

Minimizing Tort Liability -- Guidelines and
Related Thoughts
Russell Lewis

I have been asked to discuss the NCHRP Synthesis Report "Practical Guidelines for Minimizing Tort Liability" which I recently prepared for the Transportation Research Board.* As the attorneys with whom I often work would say in their favored latin, "res ipsa loquitur" -- or more simply put, the document speaks for itself. A copy of the summary taken from the report is attached for your information.

Related Thoughts and Concepts

For the few moments I have with you, I prefer to share some of the thoughts on this subject that have come to me during my training and expert witness activities and the preparation of the report itself.

My trip to participate in this meeting started deep in the Adirondack Park of upstate New York, where I maintain my summer office. I started by canoe, as there are no roads into my camp. My initial "roadside hazards" as I paddled down the lake consisted of loons and beaver cavorting about in the early dawn. In less than twelve hours, however, thanks to modern modes of transportation, I was here in Santa Cruz -- in the woods again, but overlooking the Pacific Ocean.

The relevant thought that strikes me is how times have changed. In the pioneer days when the west was settled, life was recognized as hard and dangerous. When a family started out across the plains in a wagon, they took their chances with lack of sustenance, adverse weather and hostile tribes. If they were injured or killed on route, so be it. Today, however, society feels that it should take better care of its members. When people are injured on our modern highways, juries will often seek a means for taking care of the persons financially. Thus, the proverbial deep-pocket concept has evolved. Times are different, and there are some worthwhile reasons for these changes. The management procedures employed by highway agencies must be updated, however, to accommodate new social and legal principles.

The best means of limiting liability is to reduce accidents. There are limits to what can be accomplished by such programs, however, as highways are inherently dangerous. It is an enormous challenge to provide and operate a system having the following properties:

- o The network extends over the entire countryside.
- o The facilities are utilized 24 hours a day in all kinds of weather.
- o Vehicles range in size from bicycles to tractor-trailers--differing in size, weight, power and mechanical condition.
- o Operators are mostly non-professional -- with widely varying levels of competence.

If one were to set out to design a hazardous activity, the road systems used by the traveling public might well evolve from such an exercise.

The only more hazardous situation that immediately comes to mind is attempting to maintain these roadways under traffic.

Thus, accidents are inevitable on our highway systems and cannot be completely avoided. That is all the more reason to prepare for inevitable claims. Activities need to be conducted in a manner that lays the groundwork for an effective defense, for use whenever needed. The synthesis report defines steps to be taken toward this objective.

Problems associated with the Defense

I often use analogies during my training course for highway agency personnel. One might compare the changing climate in the highway field to the game of football. At one time it was merely a ground game. Then one day the forward pass was invented. Examination of the rule book revealed that it was a legal maneuver, and the game began to change tremendously. Just imagine what would happen to a team today that concentrated only on its ground game and failed to adopt new defenses against the pass. It would surely lose every game. And that is just what will happen to highway agencies in court if they fail to adjust to the new rules.

The problems encountered in defending a highway agency in tort liability actions are formidable. For example, a plaintiff's case may be directed to the one point on the road where the accident occurred. The defense, however, may have to defend its actions over the entire road system in an attempt to show why limited resources were not allocated to the point in question. This is a most difficult undertaking, particularly considering that the lack of funds is generally not held by itself to be an acceptable defense. Simply put, the deck is stacked against public agencies. Negligence of the driver will most often be discounted, and the public agency will be held accountable to a significantly higher standard.

Challenges for the Highway Profession

The highway profession needs to do a better job of educating the public as to the safety-related trade-offs inherent in the design and operation of highway facilities. Safety cannot simply be maximized, because all the other competing demands must be considered. These problems are rarely, if ever, brought out in court. In some cases, if the agency had undertaken to improve conditions at the accident site, the overall safety of the road network would be diminished -- by not performing other work that had a higher potential safety payoff.

Providing a "safe" highway environment is an optimization process. For example, consider the trade-offs between safety and mobility. The engineering profession could design a very safe highway. The stretch of road could be managed in a manner similar to that of an airport runway. A control tower would be erect overlooking the

*Lewis, R.M., "Practical Guidelines for Minimizing Tort Liability," Synthesis of Highway Practice, No. 106, National Cooperative Highway Research Program, Transportation Research Board, December 1983.

facility. All vehicles would be operated by highly qualified pilots meeting stringent licensing, periodic requalification and medical testing standards. All vehicles would be under constant contact and supervision of the control center. Only one vehicle would be released at a time. After each vehicle had cleared, the next vehicle would be released. By incorporating such procedures, a very high level of safety could be obtained, but at an enormous reduction in capacity. By maximizing safety, mobility is minimized.

Management and Program Needs

The principal recommendation is that tort liability risks must be managed. Tort claims are not a problem that can be solved. They are an inevitable by-product of operating a highway system, and therefore, tort liability considerations must be included in the development of the overall management program. The purpose of the synthesis report was to offer practical and implementable program elements to meet this objective.

