

# Professional Liability for Engineers

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# Broad Strokes Overview

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- Professional Liability Generally
- Legal Elements of an Engineering Liability Lawsuit
- Governmental Immunity in Michigan
- Closer Look at the “Duty” Question for Governmental Employees
- Insurance Coverage for Professional Liability Lawsuits
- What Does Ethics Have to Do With It?



# Professional Liability Generally

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## □ “Ordinary” vs. “Professional” Negligence

### ✓ Ordinary Negligence

- “The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.”

Black’s Law Dictionary, 6<sup>th</sup> ed.

# Professional Liability Generally

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## □ “Ordinary” vs. “Professional” Negligence

### ✓ Professional Negligence

- “Professional misconduct or unreasonable lack of skill. . . . Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them.”

Black’s Law Dictionary, 6<sup>th</sup> ed.

# Professional Liability Generally

## A. Common Types of Professional Negligence Lawsuits

- Medical
- Legal
- Engineering/Architectural
- Accounting
- Any licensed professional
  - Beautician/Hairdresser



# Legal Elements of an Engineering Negligence Lawsuit

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1. Existence of legal duty owed by defendant to plaintiff
  - Must be based on breach of a professional standard of care.
    - Designed to ensure that one engineer is not held to a different standard than other engineers.
  - Sources:
    - Contract
    - Legislative Standards (Statutes, Building Codes, Ordinances)
    - Professional governing bodies
    - Courts (Common Law)

# Legal Elements of an Engineering Negligence Lawsuit

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2. Breach of applicable duty
3. Proximate causal relationship between the breach of duty and an injury to plaintiff
4. Damages suffered by plaintiff

# Legal Elements of an Engineering Negligence Lawsuit

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## ❑ Statute of Limitations for malpractice lawsuits

- ✓ Operates as both a statute of limitations and a statute of repose.
- ✓ Critical question is whether the allegations are directed to a breach of the standard of care (which implicates the professional negligence limitation period), or to some other duty (which implicates the ordinary negligence limitation period).

# Engineering Negligence Case Studies

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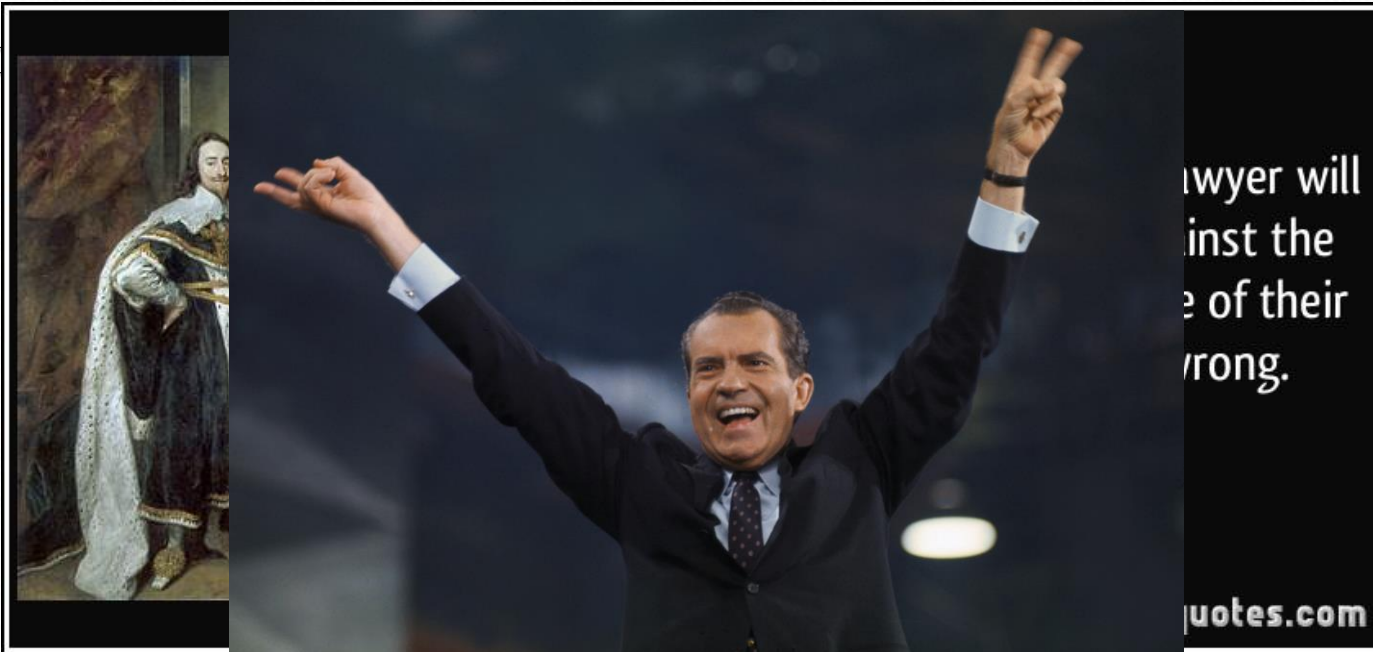
- DOT v Dupree, 256 Ga. App. 668 (2002)
  - Design of intersection: lack of traffic control devices, width of intersection, and uninterrupted vehicle approach speeds.
  - Case hinged on design standards and professional judgment rule.
- Guertin v Michigan, 2017 WL 2991768
- MCM Marine v Ottawa County Road Commission, 2010 WL 1461557

