be valid, or 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, whether or not the discretion involved be abused.

<sup>14</sup> 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

<sup>15</sup> JOHN C. VANCE, Supplement to LIABILITY OF STATE HIGHWAY DEPARTMENTS FOR DESIGN, CONSTRUCTION, AND MAINTENANCE DEFECTS (NCHRP Legal Research Digest 2, Transportation Research Board, December 1988), at 3. In the recent Wisconsin Supreme Court decision in *Kimps v. Hill*, 546 N.W.2d 151 (Wis. 1996), it was noted that "this court has never articulated an 'operational' exception to the rule of discretionary public officer immunity and we decline to do so now." The court went on to agree with the U.S. Supreme Court's position in *U.S. v. Gaubert, infra.*, decrying "the perpetuation of the 'nonexistent dichotomy between discretionary functions and operational activities.'"

<sup>16</sup> JOHN C. VANCE, IMPACT OF THE DISCRETIONARY FUNCTION EXCEPTION ON TORT LIABILITY OF STATE HIGHWAY DEPARTMENTS, (NCHRP Legal Research Digest 6, Transportation Research Board, June 1989), at 9.

*See also*:

J.A. Brown & J.C. Anjier, *Recent Developments Affecting Louisiana's Discretionary Function Exception: Will Louisiana Follow Gaubert?* 53 LA. LAW REV. 1487 (1993) (Examines recent developments in jurisprudence construing and applying both federal and Louisiana discretionary function exceptions and assesses impact of U.S. Sup. Ct. *Gaubert* decision upon both federal and Louisiana exceptions).

W.R. Hartle, *Sovereign Immunity: An Outdated Doctrine Faces Demise in a Changing Judicial Arena*, 69 N.D. LAW REV. 401 (Spring 1993) (Reviews and criticizes historical accuracy of the

doctrine in America/North Dakota and recommends abolition of the doctrine).

Amye Tankersley, *Tennessee's Adoption of the Planning-Operational Test for Determining Discretionary Function Immunity Under the Governmental Tort Liability Act*, 60 TENN. LAW REV. 633 (Spring 1993) (Comments on concept of sovereign immunity and advent of governmental tort liability; Tennessee's historical perspective; the trend toward the planning/operational distinction; and the 1992 Tennessee Supreme Court decision in *Bowers v. City of Chattanooga*, 826 S.W.2d [Tenn. 1992], adopting the planning/operational distinction.)

J.W. Bagby and G.L. Gittings, *The Elusive Discretionary Function Exception From Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. LAW JOUR. 223 (Sept. 1992) (Examines the parallel development of the discretionary function exception under the Federal Tort Claims Act and under certain state statutes and decisions, exposes the faulty reasoning, and proposes a more coherent model for analysis of the discretionary function.)

H.J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VANDERBILT LAW REV. 1529 (Nov. 1992) (Argues that separation-of-powers concerns support vesting the waiver of immunity decision in Congress, discusses the structural or separation-of-powers justification for sovereign immunity, and analyzes government tort law and contract law waivers.)

G.T. Wetherington and D.I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. LAW REV. 1 (January 1992) (Discusses both the procedural and substantive elements of the law of sovereign immunity in Florida and provides a comprehensive review of those governmental acts that have held to be immune or subject to liability and an analytical framework for determining whether a given gov-

ernmental act qualifies for immunity under Florida law.)

C.L. Kelley, *The Tennessee Governmental Tort Liability Act: Nonfeasance, The Duty to Maintain Streets, and the Discretion to Do Nothing*, 23 MEMPHIS STATE U. LAW REV. 223 (Fall 1992) (Discusses the pivotal U.S. Supreme Court cases, including the Berkovitz and Gaubert cases; interprets the doctrine of discretionary immunity, and analyzes the Tennessee interpretation of discretionary immunity with particular focus on how the Bowers decision promulgates a new definition of discretionary function.)

J. McAlister, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N. MEX. LAW REV. 441 (Summer 1991) (Examines case law associated with the New Mexico Tort Claims Act from its 1975 inception through August 1990, analyzing each of the eight government activities exempt from immunity.)

