A4002: Committee on Tort Liability and Risk Management
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Transportation Tort Law
A Look Forward

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As we enter 2000, state and local transportation agencies are experiencing a dramatic increase in tort litigation involving claims for personal injury and property damage. These claims have added greatly to the cost of constructing and maintaining the nation's highway transportation infrastructure. As the costs associated with the claims against state and local highway agencies increase, the percentage of funds available for construction, reconstruction, safety enhancement, and maintenance to improve highway safety decreases. The estimated hundreds of millions of dollars paid to claimants each year decreases the funds available to make the highway infrastructure safer for the great majority of nonclaimant drivers.

The single greatest reason for the explosion of claims against state and local transportation agencies over the last 50 years has been the abolition of the doctrine of sovereign immunity by most states. Today, sovereign immunity runs the gamut from absolute immunity to no immunity at all. Between those extremes are limited forms of immunity such as discretionary immunity, design immunity, and caps on damage awards.

The loss of sovereign immunity by public entities is only one part of the picture of the evolution of tort liability over the last century. Beginning as far back as the Progressive Era, legislatures and courts have led a movement to protect and compensate injured persons at the expense of business and government. Product liability, medical and legal malpractice, and class action suits, as they have evolved, are only a few examples. In most states, the absolute bars to recovery, such as contributory negligence and assumption of risk, have been eliminated and replaced by the doctrine of comparative negligence.

Public entities' exposure to tort liability has increased as the practical science of transportation engineering has improved, resulting in greater public expectations from government. During the period of rapid highway expansion, national engineering organizations were formed, the primary one being the American Association of State Highway and Transportation Officials (AASHTO) and its predecessor, the American Association of State Highway Officials. These organizations established and adopted standards, which are actually guidelines for the design, construction, and maintenance of safe roads, highways, streets, and bridges. AASHTO also developed the *Manual on Uniform Traffic Control Devices* and other guidelines pertaining to highways and bridges. These guidelines have been adopted by most states.

Guidelines change as new engineering techniques for construction and safety are developed. If roads, streets, highways, or bridges are not designed, constructed, or

maintained according to these guidelines, the states or their political subdivisions may be found liable under tort law. Courts appear to overlook the fact that many of the older roads were constructed for fewer, smaller, and slower vehicles. No state, municipality, or county transportation department has the resources to immediately bring all older roads and bridges up to current AASHTO guidelines. The issue of AASHTO guidelines has become a fertile field of tort litigation and is raised often by plaintiff attorneys in an effort to establish negligence on the part of transportation departments.

As this millennium ends, an established legal principle in tort law is that transportation departments owe a duty to the public to maintain transportation facilities in a reasonably safe condition, or at least to provide adequate warning of dangerous or defective conditions. The most common, but not the only, activities of transportation departments giving rise to tort claims are the following:

- The design, construction, and reconstruction of roads, streets, highways, and bridges;
- Maintenance of the driving surface and shoulders of roads, streets, highways, and bridges;
- Erection and maintenance of signs, signals, warning devices, and traffic control devices;
- Design, construction, maintenance, and operation of movable bridges and ferries (which may also give rise to actions in admiralty);
- Design, erection, and maintenance of guardrails and barriers;
- Control of and warnings involving weather-related conditions, such as ice, snow, fog, and rain;
- Control of and warnings involving erosion and falling rocks;
- Removal of and the placement of warnings about and devices protecting from obstructions on roadway and adjacent right-of-way, including but not limited to trees, rocks, utility poles, culverts, signs, mailboxes, and debris; and
- The signing, signaling, and maintenance of at-grade railroad crossings.

Notwithstanding the foregoing activities, the human element cannot be overlooked as a factor in the increased number of claims against transportation departments. Very few accidents are solely the fault of highway conditions or transportation department employees. Drivers cause or contribute to highway accidents through negligence, the use of drugs and alcohol, and general fatigue. These causal or contributing factors are defenses that can be raised by transportation departments.

TRANSPORTATION TORT LAW

The most significant effect on the practice of transportation tort law in the 21st century is expected to come from technology and innovations in the use of technology. They will present new issues and challenges for the transportation lawyer. Some of those issues will arise when new technology is implemented, and others will arise when the innovation or technology fails and a loss results. The transportation tort lawyer must develop new methods of practice to address these issues and new ways to use existing and emerging technology in the accessibility of information, experts, and legal authority, as well as new and emerging technology in the organization and presentation of the facts and information needed to represent the transportation agency.

As a result of advances in technology, the transportation lawyer will face new challenges in both the application of technology and its results. Systems such as traffic management systems hold great potential for improving the safety and efficiency of our transportation infrastructure. At the same time, these systems create the potential of new duties, risks, and liabilities for the transportation agency. The monitoring of traffic flow and congestion is becoming fairly common on crowded urban transportation networks. Along with the ability to monitor traffic flow and congestion come the ability and, arguably, the responsibility to advise users of traffic conditions ahead. Once the agency begins providing this warning service, it then may have assumed the *duty* to provide those warnings. It can be expected that the plaintiff's bar will argue that the transportation agency also assumed liability in the event that the service fails to live up to some standard of care and timeliness. There have already been instances where transportation agencies have faced claims based on the contention that the agencies failed to warn of dangerous traffic conditions ahead. As the next logical step is taken from monitoring and warning to positive control of traffic flow through such measures as closing ramps and alternative routing, the agency may very well be assuming additional duties and corresponding liabilities.