Research Needs

After completing my first draft, the NCHRP review panel stated that I omitted one item that researchers consider essential; namely, recommendations for further research. After going back to the "drawing board" (my computer/word processor CRT, in this case), I concluded that there were indeed major shortcomings to be addressed with respect to highway tort liability. Simply put, we do not know either the character or the magnitude of the problem.

There are several characteristics of the problem that make it very difficult to grasp.

- o The rapid growth in tort liability claims presents a "moving target," making the task of program development more difficult.
- o Changing legislation, judicial interpretations and case law are, in effect, continually altering the "rules of the game."
- o The time delay between an incident, filing a claim, trial and possible appeal results in a final accounting which takes many years to accomplish. Thus, factual current information as to costs associated with tort liability is impossible to obtain.
- o Most complaints filed in tort liability cases cite all conceivable highway elements and functions in order to have the broadest possible basis for a claim. For example, frequently design, maintenance and operation are all cited as being negligently performed. Therefore, it is difficult to correlate risks with agency functions and/or elements of the road system.

While many of these problems are not amenable to solution through research, two areas of need stand out.

Procedures for Assigning Tort Liability Costs to Highway Function and Element: Effective management of the risk of tort liability requires knowledge as to the sources and magnitude of the problem. Information is needed as to tort liability costs by highway function (design, construction, maintenance, etc.) and by elements and appurtenances (ditches, guardrail, luminaire poles, etc.). Since this data is not directly available, it requires some subjective assessment. Therefore, a procedure is needed which defines the methods of evaluating these costs together with a set of guidelines which will minimize variations between individuals making such assessments.

Standard Statistical Tools for Tabulating Tort Liability Costs: To develop meaningful analyses and forecasts, tort liability data from many different jurisdictions must be aggregated. To accomplish this, all data inputs must be standardized. There is a need for uniform definitions, procedures, forms and codes.

The situation is analogous to working with highway accident data. As accidents are statistically rare events, one needs to accumulate accident data over time and/or road network to develop statistical significance. Therefore, uniform accident reporting procedures have been developed which permit the combining of data from different agencies. By this means, sufficient data is amassed to enable accident rates to be developed by system components and features.

Accidents which result in claims are statistically even rarer events. Therefore, the need for standard data collection and tabulation procedures is essential to building an adequate data base.

ATTACHMENT

SUMMARY OF "PRACTICAL GUIDELINES FOR MINIMIZING TORT LIABILITY"

Transportation agencies today are faced with a changing situation regarding their vulnerability to tort suits arising from alleged dangerous conditions on street and highways. Improvements that have been made to the highway network, for higher levels of service by the traveling public. A new concept of social justice has evolved in which a "deep pocket" is sought to recompense persons who have suffered severe damages. There is now general acceptance that drivers make mistakes and that roadways should not overly punish them for minor transgressions. As a result, the forgiving roadway approach to highway design has been established.

Currently with these changes, sovereign immunity has been eroded or lost completely. Moreover, a series of court decisions in several states has severely limited the common law defenses discretionary and design immunity. This loss of protection has occurred during a time of litigation growth caused by the snowballing effect of successful suits and the increasing sophistication of attorneys in the field of highway tort liability.

Changes in the law, which varies among the states, have increased potential payments for tort

judgments. The movement from contributory negligence to comparative negligence no longer bars judgments simply because the driver was also at fault. Furthermore, it should be recognized that public agencies generally are held to higher standards than motorists. The principle of joint and several liability is particularly onerous for public agencies, as it enables plaintiffs to collect their entire awards from any one defendant. Recent court decisions have also expanded the scope of equitable indemnity to parties not named in the original suit, thus increasing cross complaints that may be filed against agencies, utility companies and contractors.

The principal recommendation of this synthesis is that tort liability risks must be managed. The implementation of an effective risk management program requires several steps, which include establishing organizational structure, staffing the requisite functions, publishing policies and procedures, and training agency personnel.

One portion of an overall program concerns pre-accident actions. Accidents are inherent in the nature of the highway system, and effective handling of them requires advance planning. The best method of reducing liability is through accident reduction, which should be one of the major objectives of every highway agency. The elements of such a program encompass every facet of an agency's operation, however, and the subject is well beyond the scope of this report. Nevertheless, it should be recognized that a well organized and documented accident reduction program will strengthen defense capability when inevitable accidents do occur.

One problem that an agency faces is that a plaintiff need only attack the department's actions at the accident site, whereas the agency may be forced to defend its whole program for the entire road network under its jurisdiction. For example, it may be claimed that an obstacle feature should have been upgraded to accommodate changing traffic characteristics. The agency must explain why it elected to utilize its resources elsewhere on the system. A well organized highway programming procedure is essential to defend against such allegations. The agency must show that it has the following program elements in place and operating efficiently: an ongoing data collection and analysis system to monitor its operations and identify problem locations, a method of selecting appropriate countermeasures, a procedure for prioritizing needs and scheduling improvements, and a means of evaluating project and program effectiveness. With this information in hand, it may be possible to show that the reason that a planned improvement is scheduled for a future year is keyed to the level of funding provided by the legislature. There is a responsibility, however, to warn the public of danger conditions which have not been eliminated and to seek low-cost, temporary measures for reducing hazard levels when such means are available.