H.J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability In Tort*, 38 UCLA LAW REV. 871 (April 1991) (Surveys history and early application of discretionary function exception and argues that the courts' exclusive focus on the nature of governmental action has ignored considerations of deterrence and overprotected the government.)

G. Fisher, *Design Immunity For Public Entities*, 28 SAN DIEGO LAW REV. 241 (Apr-May 1991) (Article, based on a review of every case decided since enactment of the California Tort Claims Act, provides a comprehensive discussion of the steps necessary to prove design immunity.)

C.W. McGee, *Governmental Immunity for Discretionary Actions Requires Actual Exercise of Discretion*, 43 S.C. LAW REV. 199 (Fall 1991) (Note reviewing *Niver v. South Carolina Dept. Of Highways*, 395 S.E.2d 728 [S.C. Ct. App. 1990], which held that a govern-

mental entity is entitled to immunity for discretionary actions only if it actually makes a conscious choice after weighing competing considerations, providing a definition of discretionary immunity that aligns South Carolina with the minority of states.)

D.H. Clark, *Exploring The Boundaries of Discretionary Immunity In Oklahoma: Nguyen v. State*, 26 TULSA LAW JOUR. 245 (Winter 1990) (Reviews history and application of sovereign immunity under federal and Oklahoma law, the purpose and application of discretionary immunity, and the decision of Oklahoma Supreme Court in *Nguyen v. State*, 788 P.2d 962 (Okla. 1990), which used the planning-operational method in deciding that the release of a mental patient was not an immune operational decision.)

<sup>17</sup> 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

<sup>18</sup> 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

<sup>19</sup> *United States v. Varig Airlines*, 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984).

<sup>20</sup> 35 F.3d 216, 221 (5th Cir. 1994).

<sup>21</sup> 666 A.2d 443, 450 (D.C.App. 1995).

<sup>22</sup> 630 So.2d 1271, 1276 (La. 1994).

<sup>23</sup> 852 S.W.2d 899, 907 (Tenn. App. 1992).

<sup>24</sup> Also see *Helton v. Knox County, Tennessee*, 922 S.W.2d 877 (Tenn. 1996) (Plaintiff killed when his vehicle went off century-old bridge without guardrails, despite repeated recommendations by Tennessee DOT that they should be installed. Because of costs and concern for preservation of historic bridge, County decided not to follow such recommendations. *Held*: The decision not to install guardrails fell within the discretionary function exception of tort claims act, citing Gaubert for the proposition that "It is the nature of the conduct rather than the nature of the actor that governs whether the exception applies.") At

886. In *Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992), minor struck by automobile after departing from school bus alleged negligence by city and school bus driver. *Held*:

The distinction between planning and operational depends on the type of decision rather than merely the identity of the decision maker. We caution that this distinction serves only to aid in determining when discretionary function immunity applies; *discretionary function immunity attaches to all conduct properly involving the balancing of policy considerations*. Therefore, there may be occasions where an 'operational act' is entitled to immunity, where, for instance, the operational actor is properly charged with balancing policy considerations [citing Gaubert]. [But]...we find that a decision left to a school bus driver on where to stop at a particular intersection is an operational act not within the discretionary function exception to governmental immunity. At 431-32. (Emphasis supplied).

<sup>25</sup> 587 N.E.2d 780, 784 (Mass. 1992).

<sup>26</sup> See also *Poly v. Moylan*, 667 N.E.2d 250, 254 (Mass. 1996), where the Court noted that the Mass. Tort Claims Act is guided by the same exception as the FTCA...citing Gaubert.

<sup>27</sup> 933 F.2d 663 (8th Cir. 1991).

