

HOW A TRIER OF FACT REACHES DECISIONS

Donna Siers

This presentation is an interactive session. All participants will be able to participate as potential jurors in an **issues focus group**.

The plaintiff, in the case we are focusing, alleges that a dangerous condition of public property on a canyon roadway caused him significant and life changing injuries. He is asking for money damages.

The plaintiff claims the dangerous condition was an unprotected and raised drainage culvert and culvert cover that was substantially elevated above the surface of the roadway shoulder. The plaintiff claims that the unprotected and raised drain and asphalt berm around the drain caused the plaintiff to be thrown off his motorcycle and onto the roadway, as he was trying to regain control of his motorcycle. The plaintiff was severely injured. He has severe and permanent spinal and other injuries. He is a paraplegic.

The defense position is that the design was necessary to get water off the roadway as quickly as possible. The top-hat drain had been in place since 1990 and Public Works had never received any complaints or needed to replace it. The County's position is that the top-hat drain is safe when motorists use due care. The drain is 6-8 inches off the shoulder where no one should be driving or attempting to drive. The defense position is attempting to drive off the shoulder on an 6-8 inch non-recoverable slope is not using due care.

The defense also claims that the plaintiff was riding a friend's motorcycle. He should not have been riding the motorcycle because it had a bald rear tire, which caused the plaintiff to lose control of the motorcycle. Instead of laying the bike down, he went up the side of the mountain and then came back onto the roadway where he as injured. It was an unfortunate accident.

At the end of the session the participants will have experienced an issues focus group, and understand that the purposes of an issues focus group are to:

1. Identify specific issues that a potential jury thinks are important.
2. Identify potential problems that a potential jury identifies.
3. Develop case themes based on a potential jury's reaction.

4. Develop, if possible, effective approaches to difficult issues based on the feedback from potential jurors.

Issues focus groups are divided into fact patterns. Each fact is presented in a neutral way by a consultant. Since some people do not like to speak in front of a group, at the end of each section, in a normal issues group, the panel members complete written questionnaires. When all the facts have been presented, and the questionnaires completed, in a normal issues group, the consultant would then read the relevant jury instructions and the panel would deliberate as a jury. However, in this demonstration, all the feedback will be verbal, as time does not allow written comments.

The three areas that will be presented to the participants are as follow:

POINTS OF AGREEMENT

1. The top-hat drain was built and installed by the County in 1990.
2. There were other designs the County could have used, but they chose to use the top-hat design.
3. The drains were designed in the field. Built in the field. Installed in the field, and had County approval through their engineering department in an informal way.
 - A. There is asphalt berm around and behind the drain inlet.
 - B. The drain is 6-8 inches off the shoulder behind what is called a paddle marker - a white rectangular sign with three reflectors.
4. There are guidelines and recommendations by licensed professional engineers that have been accumulated and stored in what are called engineering guidelines and manuals. They include CALTRANS (CA Dept of Transportation) and AASHTO (American Association of State Highway and Transportation Officials.). AASHTO provides a national guideline for how to design a safe highway.
5. After the drains were designed and built in the field there was no safety analysis with regard to these drains as opposed to the design recommended by CALTRANS and AASHTO.

6. The plaintiff had been riding motorcycles for approximately 15 prior to this incident.
7. On August 30, 2009, the plaintiff was riding a motorcycle owned by someone else.
 - A. The rear tire was bald - it had no tread.
 - B. He was northbound on James Canyon Road less than a mile from his home.
 - C. As he was entering a curve, the rear wheel of the motorcycle lost traction. Eye witnesses say they saw the rear wheel wobbling back and forth.
 - D. The plaintiff couldn't keep the bike on the road - he went off the road.
8. Both motorcycle experts - the one hired by the plaintiff and the one hired by the defense agree - if a motorcycle entered that bowl area with that ramp, the rider would be launched off his bike.

POINTS OF DISAGREEMENT

1. Top-hat drain
 - A. According to the plaintiff, AASHTO says - don't put these structures in the shoulder of the road. **Safety is never to be compromised over function** - removing water is good but how it is removed must be safe.
 - B. The County claims road design comes down to an engineering judgement, on a case by case basis, in terms of whether this roadway creates an unreasonable risk of harm when used with due care by the public generally.
 - (1) The top-hat design was a necessary and appropriate design in a down hill area that has 60% or so exposure of bedrock with rapid run off.
 - (2) The berm was designed to collect the water than would go into the drain.
 - (3) The top-hat design was necessary to keep the drain open and

clear of debris.

2. Recovery Zone

- A. The plaintiff claims that in the CALTRANS and AASHTO engineering guidelines is the concept of a clear recovery zone, otherwise known as a forgiving shoulder. In other words, a relatively flat area provided beyond the traveled way to permit recovery for vehicles that leave the roadway.
- B. The County claims that according to CALTRANS, a clear recovery zone is not defined as a forgiving shoulder as the plaintiff claims.
 - (1) The defense says that CALTRANS defines a clear recovery zone as “the total roadside border area starting from the edge of the traveled way that is available for safe use by errant vehicles. This area may consist of a shoulder, a recoverable slope, a non-recoverable slope, or a clear run-out area. The desired width of a clear zone depends upon traffic, volumes, speeds, and the roadside geometry.
 - (2) The County says that in some places on James River Canyon Roadway the roadside geometry does not allow more than the roadway and a shoulder of 1 foot or less.
 - (3) The county claims that the bowl is 6-8 inches off the shoulder - where no one should be driving or attempting to drive - the drain is not located on what would be considered a recovery zone.
- C. The plaintiff claims that errant vehicles are sometimes referred to as runoff-the-road vehicles, are vehicles for various reasons leave the roadway. There are lots of reasons why vehicles leave the roadway. Drunk drivers leave the roadway. People who can't see where they are going leave the roadway. People who have heart attacks leave the roadway. People who hit sand and gravel on motorcycles leave the roadway.
 - (1) The plaintiff said that county employees testified that statistically over 1/3 of fatal and serious accidents involve runoff-the-road vehicles.
 - (2) The motorcycle expert hired by the County testified in his

deposition, which is testimony under oath that 37% of motorcycle accidents involve runoff-the-road accidents - errant vehicle accidents.

