The Public Duty Doctrine: What it Means to an A/E

By Gail S. Kelley, P.E., Esq.

More than one A/E has been in the uncomfortable position of having a structure that he or she designed fail an inspection due to a code-related design defect. The immediate reaction, in printable form, is often "How were the plans approved if they didn't comply with the building code? That's negligence on the part of the building department." While this reaction is understandable, it doesn't provide much support for the A/E when explaining the situation to the owner. In order for an injured individual (in this case the A/E) to say that another party's negligence was responsible for the injury, the other party had to owe the individual a duty and the injury had to result from a breach of that duty.

For the A/E to hold the plan reviewer responsible for not finding an error, the plan reviewer had to have a duty to find all the errors in every drawing. From a practical standpoint, this is not possible. Within the amount of time allotted to review a set of plans, there is no way the reviewer can flip back and forth between dozens of drawings and make sure everything is coordinated. In most cases, there would be no point. At the time plans are submitted for permits, certain design decisions may not have been made, and some dimensions may have been intentionally left off or approximated.

Furthermore, from a legal standpoint, the courts in many states would hold that the plan reviewer does not owe the A/E any duty to find errors in the plans. Plans are reviewed for compliance with the building code for the same reason that building codes are adopted – to ensure the safety and protection of the public at large. Because the duty to find errors in the plans is owed to the general public rather than any particular individual, many states would find the A/E has no basis for a claim. This holding – that a private individual cannot bring a negligence claim when the duty that was breached is owed to the general public–is known as the "public duty doctrine".

A legal doctrine is a framework that provides guidance on how a ruling should be made in specific circumstances. Often a doctrine develops when a judge, in explaining why he or she decided a case in a particular way, outlines a process that can be applied to similar cases. When enough courts use the process, it becomes the defacto method of deciding these cases.

Sovereign Immunity

The public duty doctrine is sometimes referred to as "sovereign immunity" and while the two legal arguments are related, they are not the same. Sovereign immunity ("the King can do no wrong") dates back to 13th century England. Since the King's will was the law, if the King did something, it was inherently legal. The King could not be sued in the King's Court because the Court's authority was subordinate to the King.

This concept was inherited by the newly-independent American colonies, along with the rest of the English legal system, but was translated to mean that neither the federal nor state governments could be sued unless they expressly agreed to the lawsuit. Cities, counties, and other political subdivisions of the states were granted government immunity, which was essentially the same thing. The rationale was not that the government could do no wrong, but that allowing a lawsuit for breach of a government duty would expose the government to unlimited liability, the costs of which would have to be borne by taxpayers.

The immunity was not absolute however. Most, if not all states, distinguish between so-called propriety functions, which were not granted immunity, and governmental or discretionary functions, which were granted immunity. Although the distinctions are a little fuzzy, proprietary functions are generally those that can be performed by a private entity. An example of a proprietary function is the government acting as a landlord by providing public housing. The government is held to the same standard as a private landlord and can be sued if its failure to properly maintain a public housing development causes an injury.

In contrast, governmental functions are those that can only be done by the government and are done for the benefit of the general public. Plan review and building inspection are examples of governmental (discretionary) functions. Building officials must typically exercise some degree of discretion in performing their work, i.e., there may be no clear law on whether something is acceptable or how something should be done. In addition, the government, in determining how to spend public money, must often exercise discretion in whether, or to what degree, to provide a service. Governmental immunity protects both the government and the government official when a problem arises. The benefit of hindsight might suggest that things should have been done differently; however, it is generally felt that the public interest is not served by such second-guessing.

Tort Claims Acts

Under sovereign and governmental immunity, if an individual was injured by the government or a government employee, the only way the individual could get compensation was to persuade the legislature to pass a special law authorizing such compensation. Eventually, this system proved too much of a legislative burden and too susceptible to corruption; starting in the 1940s, the federal government and many of the states passed Tort Claims Acts. While these acts vary from state to state, they generally create exceptions to governmental immunity that allow an individual to bring a negligence (tort) claim in certain situations. The California Tort Claims Acts of 1963 and the New Jersey Tort Claims Act of 1972 are typical of these acts.

Development of the Public Duty Doctrine

In contrast to sovereign immunity, the public duty doctrine is an American invention and can be traced back to the 1856 Supreme Court case *South v. Maryland* (59 U.S. 396). A Mr. Pottle sued the county sheriff (Mr. South) for not arresting a gang of workmen who were essentially holding Pottle hostage because they were owed money. The Court ruled that the sheriff's duty was to the public, not to Pottle; thus, failure to provide Pottle with police protection did not give him grounds for a lawsuit.

