



Traffic Engineering, Operations & Safety Manual

Chapter 1 General

Section 20 Special Topics

1-20-1 Liabilities of Tort

November 1992

The following was specially prepared by Risk Management for inclusion in this manual

GENERAL

Because traffic engineering functions are one of the most visible elements of the Wisconsin transportation system, the department's traffic engineers are convenient targets for litigation and are often named as defendants in tort liability actions arising from traffic accidents on/along the State Trunk Highway System. Experience has proven the following to be generally valid across a broad range of circumstances:

1. If it becomes apparent that a problem exists on/along the State Trunk Highway System, due to an accident having occurred or for other reason, do whatever is necessary to rectify the situation as soon as possible/practical. Correcting a problem situation that has been brought to your attention (by whatever means) does not establish a condition of guilt. Moreover, responding in a timely manner can prevent accidents from occurring or recurring and is in concert with the department's overall mission of providing a safe and efficient transportation system. Implement remedial actions, as soon as possible and document actions accordingly.
2. If you are named as a defendant in a civil action, it is recommended that you immediately inform your supervisor, the Risk and Safety Management Section of the Bureau of Management Services. *Should* you decide to consult with your own attorney, it is highly recommended that he/she discuss your case with representatives of the Risk Management and Safety Section before advising you in the matter. Consultations with your own attorney are at your expense.
3. As a representative of the department and as a named defendant, you're entitled to be represented in your defense by the Attorney General's office. As an employee of the State of Wisconsin, this representation is provided at not cost to you. Even if judgment is rendered against you, as long as you were acting of s. 895.45, Wis. Stats. And the State of Wisconsin will pay all judgments rendered against you. If you refuse representation by the Attorney General's office (which is your right) and hire your own attorney, you waive the right to be represented by the Attorney General's office if further actions are brought in the matter, and you will be responsible for your attorney's fees in any and all such actions. Your protection as a state employee under s. 895.45, Wis. Stats. Remain, however, as long as you were acting within the scope of your employment.

The prospect of being named in a tort action is unpleasant at best, and one which unfortunately confronts the department's traffic engineering professionals all too frequently. One can deal with this situation most effectively by:

1. Applying the traffic engineering principles and standards of practice in a consistent and uniform manner, to create wherever possible the sense of expectation in the driver, that will in turn ensure that his/her driving actions/responses are as close to "second nature" as possible (eliminate the choices or reduce them to a minimum at any decision point along the highway).
2. Develop a methodology for identifying areas of (or practices related to) high accident occurrence in order to determine what, if any, mitigative measures can be taken of any engineering nature.
3. Document your actions. Keep diary. Record complaints and investigations. Your records are your best means of defending your actions, decisions and professional conduct.
4. Remember that being named in a tort action, and even having a judgment rendered against you, does not impugn you as a conscientious, capable professional. Because the State of Wisconsin is a "deep pocket," you are a tempting target for litigation.

BASIS FOR LEGAL ACTION

Several considerations enter into the filing of a valid action against a state officer, employee, or agent.

1. Notice has to be served within 120 days of the date of the accident. (Certain exceptions apply.)
2. The named defendant/s must have owed the plaintiff a specific duty and have breached that duty causing the injury complained of.

The legal duties that accrue to department staff are divided into two categories:

1. **Ministerial Duties.** These are duties, which by their very nature are absolute, imperative and certain as to the time, mode, occasion, and performance that nothing is left for judgment and discretion. Typically, they are duties required by rules, regulations, standards, practice or law. For example, the duty to maintain certain signs or to properly install them.
2. **Discretionary Duties.** These are duties that require the exercise of judgment. Typically, these duties are exercised by upper levels of management. However, it is possible to establish discretion at any level. The true test involves the exercise of judgment, by a qualified and trained professional, over valid alternatives and based upon acceptable standards of the profession. For example, the decision to place a supplemental sign is generally considered to be a discretionary act.
3. **Negligence.** Negligence is the failure to exercise that degree of care expected of any reasonably prudent person in the same or similar circumstances. However, the comparison is based upon what other reasonably prudent traffic engineers would do under the same circumstances. In other words, your actions must be appropriate in terms of the practice of the industry or your profession at the time and not what *may* have been the practice in the past.
4. **Comparative Negligence.** This is a doctrine that assigns negligence to all the parties of a lawsuit in terms of percentages the total of which does not exceed 100%. Then any judgment is reduced by the percent assigned to the plaintiff and if any of the remaining defendants are assigned a percentage greater than that of the plaintiff, those defendants will pay the remaining judgment.
5. **Joint and Several Liability.** This doctrine requires the payment of the entire judgment by any one of the defendants in an action whose negligence is greater than the plaintiff's. That means that if a state employee defendant is assigned 1% more negligence than the plaintiff and some other defendant who *may* be grossly more negligent than the state employee, the state could still be required to pay. This generally happens when the other defendants are not solvent. This doctrine is often referred to as the "deep pocket theory."