# Governmental Immunity in Michigan

A. Bro

1.

2.



A lawyer will not be held liable for negligence against the state of Michigan if the act was within the scope of their official duties and was not a grossly negligent act.

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# Governmental Immunity in Michigan

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- A. Broad statutory immunity for units of government.
  - 3. Possible that a highway defect could arise from an engineering error.
    - Liability would attach to the governmental entity only.
    - Standard for liability under highway exception would not derive from an engineering standard of care. Rather, question would be whether the highway maintenance protocol was reasonable, and separately, whether the highway was not reasonably safe for public travel.

# Governmental Immunity in Michigan

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## B. Qualified immunity for governmental employees.

### 1. Gross negligence layer of protection.

- Means that for a governmental engineer to be held liable for engineering malpractice, the applicable professional standard of care would have to be violated, and the violation would have to amount to conduct so reckless as to constitute substantial disregard for whether an injury occurs.

# Governmental Immunity in Michigan

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## B. Qualified immunity for governmental employees.

### 2. “The” proximate cause layer of protection.

- Means that the engineering negligence must be the single most immediate, direct and efficient proximate cause of the injury.

# Governmental Immunity in Michigan

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- C. Absolute immunity for the elective or highest appointed executive official of all levels of government.
  - 1. Precedent establishes that this applies to “managing directors” of County Road Commissions.
    - Depends on the organizational structure of the governmental entity.

# Closer look at the “duty” question for governmental employees

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- A. Typically, professional duties are owed to particular individuals (e.g., clients of the engineer).



# Closer look at the “duty” question for governmental employees

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**B.** In the government context, the engineer’s client is really the governmental entity that employs him or her.

- This makes a successful suit by a member of the public against a governmental engineer tricky. The duty that is owed is to the employer, not any particular member of the public. However, cases have held that design professionals may be held liable to third-parties for foreseeable injuries.
- This dynamic would change if the governmental engineer is “on loan” to another governmental unit, or is performing work for another governmental unit or private entity pursuant to a contract.
  - Moonlighting for a private company takes governmental immunity out of the mix.
  - If a governmental engineer is “loaned” to another governmental unit, use of an intergovernmental agreement can preserve governmental immunity and minimize liability exposure.

# Insurance Coverage for Professional Negligence Lawsuits

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- The risk is slight that a successful suit could be brought directly against a governmental engineer.
- Nevertheless, governmental engineers should ensure that their contracts contain indemnification provisions and obligate their employer to provide insurance coverage for professional malpractice.

# What Does Ethics Have to Do With It?

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## A. Engineering Code of Ethics

- NSPE

## B. Engineer's Creed



personal advantage, and the public welfare above all other considerations.

In humility and with need for Divine Guidance, I make this pledge.

*(Adopted June 1954)*



The National Society of Professional Engineers 75<sup>th</sup> Anniversary



# What Does Ethics Have to Do With It?

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## C. Difference between unethical conduct and malpractice.

- Certain ethics rules speak to avoiding deceptive practices, etc. These are not directly standard of care issues.
  - An engineer could be deceptive (and therefore unethical) while consistently adhering to the professional standard of care.

# What Does Ethics Have to Do With It?

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## C. Difference between unethical conduct and malpractice.

- However, there is a potential overlap between certain ethics rules and professional standard of care issues.
  - For example, an engineer does not owe an ethical or a professional duty to make sure that a structure is as strong as it could be, only that it is “strong enough.” Judgments on what is “strong enough” may implicate both ethical and standard of care questions.
  - In short, breaches of ethics rules may overlap with violations of the standard of care, which may lead to civil liability for negligence, breach of contract, or even intentional tort.

# Questions?

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# Thank You!

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