



## Traffic Guidelines Manual

ORIGINATOR State Traffic Engineer		1-20-1
CHAPTER 1	General	
SECTION 20	Special Topics	
SUBJECT 1	Liabilities of Tort	

(The following was specially prepared by Risk Management for inclusion in the TGM)

### 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 professionals 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:

### a. 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.

#### b. 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.