



the engineer had acted reasonably. The New Jersey court decided that fairness and public policy require the imposition of a duty upon the engineer having actual knowledge of unsafe practices on the job site to do something to prevent injury to the workers imperiled.

The *Carvalho, supra*, court determined that the engineer had sufficient control to halt work until adequate safety measures were taken. The court also determined that the engineer, through its on-site inspector, had actual knowledge of a dangerous condition at the jobsite. In failing to avert harm, the court decided that the engineer breached a legal duty to the worker who was killed as a result of an unsafe site condition. The *Carvalho, supra*, court further ruled that an exculpatory clause in the engineer's contract regarding liability for third-party tort claims is unenforceable as to a direct claim for negligence by the injured plaintiff. Thus, although the engineer in *Carvalho, supra*, may have had contractual remedies against the Township and/or contractor for indemnification, the engineer was left "holding the bag" because the contractor's insurer was insolvent and the tort claim asserted against the Township was dismissed as untimely.

While each case will obviously turn on its own unique set of facts and circumstances, the *Carvalho, supra*, decision places engineers, project directors, managers, coordinators, and other professionals on notice that they can be exposed to tort claims and potential liability arising from on-site injuries to workers, regardless of what contractual protection they obtain from owners or contractors against such claims. A contract obligation to inspect work for conformance with the contract or permit documents coupled with the general authority to halt work on a job site appears now to have given rise to a duty to stop work on a job, or at least say something to the contractor, where any known, apparent or reasonably foreseeable safety hazard exists. In addition, the *Carvalho, supra*, decision makes it clear that where such a duty is found to exist, it may prevail over exculpatory or indemnification provisions included in the contract for work.

** Comments of the above case represent the author's opinion and are not a conclusive statement of the law of the case.**

Insurance

The last element of the Safety and Risk Management Plan of the Pochuck Quagmire Bridge was to provide proper insurance protection for all the participants. The primary liability (tort claim) and injury protections due to volunteers working on the Pochuck Quagmire Bridge were afforded through the federal Volunteers-in-the-Parks program (known as VIP), and administered by the National Park Service (NPS) for "operation, development, maintenance and monitoring of the Appalachian Trail." This program has a sister program - the Volunteers-in-the-Forests (VIF) that extends to volunteers working on the Appalachian Trail in National Forests. The program considers bona fide Appalachian Trail volunteers as federal workers vis-a-vis the Trail, thus enjoining the US Government to defend (provide indemnity to, and legal representation for) volunteers if they are named in a liability lawsuit concerning alleged injury or damages while on the Appalachian Trail.

The program also considers Appalachian Trail volunteers as federal employees to receive supplemental medical coverage in the case of in-the-field injury in connection with their Appalachian Trail duties as quoted above. This coverage is intended to supplement a volunteer's own medical insurance, but can be used as the primary coverage if a volunteer has no medical coverage. Use of the medical provision, as a primary coverage, for treatment has not been tested on NY-NJ Trail Conference projects in terms of a claim actually being paid by the US Government (luckily no in-the-field mishaps). As would be expected, the paperwork is tedious and very time-consuming. The Trail Conference (or other officially designated Appalachian Trail clubs) must be the intermediary to get the appropriate information to, and forms from, the NPS Appalachian Trail office concerning any injury, claim, or lawsuit. The NPS provided VIP protection for the 2,285 volunteer work hours on the Pochuck Quagmire Bridge project.