Initially, this ruling was only applied in cases where law enforcement personnel were sued for failing to prevent a crime or injury. It was subsequently extended to other emergency personnel such as firemen, ambulance EMTs, and 911 operators who were sued for failing to correctly diagnose or understand the

significance of a problem, or for providing incorrect information. After the Tort Claims Acts were passed, the public duty doctrine became widely used as a defense any time the government was sued because of the allegedly negligent behavior of a government employee.

Application of the Public Duty Doctrine to Construction

In the context of construction, most claims of government negligence are for negligent inspection, alleging that the inspectors failed to notice a violation. In a Minnesota lawsuit brought against the city for personal injuries and death after a motel fire, the injured parties alleged that the city was negligent in allowing the motel to be remodeled in violation of the city's building code; *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220 (1972). The trial court dismissed the complaint; the dismissal was affirmed by the Minnesota Supreme Court who noted that building codes, permits, and inspections were designed to protect the public and were not meant to be an insurance policy by which the city guaranteed that every building was built in compliance with the building and zoning codes. The court further noted that the fee charged for a building permit was to offset the expenses incurred in promoting the public interest; it was not an insurance premium that made the city liable for defective construction.

Criticism of the Public Duty Doctrine

The public duty doctrine has been widely criticized because, to a large extent, it negates the effect of the Tort Claims Acts. While the injured party can bring a claim against the government, it is extremely difficult to prevail on the claim. A number of states, including Arizona, Colorado, Florida, Iowa, Massachusetts, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Vermont, and Wyoming, have rejected the doctrine and do not allow it to be used as a defense against claims of government negligence.

Other states have limited its application. Michigan and North Carolina, for example, have declined to expand the doctrine beyond cases alleging failure to provide police protection from the criminal acts of a third party. In the Michigan Supreme Court's

view, the fact that a government employee owes general duties to the public does not logically preclude the imposition of a private, individual duty as these duties are not mutually exclusive; *Beaudrie v. Henderson*, 465 Mich. 124 (2001).

Differences between the States

The difference in state laws has meant that the holdings in very similar cases have often been completely opposite. In a North Dakota case, *Ficek v. Morken*, 685 N.W.2d 98 (2004), homeowners sued both their builder and the city after discovering that their house was built on uncontrolled fill with foundations that did not extend below the frost depth. The resulting differential settlement made the house unsafe to live in. The North Dakota Supreme Court agreed with the homeowners that the city had a duty to properly inspect construction and that it had breached this duty by approving the foundation.

In contrast, in a Washington State case, *Williams v. Thurston County*, 997 P.2d 377 (2000), a contractor who was concerned about the foundation subcontractor's work talked to the building inspector and was assured that the foundation had been approved. During the next phase of construction, a second inspector found numerous defects in the foundation and work was stopped until repairs were made. Although the first inspector was subsequently fired, the Washington Court of Appeals found that the questions asked by the contractor were not specific enough to create a special relationship, and thus the County did not owe the homeowner any duty to find the defects before the contractor began the next phase of the work.

In another Washington State case that alleged the County was negligent in issuing a permit, *Taylor v. Stevens County*, 759 P.2d 447 (1988), the court held that the duty to ensure that buildings comply with county and municipal building codes rests with the individual builders, developers and permit applicants, not the local government. The court noted that issuance of a building permit does not imply that the plans submitted are in compliance with all applicable codes; likewise periodic inspections do not imply that the construction is in compliance with all applicable codes. Under this holding, building permits and code inspections only authorize construction to proceed; they do not guarantee compliance with all provisions of all applicable codes.

The Special Relationship Exception

States that do follow the public duty doctrine have all created exceptions. For an A/E who is concerned that some aspect of a design might not comply with the code, the most important exception is the "special relationship" exception. Under this exception, if the individual has a special relationship with the government official, different from that of the general public, the government will have a duty to the individual. Most building departments will allow an A/E to schedule an interview to review a detail before the plans are submitted for permits. When a detail has been explicitly approved by the building department, it will be hard for an inspector to insist that it does not meet code. Legally, a special relationship would have been created by the direct contact between the building official and the A/E, the explicit assurance of compliance, and the detrimental reliance by the A/E on the assurance.

Conclusion

Even in those states that don't follow the public duty doctrine, it is unlikely that the building department would be held liable for the extra costs that are sure to arise when a design error is not found until construction. An A/E who is concerned about some aspect of a design should schedule an appointment with the building department to review the detail in question. To avoid misunderstandings, the A/E should circulate an email summarizing his or her understanding of the meeting to those in attendance, and ask for any corrections. If there are no corrections, a second email can state that the A/E is proceeding with the detail as discussed. However, the A/E should realize that the approval will generally just be for the detail that was discussed; if there are any changes, the detail will probably need to be re-approved.▪

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