

LIABILITY ON THE ROAD

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STATE'S SOVEREIGN IMMUNITY GONE

There was a time, not only in Indiana, but in all states, when under the doctrine of sovereign immunity, the individual citizen didn't ordinarily sue the state. But, over the years, that doctrine has broken down. Beginning with the supreme court case in Indiana called the Perkins case of a few years ago, it was pretty well knocked out.

This, of course, affects transportation and your liability on the road. It affects all other areas of state government, as a matter of fact, because we do represent all branches of state government, all departments and agencies. Our tort/claims section defends those cases for all departments. Although I must say, our biggest client in that respect is the Indiana State Highway Commission.

TORT CLAIMS OPERATIONS—STATISTICS

In capsulated form, I will recite the statistics from our 1976 annual report to give you an idea of what sort of volume this has reached. On January 1, 1977, we were defending 241 tort lawsuits in courts throughout the state, which were demanding of the state of Indiana more than \$98 million. Then we had another 23 lawsuits which were open-ended in demand; they were demanding satisfaction, but didn't tell us how much. In addition to that, we had 282 claims which had not yet reached the status of lawsuits, but claiming a liability of over \$64 million, plus an additional 62 open-ended claims which were under investigation.

Now, when the Supreme Court of Indiana knocked out the doctrine of sovereign immunity in this area in the Perkins case, we were immediately deluged with claims. Before 1972 ended, we were defending \$567 million in claims and lawsuits against the state.

State Now Has Limits on Its Liability Payments

So, I went before the legislature and the governor the following year and pointed out that if we should be unsuccessful in these lawsuits,

or any large portion of them, the state would go bankrupt. That must have impressed them more than anything else I've ever been able to impress upon them before or since, because they passed a Tort/Claims Act which has since been amended and modeled somewhat after the federal Tort/Claims Act.

It provides remedies for people who are injured or have property damage attributable to state agencies. But it also limits that liability so that it doesn't open up raids on the treasury completely. The limits are \$300,000 per individual and \$5 million for a total occurrence, in terms of total damages. It does not permit punitive damages against the state or local agencies of government.

Last year (I've mentioned only some of the statistics), as a result of various lawsuits being concluded and claims being settled, the state of Indiana paid out \$2,063,000; but, at the same time, I should point out, the state of Indiana was saved \$68,782,318 in lawsuits and claims in which we were successful. So, it is a big operation.

Manpower of Tort/Claims Section

In terms of my office's manpower and womanpower, the tort/claims section is one of the largest sections. That's in addition to the deputies we have assigned, for example, to the state highway department who handle the land condemnation cases (which is still a fairly large section, although it's been reduced because most of the interstate highways have been completed). In addition to that, we have other deputies who work, for example, with the highway encroachment cases and things of that nature.

Attorney General Responsible to the People

I would point out, too, in connection with liability, that we get it coming and going; you can't please everybody. But, we are responsible to the people, and we maintain that responsibility, as well as our responsibility, I believe, as trustees of a great state and its institutions.

I recall seeing, and perhaps you do too, if you watch the Mary Tyler Moore show, an episode a few years ago in which Lou Grant, the station news director, was describing *executive* ability to Mary Tyler Moore. He said to her, "Do you know what the mark of a good executive is?" And she responded, "No." Grant said, "A good executive has the ability to *delegate blame*." The more I think about that, the more I see illustrations of it every day in the operations of government, the bureaucracy (of which we're a part), in the opera-

tion of private industry (of which many of you are a part), and the various professions.

I think perhaps the free competition of ideas and the free competition of pressure groups is a good thing. Some of you are members of pressure groups. There's nothing wrong with being a member of a special interest group or a public interest group. By the way, my definition of a public interest group is the same as a private interest group—it just has a different disguise. Everybody represents different groups: That's healthy for our form of government. James Madison, when he was writing about conditions that are necessary to preserve our form of government (if you will read or reread the 10th *Federalist Paper*, written at the time they were seeking to adopt the constitution), talks about the free competition of ideas and the necessity for a multiplicity of factions and special interest groups to compete with one another, not only in the secular field (meaning industry, government, the professions, and so forth), but also in the religious field. And Madison says that *that* will be the salvation of our form of government.

So long as we have a multiplicity of what we call special interest groups, private interest groups, and public interest groups, both in secular and religious fields—so long as we have all these competing interests, and they all have access to the media, whatever the media of the times are, so that the people are informed—to that extent, the form of government is saved.

Attorney General Writes Opinions on All Legislative Bills

I mention that because I see these forces at work all the time, and particularly during the state legislature, which is another reason why I can't go far from Indianapolis. My office and I have to read every bill that goes through and give the governor an opinion, in writing, on the constitutionality and effects of the bills prior to the time that he acts upon those bills—so we are kept busy and off the streets generally during the time the legislature is in session. We see, very dramatically, this competition among various interest groups, including the groups that many of you are with—the highway construction groups, the union groups, the bureaucratic groups. We see all kinds of examples of bureaucratic schizophrenia in all of these areas.