The Trail Conference has its own commercial liability insurance to protect the organization, its officers, staff, and volunteers. Such a policy may not be feasible to all non-profits (especially small groups), and they should investigate state and federal agency programs to include volunteers, similar to the VIP/VIF. The Conference's policy covers Trail Conference volunteers for liability claims (alleged bodily and property injury to others) when the volunteers are acting within the "scope" of their work (trail maintenance, building, planning, development) for the Conference. While the NJ State Park Service does not have liability protection for organized group volunteers, such as those working for the Trail Conference, they do have an individual VIP program called their "direct VIP." In the case of the Pochuck Quagmire Bridge, the State was considering all volunteers direct VIPs rather than volunteers under the Trail Conference's banner. Then, volunteers could be considered State employees and eligible for protections similar to the federal VIP program. During the development of this case study, volunteer protection legislation has passed both the New Jersey State Assembly and Senate. It was signed by Governor Christine Todd Whitman in August of 1997. This legislation extended provisions for worker's compensation and casual liability protection to volunteer workers on state park lands. In addition, on May 21, 1991, the U.S. Congress passed the Volunteer Protection Act of 1997 (H.R. 911) which was subsequently signed by President Bill Clinton.

Unfortunately, the various insurance programs did not provide appropriate insurance protection to a key volunteer, the project engineer. This problem would delay the construction one year as well as result in significant additional administrative time and monetary expense.

When the NY-NJ Trail Conference undertook the planning of the project in 1991, the 10,000 person membership was canvassed for those with experience in the design and construction of bridges. Mr. Tibor Latincsecs, P.E., an individual member of both the NY-NJ Trail Conference and Appalachian Trail Conference responded to the inquiry. His volunteer services were provided to the NJDEP Division of Parks and Forestry via the NY-NJ Trail Conference. These services included a diverse range of tasks, such as monitoring soil test holes, writing public notices, environmental permits, grant applications, and the various bridge designs. Several NJ state laws require that a bridge must be designed by a licensed professional engineer. This fundamental requirement ensures the safety, health, and welfare of the public. The numerous construction and environmental permits required to construct the bridge also needed to be prepared under the direction of a professional engineer (P.E.) simply to be filed. Once approved, the permits would only be valid if the project was under the supervision of a P.E.

When the NY-NJ Trail Conference targeted the bridge project with the NJDEP Division of Parks and Forestry in 1991, the only provision to the volunteer administrative, planning, and engineering services being provided was that the volunteer engineer be provided with appropriate insurance protection. The concern was not structural failures but rather nuisance lawsuits from people slipping, tripping, or inappropriately jumping off the bridge. The volunteer engineer and the non-profit Trail Conference were advised that this was possible. Field work was initiated, and administrative and engineering tasks were completed. Environmental and construction permits were obtained. Construction of the CCA.60 Light Frame Construction Suspension Bridge Design was initiated.

Subsequently, the NJDEP Division of Parks and Forestry advised the NY-NJ Trail Conference and the engineer that they could not provide insurance protection for the engineer as a matter of policy. The request for insurance protection was revised to an indemnification document against tort claims. The NJDEP also rejected this alternative. A dilemma developed: after years of planning with the critical mass of design-permits-material and peoplepower ready to go, there appeared no mechanism for the NJDEP to provide tort liability insurance to a P.E. acting in a volunteer capacity. The engineer withdrew from the project. Without a professional engineer's formal participation the project came to a standstill in the quagmire.



With the short construction window of the 1994 autumn rapidly approaching, alternative means of insurance were scrutinized. The VIP program was reviewed, and it was determined that its main focus was bodily injury to a volunteer while working on a project. The fact that the VIP insurance program had never been tested did not provide a high confidence level. The general liability policy of the NY-NJ Trail Conference was examined, and it was determined that the design and construction oversight of suspension bridges was outside the normal scope of the insured activities.

The insurance dilemma is a common one facing public service organizations. How does an organization attract interested volunteers if they face the threat of lawsuits in exchange for their good will? Some protection is provided in New Jersey under N.J.S.A. 2A:53A-7. This information was provided to the project partnership by the NJDEP Division of Parks and Forestry in an attempt to restart the project. N.J.S.A. 2A:53A-7 reads as follows:

25A:53A-7. Non-profit corporations and associations organized for religious, charitable, educational or hospital purposes; liability for negligence:

No nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association, where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association, but nothing herein contained shall be deemed to exempt the said agent or servant individually from their liability for any such negligence. This statute has been revised since the insurance issue for this project was dealt with. N.J.S.A. 2A:53A-7 was amended in 1995 by L. 1995, C. 183.