<sup>28</sup> 933 F.2d 663, at 668. *Accord*: *Cassens v. St. Louis River Cruise Lines*, 44 F.3d 508 (7th Cir. 1995) (Coast Guard inspection and failure to notice absence of handrail was within discretionary exception because inspection guidelines found in *Coast Guard Manual* evidenced fact that inspectors were required to make policy choices in balancing safety and economics); *Cole v. U.S.* 651 F. Supp. 221 (N.D. Fla. 1986) (Claim for army's negligent failure to apply and enforce provisions of safety manual for ammunition, explosives, etc., was barred by discretionary function exception). *Compare*: *Mandel v. U.S.*, 793 F.2d 964, 967 (8th Cir. 1986) (Failure of park ser-



vices personnel to comply with adopted safety policy not protected under discretionary function exception); *National Carriers, Inc. v. U.S.*, 755 F.2d 675, 678 (8th Cir.1985) (Meat inspector's failure to follow regulations not protected under discretionary function exception); and *Phillips v. U.S.*, 956 F.2d 1071 (11th Cir. 1992) (Army Corps inspectors negligent in discharging ordinary care responsibilities imposed by Corp's own manual and could not rely on the discretionary function exception).

<sup>29</sup> (Minn. Ct. App. 1993, C9-92-unpublished).

<sup>30</sup> *Baum v. U.S.*, 986 F.2d 716 (4th Cir. 1993).

<sup>31</sup> 486 U.S. at 536.

<sup>32</sup> 499 U.S. at 322.

<sup>33</sup> 486 U.S. at 531.

<sup>34</sup> 499 U.S. at 324.

<sup>35</sup> *Supra*, n.30 at 722 and 724.

<sup>36</sup> *Id.*, at 721. See also: *Bowman v. U.S.*, 820 F.2d 1393 (4th Cir. 1987) (Victim of automobile accident on federally-controlled Blue Ridge Parkway alleged negligence of Park Service in failing to place guardrail along embankment; *Held*: Alleged negligence fell within discretionary function exception for use of policy judgment requiring balancing of safety, aesthetics, environmental impact, and available financial resources); *Accord*: *ARA Leisure Services v. U.S.*, 831 F.2d 193 (9th Cir. 1987) (Park Service's decision to design and construct park road without guardrails was protected by discretionary function exception; However, failure to maintain road in a safe condition was not a decision grounded in social, economic, or political policies and therefore not exempt).

<sup>37</sup> 896 P.2d 618 (Utah 1995).

<sup>38</sup> *Keegan v. Utah, Id.*, 896 P.2d at 625. See also: *Costa v. Josey*, 415 A.2d 337 (N.J. 1980) (Wrongful death alleging negligence of DOT in connection with resurfacing highway; *Held*: that

material fact issues precluding summary judgment for State on grounds of immunity existed as to whether the original plan or design contemplated that resurfacing would reduce the height of dividing barrier.)

<sup>39</sup> *Compare*: *Niver v. S.C. Dep't of Highways and Public Transp.*, 395 S.E.2d 728, 730 (S.C. Ct. App. 1990) (Motorcyclist injured in collision alleged negligence of state for failure to use striping or signs on highway to indicate no-passing zone; *Held*: No immunity available under discretionary immunity exception because department failed to prove that faced with alternatives it actually weighed competing considerations and made a conscious choice not to place either striping or signs); See also: *Daniel v. State, Dept. of Transp.*, 571 A.2d 1329, 1346-47 (N.J. Super. A.D. 1990) (Death from head-on automobile accident when oncoming automobile catapulted over "ramp-like" median created by paving overlays performed by DOT in 1970 and 1981; *Held*: The finding that the lowering of the median curb was not due to approved design but to maintenance, so that the State was not immune, was supported by evidence that none of the documents referred to a deliberate design decision, but rather to routine maintenance.).

<sup>40</sup> 45 F.3d 445 (D.C. Cir. 1995).

<sup>41</sup> *Id.*, at 450.

<sup>42</sup> 539 N.W.2d 663 (N.D. 1995).

<sup>43</sup> *Id.*, at 667.

<sup>44</sup> Richard O. Jones, *The History of Tort Liability and Risk Management*, presented at the First National Conference on Tort Liability and Risk Management for Surface Transportation, Pennsylvania State University, University Park (April 4-7, 1993), at 11-15.

<sup>45</sup> Daniel S. Turner and Julie D. Wheeler, 1991 *Overview of Highway Tort Liability*, presented at the 1992 Transportation Research Board Legal

Workshop, Charleston, S.C. (July 1992).

