

TORT CLAIMS INVOLVING ROADSIDE SAFETY
August, 1984

PREFACE

This circular contains the proceedings of a workshop sponsored by the Committee on Safety Appurtenances and held at Santa Cruz, California, August 7-8, 1984. The proceedings include several invited papers as well as summaries of working group discussions. Main discussion issues centered around topics developed by the program committee, who in turn received inputs from engineers and attorneys employed in various states. Issues were prioritized both in group discussions and by individuals.

Special credit for this publication is due William W. Hunter and Hayes E. Ross, Jr., who were primarily responsible for planning and conducting the workshop and assembling this material. Sincere appreciation is extended to Roger L. Stroughton and other California Department of Transportation personnel who provided program inputs, local arrangements and other logistical functions. Grateful acknowledgement is also extended to each participant for his/her contributions and suggestions.

I. INTRODUCTION

William W. Hunter
UNC Highway Safety Research Center
Hayes E. Ross Jr.
Texas A&M University

In recent years the concept of sovereign immunity from tort liability has been sharply diminished. Most states are now without this protection. The basic legal defenses of discretionary and design immunity have been in litigation, an increase in successful suits, and an increase in the skills and knowledge of attorneys specializing in tort liability as it pertains to the highway area. As an example, the number of annual new tort claims in California has tripled in the last 12-15 years.

This meeting was held to discuss how to make tort liability a more manageable problem, but with a focus toward highway safety appurtenances. Besides the members of the Safety Appurtenances committee, invitations were also sent to various attorneys, researchers, consultants, etc. The result was a mix of about 40 people of varying backgrounds that led to considerable, vigorous dialogue about the subject at hand.

The workshop scope and both objectives were described in the following manner:

1. Identify problem areas -- The workshop will focus on potential engineering problems in the planning, design, construction, operation, and maintenance of roadside safety features.

Examples are nonstandard guardrail and bridge rail (too low, improper post spacing, too weak, etc.); nonstandard guardrail and treatment; absence of guardrail at "hazardous" locations (a problem of guardrail warrants for different classes of roadways); proper safety treatment for sign supports, light poles, traffic signals, and utility poles (a problem of warrants for proper safety treatment of these structures); edge dropoffs; proper use of curbs; safety treatment of drainage structures, ditches, median dikes, etc.

2. Identify solutions -- To the extent possible, the workshop will identify ways to mitigate problems. There is a need to collect and disseminate solutions that have been used by various agencies. Changes and improvements in procedures and policies may be needed at various levels, including state, county, and city transportation agencies, federal transportation agencies, research agencies, and consulting agencies. For example, it may be prudent for transportation agencies to employ cost-effective procedures in establishing warrants and priorities for safety improvement programs. Research agencies should realize the importance and implications of research reports and the degree to which conclusions and recommendations are interpreted and used by claimants.

3. Identify research needs -- Some problems have no immediate or simple solutions. The workshop will identify the nature of those problems and recommend programs to address the problems. For example, it is believed that guidelines should be developed on a national level to address the questions of "How, when and where should nonstandard features be upgraded?"

II. WORKSHOP AGENDA

To set the stage for the workshop, several individuals were invited to offer their perspective of the problem. The complete list is shown in Table 1, the agenda for the meeting. To take advantage of the variety of expertise present at the meeting, breakout discussion sessions were organized around two main topics: (1) planning, design and construction, and (2) operations and maintenance. Each participant was encouraged to offer comment on the issues addressed. Breakout groups are shown in Table 2.

III. INVITED PRESENTATIONS

The invited presentations that offered the perspectives of individuals with varying backgrounds as pertains to highway safety and tort liability follow.

TABLE 1. AGENDA

Sessions

Tuesday, August 7, 1984

I. INTRODUCTION

- o Welcome and Introductions

Hayes Ross, Jr., Professor and Research Engineer,
Texas Transportation Institute, Texas A&M University
and Chairman, TRB Committee A2A04

Robert Defae, Attorney, California Department of
Transportation

Roger Stoughton, Senior Materials and Research
Engineer, California Department of Transportation

- o Workshop Scope and Objectives

William Hunter, Program Manager for Engineering
Studies, University of North Carolina Highway Safety
Research Center and Workshop Chairman

II. OVERVIEW OF PROBLEM

- o National Perspective

Jim Stapleton, Assistant Chief Counsel, Federal
Highway Administration

- o A Highway Engineer's Perspective

David Henry, Supervising Transportation Engineer,
California Department of Transportation

- o A State Attorney's Perspective

Sharon Lyles, Executive Assistant General Counsel,
Louisiana Department of Transportation and Development