LIABILITY REDUCTION

Adverse exposure can and *should* be reduced in the following ways:

Pre-accident Actions

While the efforts of traffic engineers are usually focused upon improving efficiency of operation, reducing accidents is usually a prime consideration. Because the best method of limiting liability is to reduce the potential for accidents, an accident reduction program is an integral part of the overall traffic effort. The following aspects are typically involved:

- A system of regular inspection *should* be established and maintained on a continuing basis.
- Design and operational reviews *should* be conducted before and after installation of traffic control elements.
- A procedure for handling citizen complaints *should* be established and records made and kept.
- Claims and judgments can be a major financial drain, and *should* be a consideration in expanding funds to improve highway systems.
- Engineering countermeasures to accident problems *should* be sought.
- Careful prioritization of needed improvements (as in the Traffic Operations Improvement Program) is an appropriate means of documenting why a specific improvement was not implemented earlier.
- Project and program evaluations should be undertaken regularly. A project is site specific, lending itself to a before-and-after engineering analysis. Program evaluation is a managerial function, and is particularly relevant to accident reduction and tort liability mitigation.
- Utilize positive guidance principles in the operation and the development of improvements to the highway system.
- Evaluate all feasible alternatives.
- Keep the highway system as simple, consistent and forgiving as possible.
- Maintain a system of documentation.

Post-accident Actions

Adequate instructing and training of personnel in on-site actions, accident investigations and use of accident data can go a long way toward preventing further unwarranted accidents close behind the initial incident, thereby reducing liability exposure. While the traffic engineer is not typically involved in site control, he/she is typically involved in analysis of "problem" locations. These investigations enable the cause of accidents to be identified,

and where feasible engineering countermeasures to be implemented.

1-20-4 Indemnification

April 1995

Standard indemnification provisions occur mostly in two areas in the Division of Highway's policies. One is in Standard Spec 107 covering construction activities. The basic premise there is that the contractor insures us while the construction activity is occurring. It also covers actions resulting from faulty materials or construction. The second indemnification in use is the standard provision for utility-type facilities administered by the Maintenance Office. This provision is part of every utility permit and is referenced therein to policy 96.03 of the Utility Accommodation Policy. This indemnification is tailored to cover the liability occurring while an object, most commonly a utility pole, is being installed, and also to cover liability during the time the object remains on the ROW.

The Office of Traffic has found on several occasions that Regional offices have attached the above indemnification to various traffic related permits issued by the Regions. These permits include closure of highway, banners, snowmobile crossings, and highway lighting. The Office of Traffic does not endorse the use of indemnification provisions. The perceived need for and use of provisions is left up to the Region. The following advisory comments about the usage *may* be helpful, however.

The Maintenance indemnification is tailored to cover utility-type situations. The provision first covers the period of installation, with the implication that the applicant *may* damage someone else's utility, and secondly, the period while the object is in place, which of course would be many years. The primary concern during that time could be inferred to be mainly crashes with the poles. The Maintenance indemnification applies to situations very similar to that covered by lighting permits, permits for flashing beacons and banners over highways, where new poles or supports are set. From that standpoint the Regions *may*, if they so choose, make use of or make reference to the Maintenance indemnification, using the full name.

On the other hand the Maintenance policy does not appear to fit the situations involved in highway closures, snowmobile crossings or routes, or painting crosswalks, etc. In these cases the anticipated major problem would likely be vehicle crashes resulting from alleged inadequate signing, marking or barricading; in other words, something which can be described as a traffic control device misuse or inadequacy. While this guideline makes no recommendation as to the need for indemnification statements in permits issued by the Regions related to traffic operations activities, caution is urged that unless the indemnification is tailored to the nature of the activity or situation the indemnification *may* have little or no substance.

In the case of small communities especially, the inclusion of an indemnification requirement *may* cause their insurance carrier to re-assess their coverage situation.

Indemnification related to work performed for us by others which is not being done under contract administered by the Construction Office *may* be referenced to Standard Spec 107. Again, this is not a recommendation that the activity be covered, but simply an appropriate and approved indemnification clause that can be used if the Region so chooses.

1-20-5 Avoiding Utility Damage

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LOCATING PRIOR TO DIGGING

It is the policy of the Department that all WisDOT employees comply with the provisions of s. 182.0175 (1m)(a), prior to any digging or excavating of earth either on or off the highway right-of-way whether manually or with powered equipment except in those cases where such digging or excavating is necessary for the immediate protection of highway users.