- D. The plaintiff claims that the County knew that the shoulder is part of the roadway, and have never designed a bowl drain. The roadway shoulder area of this incident does not meet the definition of a forgiving shoulder - it is a dangerous condition for motorcyclists.
 - (1) The plaintiff claims that the County knew about the danger of errant vehicles, of runoff-the-road vehicles going onto the shoulder of the road, and they knew that before this accident.
 - a. The plaintiff claims that the County should know these drains are unsafe because they have been hit by other vehicles.
 - b. County employees testified in their depositions that this design of drain outlets have had to be replaced in other areas in the past because they were damaged by vehicles hitting them.
 - (2) The County says that this drain was installed in 1990 and no other vehicle had ever damaged it. It was the original drain.
 - (3) The country says that 2% of the motoring public ride motorcycles and this was the first accident of any type at this location.
- 3. The cause of the slide by the motorcycle.
 - A. The plaintiff claims that he hit a patch of gravel on the roadway that caused him to start to slide over to the side of the roadway.
 - B. The Highway Patrol officers and civilian witnesses said they did not see gravel in the roadway. Therefore, the County does not believe there was sand on a roadway. However, according to motorcycle safety and operation people, gravel on a roadway is is a traversable pathway as long as the driver is aware of it and acts appropriately. The bald tire in the rear had no traction - that is what caused the plaintiff to start to slide on the curve. Driving a motorcycle with no tread on the rear tire is not acting appropriately.
 - C. The defense claims that the plaintiff had to have been leaning to far to

the side and lost control - it was all caused by the plaintiff. The plaintiff was riding an unsafe vehicle in an unsafe manner and he lost control causing this incident.

4. The plaintiff claims that after the bike left the roadway, he got it back under control and BUT FOR the drain system that was constructed to be a dangerous condition by the County he would have gotten safely back on the roadway.
 - A. According to the plaintiff's expert, the tire marks on the drain and paddle marker match up exactly with the hardware on the motorcycle.
 - (1) The plaintiff's lawyer says the plaintiff planned to come between the drain outlet and the paddle to get back onto the highway, because he couldn't go over the drain - it was an obstacle that would have thrown him off the motorcycle if he had gone over it.
 - (2) The plaintiff scraped the side of the inlet. But when the wheel of the motorcycle hit the ramp portion of the bowl it bucked him off the motorcycle.
 - B. The county says the drain was an innocent bystander that was not involved in the accident. The defense claims the plaintiff lost control of the motorcycle he was riding. That is what caused the accident.
 - (1) The defense says that when the plaintiff lost control of the motorcycle he was riding, his bike went up the side of the mountain and then came back onto the roadway where the plaintiff was injured.
 - a. The plaintiff testified that when he got over to the shoulder of the road, he doesn't remember exactly what happened or where his motorcycle exactly was.
 - b. One witness, who was north of the drain, testified the plaintiff went up on the bank, over the rock and down. The next thing he saw was the motorcycle flipping up into the air.
 - c. One witness testified she found the plaintiff's body north of the drain. The plaintiff's motorcycle expert testified that based on calculations he did, there is no way the body could have arrived at that point if the rock upset the bike. It had to be the drain.

DAMAGES

1. The plaintiff received the following injuries:
 - A. Fractures of the T10 and the T11 vertebrae.
 - B. Fractured ribs.
 - C. Damaged spinal cord - permanent paraplegia
2. Based on life expectancy tables, a person in the same condition as the plaintiff is expected to live another 30 years - some live more - some live less - that is the average.
3. There are two categories of damages - economic - which are objectively verifiable and non-economic where there is no formula but includes the loss of the plaintiff's legs, the loss of his ability to perform functions, the need to self stimulate to go to the bathroom, depression - the life changes.
4. The plaintiff has worked once since he was paralyzed. For a time, while it was legal, he ran a medical marijuana shop. He cannot be a truck driver and he has not had any other job. He has been unemployed since the medical marijuana shop closed.
5. The plaintiff is asking for a total award of \$3.5 million.
 - A. \$1,493,616.67 in economic damages.
 - (1) Past medical expenses \$93,154
 - (2) Future medical expenses \$1,092,891.80
 - (3) Past loss of earnings \$95,000
 - (4) Future loss of earnings \$212,570.87 - the plaintiff was studying to be a truck driver when he was injured.
 - B. Non-economic request by the plaintiff is \$2.1 million.
6. The County is asking for a defense verdict and no award.
 - A. While the County feels very badly for what happened, and agrees that this was a tragic accident, that it what it was - an accident that could have been prevented by th plaintiff had he made other choices.
 - B. The County does not believe the plaintiff's injuries were their fault.

- (1) The plaintiff's injuries were caused by the plaintiff riding a motorcycle with a bald tire and losing control of the motorcycle he was riding.
- (2) What happened was an unfortunate one vehicle accident.