- o A Highway Safety Research Engineer's
Perspective

Don Ivey, Associate Director, Texas Transportation
Institute, Texas A&M University

- o Practical Guidelines for Minimizing
Tort Liability

Russell Lewis, Consulting Engineer, Annandale, Virginia

III. PLANNING, DESIGN AND CONSTRUCTION - SUMMARY OF PROBLEM AREAS

Jack Humphreys, Professor, Civil Engineering Department, University of Tennessee

- o Group Discussion Sessions

Problems in Planning, Design and Construction

- o Summary of Group Discussion Sessions

Group Leaders

IV. OPERATIONS AND MAINTENANCE - SUMMARY OF PROBLEM AREAS

Jack Humphreys

- o Group Discussion Sessions

Problems in Operations and Maintenance

- o Summary of Group Discussion Sessions

Group Leaders

V. WORKSHOP SUMMARY

William Hunter

TABLE 2. DISCUSSION GROUPS

Topic 1 - Planning, Design and Construction

Group 1	Group 2	Group 3	Group 4
<u>Discussion Leaders</u>			
<u>H. Anderson</u>	<u>E. Nordlin</u>	<u>D. Woods</u>	<u>R. DeFea</u>
D. Adams	M. Alfred	D. Berkman	F. Campbell
J. Beaton	J. Bryden	R. Bishop	R. Coleman
J. Carney	G. Cory	K. Dewell	R. Edgar
O. Denman	P. Hale	B. Gowan	L. Ferguson
W. Hickey	D. Henry	J. Hatton	S. Fox
W. Hunter	T. Hirsch	J. Humphreys	D. Ivey
R. Lewis	J. Michie	S. Lyles	H. Ross
J. Stapleton	D. O'Brien	E. Post	J. Underwood
H. Taylor	C. Quan	R. Stoughton	J. Viner
W. VanWagoner	L. Spaine	D. Thomas	
	F. Tamanini	E. Tye	

Topic 2 - Operations and Maintenance

Group 1	Group 2	Group 3	Group 4
<u>Discussion Leaders</u>			
<u>F. Tamanini</u>	<u>J. Hatton</u>	<u>J. Viner</u>	<u>P. Hale</u>
H. Anderson	D. Adams	F. Campbell	M. Alfred
J. Beaton	D. Berkman	R. DeFea	J. Bryden
K. Dewell	R. Bishop	L. Ferguson	R. Edgar
J. Humphreys	J. Carney	T. Hirsch	S. Fox
R. Lewis	R. Coleman	W. Hunter	B. Gowan
D. O'Brien	G. Cory	S. Lyles	W. Hickey
E. Post	O. Denman	E. Nordlin	D. Ivey
L. Spaine	D. Henry	H. Ross	C. Quan
W. VanWagoner	J. Michie	J. Stapleton	H. Taylor
	J. Underwood	R. Stoughton	E. Tye
	D. Woods	D. Thomas	

II. OVERVIEW OF PROBLEM

National Perspective: The Uncertain Sea of
Tort Liability Law
Jim Stapleton

Highway tort liability law has been referred to as "an uncertain sea" where "uncertainty and bewilderment ... persist to confound the stormtossed wayfarer."¹ The uncertainty and bewilderment are understandable in light of the many conflicting and frequently illogical court decisions from the various states and often even within the same state. I will attempt today neither to part this uncertain sea nor to walk upon its waters, but perhaps I can post some beacon lights to give you some direction.

Potential legal liability is a factor in inducing greater compliance with safety standards and, thus, in reducing highway deaths and injuries. As Professor William Prosser, the leading authority on tort law, once said: "When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive."²

Concern for potential liability is healthy and legitimate. If that concern turns to hysteria and paranoia, it is unhealthy and counterproductive. Inaccurate and distorted perceptions of liability can adversely affect the quality of the engineer's decisions concerning highway design, construction, and maintenance. It is important to keep litigation concerns in proper perspective, and to remember that there is no substitute for good common sense combined with sound engineering judgment.

For many years the states had little fear of suits for injury or death caused by negligence in the design, construction, and maintenance of highways. The states' salvation was the doctrine of sovereign immunity which sprang from the ancient maxim that the King can do no wrong. Over the past 20 years the doctrine has undergone considerable erosion. Most states have abandoned it either by judicial decision or by statute.

A survey conducted in 1983 by AASHTO on the status of sovereign immunity in the states reported that only seven states still have sovereign immunity as to torts. However, of those seven, one (Mississippi) reported that as a result