<sup>46</sup> Elder Witt, NIMLO Mid-Year Seminar: "The Tort Liability Crisis," 27 *Mun. Att. L.* 1, 2, (1986).

<sup>47</sup> U.S. DEPT 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, (1986).

<sup>48</sup> FREILICH ET AL. *The Supreme Court and Federalism*, 18 *URBAN LAWYER* 4, 811, N.255 (1986).

<sup>49</sup> John C. Vance, SUPPLEMENT TO LIABILITY OF STATE HIGHWAY DEPARTMENTS FOR DESIGN, CONSTRUCTION, AND MAINTENANCE DEFECTS, (NCHRP Research Results Digests 2, Transportation Research Board, December, 1988).

<sup>50</sup> W.S. 1-39-106 (1991).

<sup>51</sup> *White v. State of Wyo. and Wyo. State Highway Dept.*, 784 P.2d 1313 (Wyo. 1989).

<sup>52</sup> R. Vansant, *Liability: Attitudes and Procedures*, American Society of Civil Engineers, Symposium: Managing Liability (April 1982).

<sup>53</sup> Thomas, Larry W., "Legal Implications of Highway Department's Failure to Comply with Design, Safety, or Maintenance Guidelines," NCHRP Research Results Digest 129, Transportation Research Board (October 1981);

Whether issued as a regulation, or as an internal memorandum or directive, it appears that rules or procedures adopted by a party—in this instance the highway department—for the guidance or control of its employees in the performance of their duties are admissible in most states.

Thus, cases appear to hold that if the regulation allows the agency to exercise its discretion and does not direct that its action conform to a prescribed, mandatory standard, the deviation from the standards may be considered to be some evidence of negligence but is not negligence per se." At pages 8-9.

<sup>54</sup> R.M. Lewis, PRACTICAL GUIDELINES FOR MINIMIZING TORT LIABILITY, (National Cooperative Highway Research Program: Synthesis of Highway Practice 106, Transportation Research Board, December 1983).

<sup>55</sup> *Id.*, at 30.

<sup>56</sup> R.M. Lewis, R.M., MANAGING HIGHWAY TORT LIABILITY, (National Cooperative Highway Research Program: Synthesis of Highway Practice 206, Transportation Research Board, (1994).

<sup>57</sup> Prosser and Keeton, *supra.*, at 356.

<sup>58</sup> Larry W. Thomas, LIABILITY OF STATE AND LOCAL GOVERNMENTS FOR SNOW AND ICE CONTROL (NCHRP Research Results Digest 83, Transportation Research Board, February 1976), at 5, citing *Echerlin v. State*, 184 N.Y.S. 2d 778 (Ct. Cl. 1959) and 39 Am. Jur. 2d, Highways, § 509 at 909.

<sup>59</sup> *Id.*, 39 Am. Jur. 2d, Highways, § 506 at 906.

<sup>60</sup> Am. Jur. 2d, Highways, § 397 at 792.

<sup>61</sup> 28 U.S.C 2680, 1346(b).

<sup>62</sup> 28 U.S.C. 1346(b), The central provision of the Federal Tort Claims Act provides that suit may be brought against the United States:

For injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (emphasis added)

For example, see the following state statutes:

Florida: Florida Tort Claims Act, FLA. STAT. § 768.28(5): "The state and its agencies and subdivisions shall be liable for tort claims in the same manner and

to the same extent as a private individual under like circumstances."

Hawaii: HA. REV. STAT. § 662-2: "The State hereby waives its immunity for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances."

New Jersey: N.J.S.A. 59:2-2.a: "A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances."

Rhode Island: R.I. GEN. LAWS ANN. § 9-31-1: "The state...and any political subdivision...shall...be liable in all actions of tort in the same manner as a private individual or corporation."

Vermont: Vermont State Tort Claims Act, VT. STAT. ANN. 12 § 5601: "The state of Vermont shall be liable for injury...in the same manner and to the same extent as a private person would be liable to the claimant."

