

6.0 TORT LITIGATION

6.1 TORT CLAIMS

Lawsuits seem to be inevitable in U.S. public agencies. U.S. society is well known as being prone to sue rather than settle disagreements through mediation and reconciliation. Thus, maintenance engineers and maintenance managers should be prepared to participate in a process intended to “manage” litigation [1]. The basic processes for managing litigation, besides having capable, aggressive legal assistance, include the following activities:

- Establishing a risk management group.
- Coordinating an approach that deals with litigation across the entire governmental unit (including all state agencies, all departments of the city, etc.).
- In a comprehensive manner, monitoring and reviewing litigation across the transportation agency’s entire range of responsibilities and activities.
- Creating a claims management process that is consistent in its approach to processing claims, settling claims versus pursuing a trial, and investigating and analyzing activities.
- Establishing an analytical process to forecast and allocate expected tort claim costs, minimizing the disruption one year’s claims will cause to the transportation agency’s functional activities.

Maintenance engineers and managers should not let the threat of possible tort action drive their decisions; but, on the other hand, their decisions should not encourage tort action against the agency. From that perspective, one might well consider the maintenance activities and highway and bridge features discussed in the *NCHRP Selected Studies in Highway Law, Volume 4*. Attorney Larry W. Thomas has identified a number of items in Section 2: Transportation Activities That May Give Rise to Tort Liability [2]. Special emphasis should be placed on the word may, as each agency will be governed by its own state laws and past court decisions controlling the risk associated with a given activity.

Installation and maintenance of traffic control devices: Thomas lists warning signs, traffic signals, and pavement markings as each having the opportunity to create tort problems for maintenance. Generally, once any such traffic control device has been installed, it becomes the maintenance organization’s obligation to “properly and adequately” maintain it. Many of the decisions regarding how such traffic control devices are operated and maintained are considered as falling within the maintenance engineer’s discretion. However, maintenance agencies should be careful to ensure that policies for the maintenance and operation of such devices do not set standards or raise expectations that are virtually impossible to satisfy. Similarly, an agency’s legal staff should keep the maintenance organization aware of any court decisions that might limit the discretionary action of maintenance personnel in these matters.

Responding to defects in the pavement surface: Defects in the pavement include potholes, blowups, faults, cracks, ruts, etc. In order to limit the exposure of maintenance to potential tort liability, a pavement inspection and management system should have guidelines by which certain defects are considered within the scope of maintenance activity for repair and others considered within the scope of pavement rehabilitation. For programming and planning needs, inspection and review should also document the decision-making process for any action,

including decisions to do nothing until a later date. Proper documentation and evidence that a response system is in place and working is often key to successfully defending against a tort claim.

Responding to snow and ice conditions: In regions where snow and ice are routinely expected as part of winter driving conditions, the manner in which the maintenance agency responds can either invite tort claims or instill confidence in the driving public. Stidger has pointed out that good winter maintenance for snow and ice control increases both driver confidence in the highway agency and overall roadway safety [3, 4, 5]. Both of these characteristics improve the likelihood of having a jury pool that values the actions of the maintenance agency, in the event a tort claim action reaches trial.

Wet weather conditions and skidding accidents are more likely to offer the potential for tort action against maintenance agencies outside of the snow and ice regions. Care should be taken not to apply surface treatments or take warning measures that might increase the likelihood of tort claims. Policies and actions should always support what is expected of a reasonable and prudent driver.

Response to obstructions or defects in the highway shoulder: One of the principal concerns for tort action with respect to shoulders is any drop-off between the edge of the pavement and the shoulder. In some states, courts have established maximum allowable drop-offs beyond which the highway agency may be exposed to liability for accidents. All maintenance engineers and managers should be made aware of any such court-imposed maximum allowable drop-offs as a legal principle. Ruts, holes, depressions, raveled areas, etc., all have the potential to generate tort claims in the event of an accident, such that shoulder maintenance inspection and repair must be watchful for any such conditions. Zegeer [6] points out that shoulder maintenance and repair is an ideal time to evaluate issues such as the potential location of utility poles in the shoulder. Casey [7] suggests that, when doing shoulder work, it is a good idea to examine guardrail location to ensure that space is available for maintenance work to be done safely and properly.