New Jersey case law examples of N.J.S.A. 2A:53 A-7 show various applications and outcomes, as in the following cases:

- *Pomeroy v. Little League Baseball of Collingswood*
- *Kirby v. Columbian Institute*
- *Jacobs v. North Jersey Blood Center*
- *Peacock v. Burlington County Historical Society*

The NJDEP Division of Parks and Forestry made the conclusion that based on N.J.S.A. 2A:53A-7, any agent or servant of the non-profit NY-NJ Trail Conference would be immune from tort liability for charitable work donated or performed on behalf of the NY-NJ Trail Conference. Therefore, so long as the engineering and design services for the bridge were donated to and were a function of the NY-NJ Trail Conference activity, said servant performing such function would be granted immunity from tort liability, so long as any damage resulting from said servant's action was not a willful, wanton, or grossly negligent act of commission or omission.

Relying on N.J.S.A. 2A:53A-7 had several drawbacks:

- What if the plaintiff was not a beneficiary of the NY-NJ Trail Conference? Chances are that someone misusing the bridge would not be a member. A 1989 tragedy and subsequent 1992 lawsuit highlights the sometimes foolish acts of the populace. On October 28, 1989, a tourist bus stopped at the historic 77-year-old pedestrian suspension bridge over the Little Red River in Cleburne County, Arkansas. Forty tourists disembarked from the bus, mounted the bridge and started to swing it side to



side. The cables snapped. Five people were killed and dozens injured. The families of the deceased and injured sued Cleburne County on the basis that the County violated the victims rights to due process and that the County and adjacent landowners were negligent in warning tourists of the hazards of the 77-year-old bridge. The suit included the diner where the tourist bus parked, although no tourist even purchased any food at the diner. Eventually in 1996 the Circuit Court of Appeals ruled in favor of the defendants.

- N.J.S.A. 2A:53A-7 would not prevent improper suits from being filed to which the engineer as a private individual would have to answer to, nor does it provide resources with which to prepare a defense. An innocent person could be bankrupted while a suit is pending.
- Proceeding with the project based on N.J.S.A. 2A:53A-7 would have resulted in a peculiar reversal of the roles. The public-private partnership was based on the NY-NJ Trail Conference providing volunteer technical, administrative, and construction peoplepower to the NJDEP Division of Parks and Forestry in order to assist the NJDEP in closing a missing link in the Appalachian Trail corridor. The bridge is a State structure on State land fulfilling a responsibility of the State. It was not the responsibility of the non-profit NY-NJ Trail Conference to insure a State project.

The 1994 autumn construction season passed by without this dilemma being resolved. No construction took place. With the 1995 construction season rapidly approaching, a solution was needed. To resolve the problem, the volunteer engineer and the firm of Conklin Associates, with whom Mr. Latincsics is employed, was retained by the DBC at the request of the Division of Parks and Forestry to perform as project engineer. A requirement to bid on the engineering of the project was having a one million dollar liability insurance policy. Conklin Associates received a professional fee for their services.

Project Engineering

From 1991 to early 1995, the author served as project engineer in a volunteer capacity. Much of the site assessment, research, field inventory, design, and legwork resulting in the Pochuck Quagmire Bridge was performed in this time period. In late May 1995, Conklin Associates, the firm with whom the author is employed, was retained by the DBC at the request of the Division of Parks and Forestry to finalize the project design and permits. The DBC contract specified a 45-day time limit to ensure the project would meet the short late summer construction window in the quagmire. Among the engineering, survey, and project administration services Conklin Associates performed in this 45 days were the following:

- Finalize geotechnical investigations.
- Three-mile double rod bench run to establish a benchmark in USGS 1929 Datum on the site.
- Verify that the bridge site is in the trail corridor by survey.
- Survey stakeout of the foundation, towers, and anchors.
- Basic hydrologic investigation.
- Foundation and anchorage design.
- Suspension bridge design and plans.
- Detailed material list by quantity and cost.