**Caution:** The reader is advised to examine such statutory provisions in full, including later amendments, to ascertain the exact status of liability or immunity: as all state tort claims act provide exceptions to liability and legal processes that differ from that of private individuals.

<sup>63</sup> California Tort Claims Act, Deering's Cal. Gov. Code §§ 830 and 835.

<sup>64</sup> See *Murrel v. State of California* ex rel Dept. Pub. Wks., 47 Calif. App. 3rd 264, 271 n.7, rejecting this standard of negligence for the state. See also: *Morse v. State of Tex.*, 905 S.W.2d 470 (Ct. App. 1995), recognizing that under the Texas Tort Claims Act, a "special defect" gives rise to a heightened duty on the part of the DOT as a matter of law, with the State owing the same duty to warn that a private landowner owes to an invitee.

<sup>65</sup> Kenneth G. Nellis, THE PUBLIC DUTY DEFENSE TO TORT LIABILITY. (NCHRP Research Results Digest 17, Transportation Research Board, (December 1990).

<sup>66</sup> *Id.*, at 3.

<sup>67</sup> *Id.*, at 23-24.

<sup>68</sup> Brelend C. Gowan, MANUALS FOR TRAFFIC ENGINEERS: AN ENGINEERING TOOL OR LEGAL WEAPON? THE CALIFORNIA EXPERIENCE, (Transportation Research Circular 361, Transportation Research Board, July 1990).

<sup>69</sup> 574 A.2d 728 (Pa. Cmwlth. 1990).

<sup>70</sup> In *Foley v. State Dept. Of Transp.*, 422 So.2d 978 (Fla. App. 1982), the court held that the DOT could not invoke governmental immunity simply by showing that it had formulated and adhered to a schedule of road maintenance at the accident site.

<sup>71</sup> Thomas, *supra*, n.1, at 9.

<sup>72</sup> 738 P.2d 1274 (Mont. 1987).

<sup>73</sup> John C. Vance, SUPPLEMENT TO LEGAL IMPLICATIONS OF HIGHWAY DEPARTMENT'S FAILURE TO COMPLY WITH DESIGN, SAFETY, OR MAINTENANCE GUIDELINES, (NCHRP Legal Research Digest 26, Transportation Research Board, December 1992).

<sup>74</sup> 853 P.2d 1214 (Mont. 1993).

<sup>75</sup> In *State of Colorado v. Moldovan*, 842 P.2d 220 (Colo. 1992) (Motorcyclist injured when he collided with a cow that had entered the highway through an allegedly negligently maintained highway right-of-way fence). The Colorado Supreme Court, in reversing the district court's summary judgment for the state and remanding for further proceedings, considered the Colorado Division of Highways' *Manual of Maintenance Procedure*, Ch. 11, § 11.6 (1990), "The Colorado Open Range Law requires the Department to fence stock out," in holding that the department had a statutory duty to maintain the fence, but violation was not negligence per se since proof was still necessary under the Tort Claims Act that the department knew or should have known of the "dangerous condition." But see *Mason & Dixon Lines, Inc. v. Mognet*, 645 A.2d 1370 (Pa. Cmwlth. 1994) (Damage to defendant's truck and cargo and plaintiff's truck

due to collision with cow that had entered turnpike through hole in fence. *Held:* The cow...was simply "on" the highway, and was not a dangerous condition "of" the highway, and also that the commission had no statutory duty to erect fencing and therefore owed no statutory duty to plaintiff and defendant.

<sup>76</sup> 863 P.2d 349 (Idaho 1993).

<sup>77</sup> *Esterbrook v. State*, 863 P.2d 349, at 351. In *Roberts v. Idaho Transp. Dept.*, 827 P.2d 1178, 1185 (Idaho App. 1991), a suit involving death from a collision at an intersection between a state highway and a county road, the court considered whether placement of a "standard-sized" stop sign on the side road necessarily shielded the DOT from liability. The court highlighted the MUTCD rule adopted by the state, which provided: "Where greater emphasis or visibility is required, a larger size is recommended...Manual Rule 2B-4." The court held:

Having adopted such a guideline, however, the Department is bound to abide by it. Therefore, the fact that the Department erected a 30 x 30 inch stop sign at the intersection does not necessarily establish its fulfillment of its duty if in fact, the Department failed to exercise ordinary care in implementing its own policies and guidelines.