Response to trees or vegetation in the right-of-way or on adjacent property: Routine maintenance patrol and inspection should be vigilant for trees in the right-of-way that may become hazards to drivers, should their vehicles run off the road. It may surprise maintenance personnel how quickly a sapling can grow into a tree with the potential of becoming hazardous. NCHRP Report 500, Volume 3 deals extensively with this subject [8]. In regions of the U.S. with significant annual rainfall, the general growth of vegetation can become a problem that must be dealt with in order to limit tort liability, especially with regard to providing clear sight triangles at uncontrolled intersections. NCHRP Report 500, Volume 5 deals extensively with this subject [9].

Response to conditions of bridges and other structures: Tort liability seems most often to arise from defects in bridge railings, snow and ice conditions on bridges, and failure to post warnings of structural defects (i.e., load limits). Dealing with snow and ice on bridges should not be controlled by policies that set standards impossible to meet under certain conditions. The maintenance of bridge railings and posting of load limits should flow from the routine bridge inspection process, which suggests that bridge inspection and response implementation should be coordinated between roadway and bridge maintenance forces to limit exposure to tort liability.

To the degree possible, it is advisable to have policies and mechanisms in place that facilitate resolution of claims rather than adversarial court action. This strategy is especially true for contract disputes and will become more important as some agencies increasingly adopt contract maintenance for selected activities [10]. A program to assist maintenance engineers and maintenance managers in the effective administration of contract maintenance in ways that avoid contract claims should include (1) dispute avoidance techniques, (2) early dispute recognition techniques, and (3) dispute resolution techniques.

Efforts to prevent disputes include developing partnering relationships in contract efforts so that all parties have a vested interest in cooperating. Open, direct communication activities with interested, affected parties, such as adjacent property owners, will help to avert future disputes.

Early dispute resolution requires bringing all parties together to seek a team solution to the conflict. If the agency, any contractor involved, roadway users, suppliers, etc. who are sources of the dispute can be brought together to “find an answer we can all live with,” frequently persons can find a common ground without litigation erupting. The key is to get conflicting parties talking before a large emotional investment has been made in any particular position. All complaints and concerns need to be treated seriously and dealt with promptly.

Once disputes are firmly set with opposing positions, resolution without court litigation requires some form of arbitration or negotiation be available. It is usually better if the negotiator or arbitrator is a neutral third party not seen as having any real interest in either side. Both sides of a dispute have to agree to be bound by the arbitrator’s finding. Otherwise, this is only a later-stage effort to recognize and avoid disputes.

An extensive survey has been conducted of the efforts of various state departments of transportation to initiate risk management [11]. The survey results were analyzed to provide typical profiles of approaches and methods that have been deemed successful. A key element in the implementation of good risk management is always good data on the system’s condition, what maintenance was done when and by whom, and a paper trail of the engineering decision process in determining what maintenance was to be done when. Thus, having effective maintenance management systems and bridge maintenance management systems in place are an integral part of good risk management.

The successful defense of lawsuits arising from claims of maintenance negligence are significantly aided by good documentation of the actual conditions at the time of an accident. Field forces equipped with photographic equipment and instructed in its proper use can document the conditions existing at the time of the accident. Videotaped evidence of the conditions has also been found to be effective [12].