In the very near future, sets of plans may be created and retained only in an electronic format. For the transportation tort lawyer trying to establish design immunity, this procedure will present additional hurdles in proving the authenticity of hard copies of those plans and designs.

The transportation tort lawyer also will likely encounter new issues in commercial motor vehicle operations. Systems that automate the checking of a vehicle's credentials and weight are already in place. In the near future, we could see the implementation of technology that would allow for automated safety checks of vehicle systems. Along with these systems should come concerns about the possible tort liability of the transportation agency if it fails to detect and stop an illegal or dangerous vehicle that is subsequently involved in an accident.

Vehicles that use the transportation infrastructures are also changing. Pressure, in the form of federal legislation and regulations, state and local requirements, and public demand, continues to increase for safer, cleaner, and more efficient vehicles of every type. Improvements in existing technology and the implementation of new technologies not currently available will be needed to fill these demands.

The benefits of cleaner, safer, and more efficient vehicles are self-evident, but some of these technologies will have effects on transportation beyond the demands they are designed to fulfill. Alternative-fuel vehicles, such as electric cars, reduce the amount of pollutants in the atmosphere, but they also reduce the traditional motor fuel tax funding base used to build and maintain the transportation infrastructure. Whether the electric car or a different alternative-fuel engine becomes accepted into general use, the new technology will force revisions in the funding of the transportation infrastructure of highways and mass transit. Failure to meet this challenge will initiate a series of consequences: reduced funding, leading to reduced maintenance and new construction, leading to deterioration of the highway system, leading to increased accidents and claims, leading to increased tort exposure and payouts, leading to further reduced funding for transportation infrastructure, and so forth.

TORT LITIGATION

The transportation tort lawyer's litigation practice can also be expected to change in the 21st century. Today, there are jurisdictions where it is no longer necessary to race to the mailbox or the courthouse to file court documents. Documents prepared on a personal computer can be transferred to the court clerk and filed with a "click of a mouse." Opposing counsel can receive a copy simultaneously with the electronic filing with the court. In the near future, voice recognition technology will begin to replace those hours spent at the keyboard or with a pen and a yellow legal pad drafting documents, and word processing systems will format and formalize the draft into a final document. It is hoped that, with the elimination of some of the mechanical burden, practitioners will be able to devote more effort to the art of creating clear, more comprehensive, and more convincing documents.

Going to court will likely take on new meanings in the future. Already, a significant number of disputes are settled through one of the many forms of alternate dispute resolution without a lawsuit being filed. In those instances when a case is filed, courts are encouraging, and even requiring, various forms of alternate dispute resolution before trial. Appearances for motion dockets, discovery conferences, status conferences, and even oral argument on an appeal may, in the future, be handled from an office videoconferencing center. With a little imagination, it is easy to foresee trials taking place with the judge, witnesses, and attorneys interacting through video from different locations. It is even possible that a jury will hear evidence and view exhibits through an electronic hookup. The technology, albeit somewhat expensive, already exists today that makes this possible. It may be only a matter of refinement of the technology and the willingness of some innovative court to try an experiment to start a trend in this direction.

Technology will affect not only the physical location of court proceedings, but also the transportation tort lawyer's methods used in the discovery and presentation of evidence. Documents such as studies, contracts, plans, photographs, specifications, surveys, and field books, which often play a significant role in transportation tort cases, are more and more frequently found to exist on disk rather than as a paper copy. The discovery production of such documents on a disk has both advantages and disadvantages. There is a certain attraction to being able to fulfill discovery demands with a couple of disks rather than boxes of paper documents, but this raises questions relating to alteration of the documents after production, and even whether they can be accessed without the sometimes very expensive programs and hardware by which they were created. Before the wide use of discovery in electronic format becomes the norm, jurisdictions may need to impose program and format rules. However, with the speed at which current technology and software become obsolete, mandatory requirements may not be a practical answer.

The ability to present documents directly from the computer disk on which they are stored to a courtroom video display for the trier of fact to see already exists, and it will become more common as the technology becomes more common and affordable and as more courtrooms become equipped with the necessary hardware. The ability to use this and other new technology in the trial of a case will allow for better-organized and more effective presentation of evidence, while eliminating the search through boxes of documents and stacks of exhibit boards for that document or exhibit.

In the area of both fact and expert witness, the technology that enables tort lawyers to illustrate their testimony through graphics, reproductions, and simulations continues to

evolve, and through it, even semiskilled advocates can take a trier of fact to an accident scene and present what they believe occurred.

Whereas the advance of technology will enhance the transportation tort lawyer's ability to represent the transportation agency more effectively, the same technology will be used against the agency in the presentation of the opposing party's case. Lawyers cannot afford to be left behind as the technology of effective presentation progresses.

TRANSPORTATION LAWYERS MUST ADJUST

With each technological advance in transportation, issues will arise that challenge transportation tort lawyers. Technology will free them from some of the time-consuming tasks faced today and allow for better organization and use of available information and resources. Technology will also allow transportation tort lawyers to devote more of their knowledge and experience to defending the agency in tort litigation, thereby protecting its resources. It will be incumbent upon transportation tort lawyers to meet these challenges of the 21st century.