<sup>78</sup> Thomas and Vance, *supra*, n.1.

<sup>79</sup> Vance, *supra*, n.48, at 7-8; also see *City and County of Denver v. DeLong*, 545 P.2d 154 (Colo. 1976) (Police department rule regarding maximum speed police vehicle could enter intersection was clearly a safety rule and admissible to establish the standard of care.) Annotated by David Rand, Jr., *Municipal Corporation's Rules or Regulations as Admissible in Evidence in Action by Private Party*, 82 A.L.R.3d 1285 (1976); Daniel E. Feld, *Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental*

*Body or by Voluntary Associations*, 58 A.L.R.3d 148 (1974).

<sup>80</sup> However, see *Ga. Dept. Of Transp. v. Brown*, 460 S.E.2d 812 (Ga. App. 1995) (Survivors of motorist killed in intersectional collision alleged negligence in state's decision to open road prior to completion of alternative traffic control system that relied on two-way stop signs rather than on four-way traffic light signals; *Held:* Evidence supported finding that state deviated from generally accepted engineering/design standards, even though no specific provision regarding such transition exists in the MUTCD.)

<sup>81</sup> *Manual on Uniform Traffic Control Devices for Streets and Highways*, Federal Highway Administration (1988):

#### 1A-4 Engineering Study Required

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation.

#### 1A-5 Meanings of "Shall," "Should" and "May"

In the Manual sections dealing with the design and application of traffic control devices, the words "shall," and "should" and "may" are used to describe specific conditions concerning these devices. To clarify the meanings intended in this manual by the use of these words, the following definitions apply:

1. SHALL—A mandatory condition. Where certain requirements in the design or application of the device are described with the "shall" stipulation, it is mandatory when an installation is made that these requirements be met.
2. SHOULD—An advisory condition. Where the word "should" is used, it is considered to be advisable usage, recommended but not mandatory.



3. MAY—A permissive condition. No requirement for design or application is intended.

<sup>82</sup> INDIANA DEPARTMENT OF TRANSPORTATION, INDIANA MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS.

<sup>83</sup> TEX. DEPT. OF TRANSP., TEX. DEPT. OF TRANSP. SAFETY AND MAINTENANCE OPERATIONS DIVISION MANUAL, § 5-503, Maintenance Guidelines at 5-37.

<sup>84</sup> 200 Neb. 225, 263 N.W.2d 442 (1978).

<sup>85</sup> 472 N.W.2d at 104 n.1.

<sup>86</sup> 1 Neb. App. 839, 510 N.W.2d 426 (1993).

<sup>87</sup> 242 Neb. 10, 492 N.W.2d 866 (1992).

<sup>88</sup> 231 Neb. 536, 437 N.W.2d 439 (1989).

<sup>89</sup> Shepard's/McGraw-Hill, Inc., Colorado Springs, Colo.

## APPENDIX A—QUESTIONNAIRE

Subject: NCHRP 20-6, Legal Problems Arising Out of Highway Projects, Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards

Responding Agency: \_\_\_\_\_

Contact Person: \_\_\_\_\_

Phone: \_\_\_\_\_ FAX: \_\_\_\_\_

(1) Is your legal department afforded the opportunity to review written design and performance standard guidelines, including amendments, prior to their issuance (i.e. always, frequently, infrequently, or never)?

(2) In connection with your answer to the foregoing question, what effect do you consider this practice to have on your agency's liability experience in tort litigation? Please explain.

(3) Briefly describe your practice/procedure, if any, for recommending re-evaluation of problematic language in such written guidelines when legal considerations suggest the need.

(4) Describe illustrative instances in your jurisdiction where liability has been imposed because of the adoption or imposition of such guidelines, attaching copies of any standards or guidelines referred to.

(5) Describe instances where compliance of agency participants was encouraged in such guidelines but was not forthcoming, and where liability was still avoided, attaching copies of any standards or guidelines referred to.