Maintenance organizations should establish liaisons with persons in their agency who monitor research and development in transportation safety. Maintenance engineers and maintenance managers should attempt to keep abreast of the evolving safety literature. By maintaining contact with engineers and managers who are involved in tracking safety research, therefore, they can more easily keep current with new developments that may apply to maintenance operations. For example, a research article on tort liability associated with utility poles in the right of way may interest maintenance engineers with responsibility for urban roadways [13]. Another recent research article that relates a roadway surface’s potential to produce hydroplaning and roadway tort liability might interest a maintenance engineer who is responsible for the maintenance of high-speed roadways in regions with high-rainfall climates [14]. The roadway and bridge safety literature is quite extensive; therefore, no attempt has

been made to cover it here. Because safety research affects the decisions of maintenance engineers and maintenance managers in planning for and conducting maintenance, however, there is some merit in keeping current with developments in this area.

Maintenance engineers and maintenance managers with little experience in responding to litigation alleging maintenance defects in a roadway or bridge network should consider reviewing some literature that will provide an understanding of liability issues. One excellent source is the National Cooperative Highway Research Program Legal Research Digest series. For example, some issues covering topics relevant to a maintenance engineer's or maintenance manager's scope of responsibilities include the following:

- Number 40: *Liability of Highway Departments for Damages Caused by Stormwater Runoff*, March 1998. This digest discusses how routine maintenance of drainage facilities may contribute to a reduction in liability lawsuits.
- Number 38: *Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards*, August 1997. The principles discussed here also apply to written and publicly available maintenance standards.
- Number 35: *Continuing Project on Legal Problems Arising Out of Highway Programs*, 1995. The contents of these periodic summaries sometimes contain information directly applicable to maintenance.
- Number 34: *Transportation Agencies as Potentially Responsible Parties at Hazardous Waste Sites*, 1995. While hazardous waste sites may be found in new route location rights of way, maintenance garage yards are also frequent hazardous waste sites.
- Number 31: *Federal Air Quality Laws Governing State and Regional Transportation Planning*, 1994. Typically, state environmental quality regulations provide guidance on how to meet these requirements. However, reading summaries such as these provides a better understanding of the degree to which maintenance operations may be exempted or required to comply.
- Number 29: *Highways and the Environment: Resource Protection and the Federal Highway Program*, October 1994. Maintenance engineers and maintenance managers can better appreciate the concerns of environmental groups with respect to maintenance methods and materials if they have reviewed an analysis of how environmental law applies to highway programs.
- Number 27: *Supplement to Liability of the State for Injury or Damage Occurring in Motor Vehicle Accidents Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property*, 1993.
- Number 26: *Supplement to Legal Implications of Highway Department's Failure to Comply With Design, Safety, or Maintenance Guidelines*, 1992.

As environmental concerns have become a major focus for maintenance organizations, so has the potential for tort claims associated with environmental accidents. In most situations, maintenance organizations are responsible for assisting in the cleanup of someone else's environmental hazard spill; in such cases, it is highly unlikely that any tort liability would be assigned to the highway agency. However, maintenance organizations handle many hazardous materials themselves and must ensure that personnel policies and procedures provide adequate training and supervision in the proper handling of hazardous materials to enable employees to work safely. Note that, even with such policies and procedures in place, accidents can still happen, against which the organization should be prepared to defend any tort claim. There is a growing awareness among the public of the negative interaction between roadway traffic and wildlife, with damage to vehicles and their passengers as well as to wildlife. *NCHRP Synthesis 305* [15] begins to address some of these issues in which maintenance organizations will necessarily play a larger role in future efforts to reduce these concerns. Because garages

and depots have not always properly understood the effects of fuel and oil spills in the past, maintenance organizations will have to deal with the remediation of petroleum-contaminated soils for some time. *NCHRP Synthesis 226* provides information and guidance on remediation of soil contaminated by fuel and oils [16].

Efforts to develop a national database to track tort claims against multiple states, along with characteristics of the circumstances generating such claims, may eventually aid agencies wishing to respond appropriately to litigation [17]. While the initial effort in this direction has been only partially successful, researchers have identified ways in which such a database might successfully be implemented.

6.2 REFERENCES

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