I've summarized, briefly, some of the statistics on our tort/claims operation. I'll touch also on some of the legal aspects of the Tort/Claims Act, itself.

LEGAL ASPECTS OF TORT/CLAIMS ACT

There are really two parts, one applying to the local units of government, the other to the state, both which are pretty much parallel. In the case of the state, the attorney general is the lawyer for the state agencies; and, if there are any settlements of claims, they have to be approved personally by the governor. When an individual is injured or feels he's injured, or has property damage attributable he or his lawyer thinks, to some state agency, he has 180 days in which to file a notice (a claim). The state, in the case of state agencies, has 90 days in which to answer. If the state does not answer in 90 days, it's considered automatically denied. With that preliminary condition, the individual, if he or she feels the case is meritorious, can then bring a lawsuit under the Tort/Claims Act, within statutory limitations.

Some Immunities for State Employees

There are a few immunities, and I might touch on those. They'd be of interest to you, whether or not you are state officials, whatever involvement you have. A governmental unit or employee of the state government acting within the scope of his employment is not personally liable, that is to say, he is immune to payment of damages, *if a loss results from any of the following categories:*

1. The natural condition of unimproved property;
2. The condition of a reservoir, a dam, a canal, a conduit, a drain, or similar structure when used by a person for a purpose which is not foreseeable;
3. The temporary condition of a public thoroughfare which results from the weather (so if you break an axle in a chuckhole which had just developed five minutes before because of the weather, there might not be any liability on the part of the highway department);
4. The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area. For example, if you go out in the wilds in the state, even though they may be owned by the state, you take a certain responsibility on yourself; you can't expect a state employee or a state-employed doctor to hold your hand while you scale a cliff and expect to be reimbursed if your foot slips while you're scaling the cliff;
5. The initiation of a judicial or administrative proceeding, the performance of a discretionary function of government. And there are two or three other categories—failure to issue a license under proper authority, as an example.

Insurance For State and Local Governments

I've described the limits on recoveries of damages, and I've told you about the notice requirement. Although most of its coverage is self-insured, the state is also permitted to insure itself through private insurance companies. So is a city, county, or other local unit of government. The attorney general, of course, is required to defend the state, as county attorneys are the county, and city attorneys the cities, and so forth. That is a rather broad-brush coverage.

Attorney General Covers All State Bureaus

I mention one other category or two that we cover for the state only to remind you again that the highway department is not the only department that we represent. We represent all of the hundreds of different state bureaus; we represent the governor and the legislature; we represent the court. Mind you, in this day of much litigation, even judges are sued. As of today, in checking the record, I found that we're defending 14 judges and eight prosecuting attorneys in litigation around the state. We recently entered our appearance in a federal court to defend the five members of the Indiana Supreme Court against some convicted criminal in the Michigan City Prison who, having little else to do, filled out some mimeographed forms, asked for constant rehearings, and accused the judges of the courts of offending his civil rights.

So, whether or not a cause is legitimate, or whether or not it comes under the tort/claim section, we have to spend taxpayers' money and time defending every lawsuit against the state. I don't have the exact number of tort cases beyond December 31 in my report today, but I can tell you that they are a significant part of our overall caseload. As of yesterday, our computer docket sheet showed that we were defending more than 8,000 lawsuits in courts throughout the United States.

STORY OF A DIRECT ACTION CASE

I would like to tell you about one direct action which some Indiana state officials took one time. One day, a few years ago, Bob Harrell, whom many of you know (he was then the executive director of the State Highway Commission), and I were driving through northern Indiana, inspecting some places in the road that might need correcting. We stopped at one intersection where there was an advertising sign, obviously an encroachment on state property, next to a filling station. The owner had taken the sign and tacked it up (it

was a large one) on a pole which was supporting the state's four-way stop sign. His board was clear out in the road right-of-way, blocking the view. Some people had been killed there not too long before.

So, I said to Bob, "Why don't we stop and see if we can talk this man into removing that sign?" He said "OK," and I drove the car into the filling station, went in, shook hands with the man, and handed him my card. Then I introduced Bob as the executive director of the State Highway Commission. I said to the gas station owner, "Under Indiana's encroachment laws, the highway department could bring a lawsuit to force you to remove that sign which is on state property and which is a detriment to the safety of people who are driving." And, I added: "It might take some years, but the state would eventually win it. And you'd have to go the cost of hiring attorneys and fighting it, maybe even all the way to the supreme court if you so chose." And I added, "You could resolve all that simply by walking out there and taking that sign down."

He looked at Bob and he looked at me, and he looked at the "Star 6" plate on my car . . . and the state trooper that was with us . . . and immediately said, "That's a good idea." So he walked out and dismantled the sign right in our presence. Bob Harrell likes to tell that story, and of course I do, too.

I wish all the cases were that easy. But we do try, and we do try to be fair, both to the public and to the state agencies we represent.