(6) Identify terms or techniques of expression used your State's guidelines by which compliance is encouraged, but liability avoided, in the event there is a failure to comply with or a deviation from those guidelines.

(7) Give examples of your use of disclaimers in such written guidance which has influenced or may influence liability.

(8) Give examples of when the evidence or lack of evidence of written justification for design exceptions has influenced or may have influenced liability.

(9) Suggest language or terms of expression for use in design exception justification which you believe enhances the ability to defend such justification during trial.

NOTE: In LRD 2 (December 1988), *Supplement To Liability of State Highway Departments for Design, Construction, and Maintenance Defects*, the author observes:

"Because State legislation has so closely pursued the language of the Federal [Tort Claims] Act the natural consequence has been that State courts have in general followed the lead of the United States Supreme Court in adopting the planning and operational dichotomy, announced in *Dalehite* [*Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L. Ed. 1427 (1953)] as a useful tool in distinguishing between those activities that are protected by the discretionary exemption and those that are not so protected.

In the most recent U.S. Supreme Court decision involving the discretionary function exception, *United States v. Gaubert*, 499 U.S. 315, S. Ct. 1267, 113 L. Ed. 2d 335 (1991), the Court arguably explains away the "planning and operational" dichotomy:

But the distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy...The Court of Appeals misinterpreted *Berkovitz's* [*Berkovitz v. United States*, 486 U.S. 531, 100 L. Ed. 2d 531, 108 S. Ct. 1954] reference to *Indian Towing* [*Indian Towing Co. v. United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S.Ct. 122

(1955)] as perpetuating a nonexistent dichotomy between discretionary functions and operational activities. At 326.

The Court also established an important presumption:

On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations...In addition, an agency may rely on internal guidelines rather than on published regulations...When established government policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. At 324.

(10) Cite or attach, if unreported, any decisions in which courts in your jurisdiction have cited the *Gaubert* decision and whether it was followed, rejected, or distinguished.

(11) Notwithstanding your answer to the foregoing question, do you believe the *Gaubert* decision will provide any precedential value to your agency on the discretionary function exception, particularly as it relates to permissive language in agency guidelines and performance standards? Explain.

PLEASE PROVIDE ANY FURTHER COMMENTS YOU WISH TO MAKE:

## APPENDIX B—DISCLAIMER LANGUAGE

### California

California DOT manuals include an introductory disclaimer that essentially states that "it is not designed to nor does it establish a legal standard of care. It is published solely for the information and guidance of the employees of the Department of Transportation." In addition, California's Streets and Highways Code sections 91 and 27, when read in combination, essentially state that the degree and type of maintenance performed on our highways is within the discretion of the department.

Section 27. Maintenance, provides: "*The degree and type of maintenance for each highway, or portion thereof, shall be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor.*" (emphasis supplied).

### Nebraska

Nebraska's example is the disclaimer in a clause made part of the typical agreement for engineering consulting services:

It is understood by the parties that the State will rely on the professional performance and ability of the Consultant. Any examination by the state or the FHWA, or any acceptance or use of the work product of the Consultant, will not be considered to be a full and comprehensive examination and will not be considered an approval of the work product of the Consultant which would relieve the Consultant from any liability or expense that could be connected with the Consultant's sole responsibility for the propriety and integrity of the professional work to be accomplished by the Consultant pursuant to this agreement. That further, acceptance or approval of any of the work of the Consultant by the State or of payment, partial or final, will not constitute a waiver of any rights of the State to recover from the Consultant, damages that are caused by the Consultant due to error, omission, or negligence of the Consultant in its work. That further, if due to error, omission, or negligence of the Consultant, the plans, specifications, and estimates are found to be in error or there are omissions therein revealed during the construction of the project and revision or reworking of the plans is necessary, the Consultant shall make such revisions without expense to the state. The consultant shall respond to the State's notice of any errors or omissions within 24 hours and give immediate attention to these corrections to minimize any delays to the construction contractor. This may involve visits by the Consultant to the project site, if directed by the State. If the Consultant discovers errors in its work, it shall notify the State of such errors within seven days. Failure of the Consultant to notify the State will constitute a breach of this agreement. The Consultant's legal liability for all damages incurred by the State caused by error, omission, or negligent acts of the Consultant will be borne by the Consultant without liability or expense to the State.