In all cases except emergencies as discussed below, WisDOT employees whose work requires digging or excavating **shall** investigate what utility companies and others *may* have underground transmission lines in the area where the digging or excavating is required. Diggers Hotline (1800-242-8511) **shall** be contacted prior to digging or excavating. No digging or excavating *may* be done until after the locate by Diggers Hotline.

Emergencies in which the practice of contacting the owners *may* be omitted include, in the traffic area, replacement of knocked down, missing, and severely damaged Stop signs, traffic control signals, Stop Ahead signs, Large Arrow signs, and Curve and Turn signs. The installation of new signs (including detour signs) and the routine maintenance of posts are not of an emergency nature.

DIGGERS HOTLINE MEMBERSHIP

Wisconsin law, s. 182.0175 (1m) (b) requires WisDOT to be a participating member of the one call service known as Diggers Hotline system. As a member, WisDOT needs to provide the one call service with information regarding the location of state-owned electrical facilities and WisDOT will receive tickets that require WisDOT to locate and mark its facilities when work is to be performed in the vicinity of those facilities.

In order to incorporate WisDOT electrical facilities into the Diggers Hotline database, the Regional offices submit location maps to Diggers. Typical electrical installations to include on the Diggers Hotline service are: signal systems, lighting systems, flashing beacons, ramp meters, changeable message signs, rest areas, and weigh scales.

Following receipt of a Diggers Hotline ticket, WisDOT electrical installations are field-located by Electrical personnel or a designated contractor. To ensure valid tickets are received, electrical installation location maps *should* be verified and updated routinely.

1-20-10 Response to Damage

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BACKGROUND

The Department has a 24/7 obligation to respond to failures or damage that *may* jeopardize traffic safety or mobility. Given the extent of the system and the role of the Department, it is most often the case that law enforcement or local government employees will become aware of these situations first. A protocol for dealing with those situations will benefit the entity that first becomes involved, as well as serving the public needs for safety and mobility.

NOTIFICATION TO OTHERS

In conjunction with and addition to the "Highway Facilities Damage Claim Program" coordinated by Risk Management, each region **shall** develop an on-going program of establishing and maintaining contacts with appropriate enforcement agencies, for the purpose of distributing information on whom to contact for emergency sign repair.

This notification *should* include the types of signs which are critical in nature and the telephone number and agency of whom the enforcement people are to contact at any given hour of the week -- day, night, weekday, weekends.

The notification *should* also include the appropriate contact regarding traffic signals, highway lighting and other appurtenances. Instructions *should* go on to cover reporting of routine damage or malfunction of a non-emergency nature.

The same notifications *should* be distributed to state maintenance people and others who *may* be in a position to see and report problems.

A suggested letter to be used for this purpose is included as part of this guideline.

CRITICAL SIGNS

Critical signs are stop signs and yield signs, and *may* include large arrows in critical locations, keep right signs on important transition sections, and similar applications.

Date

Addressee

Subject: Reporting Damage to Signs and Signals On State Trunk Highways

We are contacting you to reconfirm and/or update information on whom to contact regarding the repair of damaged highway signs and traffic signals which are owned and operated by the State Department of Transportation.

We have assumed that you have enforcement officers and/or maintenance workers who will come upon damage and will be obliged to initiate action to have repairs made. The list on the next page will serve to expedite obtaining the proper phone number and the circumstances necessitating a call. You *should* make copies of this list available to each person.

We suggest that the officer or employee keep a record of the time and circumstances when contact was made with the person on the list.

We thank you for your cooperation and welcome your comments or questions regarding notification of damage to traffic control devices.

Regional Chief Traffic Engineer or Supervisor

Contact Persons Below to Report Damage to Signals and Signs on State Highways

	Agency-Person/Telephone Number		
<u>Emergency Damage</u>	<u>Working Hours</u>	<u>Week Nights</u>	<u>Weekend</u>
Electrical			
Examples:	_____	_____	_____
Traffic signal down	_____	_____	_____
Signals on flash	_____	_____	_____
(call top name first	_____	_____	_____
then next, etc.)	_____	_____	_____
Signing:			
Critical sign down or	_____	_____	_____
missing, such as stop,	_____	_____	_____
yield, large arrow, keep	_____	_____	_____
right sign, etc.	_____	_____	_____
	_____	_____	_____

In most cases a sign can be re-erected temporarily until the next working day.

<u>Non-Emergency Damage</u>	<u>Work Hours Only</u>
Electrical	_____
Example: lamp burned out	_____

Signs	_____
Example: Less important sign damaged or missing	_____