## APPENDIX C—DESIGN EXCEPTIONS CRITERIA

*Missouri (See Missouri Design Manual 2-01.8)*

2-01.8 DOCUMENTATION OF DESIGN EXCEPTIONS. Documentation of design exceptions is necessary for the department to be able to defend itself from litigation. Litigation may take place many years after the actual construction and permanent documentation is necessary to determine the justification for design exceptions.

Design exceptions consist of items which vary from the *Policy, Procedure, and Design Manual*, the *Policy on Geometric Design of Highways and Streets* (AASHTO *Green Book*), the *Roadside Design Guide*, or other accepted guides.

The request for roadway design exceptions must be initiated and signed by the district highway design engineer in charge of the project or the project manager, if designed by consultant. All consultant design exceptions are reviewed by the district prior to submittal to the Design Division for processing.

....  
The Design Exception Information form shown in figure 2-01.10 is used to request design exceptions. Additional supplemental sheets may be attached as needed....

All requests must contain reasons to justify the exceptions. It is imperative that the justification be sufficiently complete to clearly reflect that reasonable care was exercised by the designer in the selection of a particular highway design. It should be kept in mind when writing the justification that design exceptions arise because it is impractical or impossible to reasonably meet a specific design standard. If the standard can be reasonably met, then the item in question should be built to standard. The justification may include appropriate economic analysis, discussion of applicable accident location and type, or discussion of avoidance of Section 4(f) or Section 6(f) lands. The justification should support the concept that maximum service and safety benefits were realized for the cost invested. Engineering judgment should be used when balancing the economic and engineering reasons for the justification. A design exception is based on sound engineering judgment rather than an attempt to save cost.

....  
The Design Division maintains the design exceptions in a permanent project file. A copy of the form is also kept in the district file.

*New York. (See New York State DOT Highway Design Manual (HDM.)*

From Chapter 1, Purpose:

Variations from this manual will be necessary for special or unusual conditions, or between the issuances of new or revised source documents and any corresponding updates of the HDM. Consequently, instructions in this document are not intended to preclude the exercise of individual initiative and engineering judgment in reaction to site specific conditions or application of current state of the art practices. Rather, such initiative and judgment is encouraged when it is appropriate and there is a rational basis for deviation. However, it is equally important that there be consistency statewide in the application of this manual. The objective is uniformity of design for the same or similar conditions. To promote this objective, provide a record for decision makers and help defend the state if litigation should occur, the rationale for variations from this manual are to be documented as appropriate. The degree of documentation depends on the exact nature of the deviation and its degree of importance in respect to safety and good design. Most chapters contain additional information on documentation requirements or recommendations. Note that

certain items, such as design criteria (Chapter 2) require specific approvals before deviations are allowed.

### 2.8 Requirements for Justification of Nonstandard Features

In recognition of the fact that meeting established criteria for the critical design elements is not always feasible, cost-effective or warranted based on project specific conditions, a procedure has been established by the Department to obtain approval of exceptions to these standards. This procedure, described in the *Design Procedure Manual*, includes documentation in the Design Approval Document of the rationale for not meeting applicable criteria. The extent of the documentation or justification is influenced by project conditions and not by the project type or the approving authority.

The data provided must include the rationale to support the designer's decision to include a nonstandard critical design element. A separate discussion in support of retention or creation of each nonstandard feature included must be provided. This information is only required for the design alternative for which design approval is sought.

### Basic Design

#### 5.1 Introduction

...  
Variances from standard values established for critical design elements listed in Chapter 2 require a justification and approval as described in that Chapter...Any decisions to vary from recommended values or accepted practices for these elements need to be explained and documented in the scoping and design approval documents and, when identified after design approval, in the project files. The more significant the deviation or the more important an element is to quality design, the more detailed the explanation will be....

## ACKNOWLEDGMENTS

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