Post-accident actions which may reduce liability risks include to following: instructing personnel as to their responsibilities if they are at the scene when an accident occurs, and agency investigations to augment information in police

reports. Accident data must be evaluated, as it may establish notice of dangerous locations.

To prepare for trials, procedures need to be established with regard to the release of information and production of documents. Agency personnel should be instructed as to what to expect and how to properly respond during depositions. In many instances expert witnesses may be needed, particularly when such experts are utilized by the plaintiff. It is recommended that a cadre of agency experts having good communications skills be trained and utilized. In-house experts are best used to explain agency procedures and actions. In those instance where an expert opinion is desired as to the level of safety provided or the appropriateness of performance, outside experts may well be perceived as less biased by members of a jury.

Exhibits of various kinds can be most helpful in explaining site characteristics and features to a jury. Consideration should be given to obtaining enlarged ground and aerial photographs and to the preparation of display boards and models. Other techniques such as site reconstructions have been performed -- for example, where a work site condition is no longer in place.

An effective loss mitigation program includes many facets. An aggressive program to achieve legislative change to place reasonable bounds on liability is an important program component. Consideration must be given to the means of funding tort liability judgments. The relative merits of commercial and self insurance should be explored along with coverage variations that are available. Either way, payments need to be budgeted. A decision needs to be made as to the merits of having the transportation administrator responsible for all costs associated with providing and operating the highway system including the cost of liability judgments, as opposed to such payments being made from the general fund. Risk shifting to other parties, such as contractors and lessors of agency property, can be accomplished through both indemnity agreements and insurance clauses.

Organizing the risk management function involves staffing arrangements for both legal and engineering activities. With the transportation agency a risk manager may be needed along with any additional staffing that is in order. If the organization is large, district claims officers may be needed on either a full-time or collateral basis. A tort liability committee is a useful means of operation relative to processing claims and case preparation should be identified and corrected. Examples include facilitating out-of-state travel for obtaining expert witnesses, and rapid techniques for purchasing evidence items.

The management of claims should encompass established procedures for identifying potential suits, receiving claims, maintaining the confidentiality of claims filed, controlling the release of information, and claims investigations. Other related elements which need to be established are a settlement program and safety-related training activities. To manage risk one must know the character and magnitude of

the problem. Procedures are needed which quantify potential claims and judgments and relate these to agency functions (design, construction, maintenance, etc.) and to highway elements and features (ditches, guardrail, sign supports, etc.).

The last chapter of the synthesis contains specific action guidelines for each agency function. These may be used as a checklist of ideas for consideration and implementation.

III. & IV. DISCUSSION GROUP RESULTS
Jack Humphreys

Prior to the meeting, separate lists of problems/issues for the topics of Planning, Design

and Construction (Table 3) and Operations and Maintenance (Table 4) were prepared by the workshop organizers. These were to serve as starting points for the group discussions. It was acknowledged that duplication existed between problems and lists. Groups were also told to freely add other problems/issues discussed, as well as identify solutions and/or recommend research. Results are shown below. Problems/issues numbers and short titles generally refer to Tables 3 and 4, unless a discussion group for the two major topics.

Topic 1. Planning, Design and Construction

Group 1

Problems/Issues Prioritized

1. Lack of communication to state-of-the-art engineering knowledge and research results to design, construction and maintenance personnel (New Item).
2. Problem of limited funds precluding immediate and full adoption of all recommended safety standards (Item #2, Table 3).
3. The inability to design and test safety appurtenances with unusual design vehicles (Item #3).
4. Accident problems in construction zones (Item #5).
5. Design standards do not consider all persons "legally" using the roadways (Item #11).

Suggested Solution or Recommended Research

Develop an approach (may require research) that supplies design, construction and maintenance personnel with the latest technology in regard to highway safety appurtenances and other roadway features so that the technology can be applied sooner.

The cost effectiveness approach to allocating limited funds tends to be accepted as reasonable by juries. (Juries make similar deliberations about the value of a life.) This approach should be followed. The cost effectiveness approach needs to be continually refined to take into account new research findings about both costs and benefits.

Technology does not exist to design all barriers for all vehicles. There is a need for more compatibility between vehicle and roadway designers. The minicar presents a particular problem. Need data concerning the minimum vehicular weight that can be accommodated. General consensus is to at least consider "giving notice" to vehicle operators that safety features on some or all roads have not been designed or tested with certain classes of vehicles.

More research needed to develop appropriate standards for various classes of construction zones. Need guidelines for temporary barriers. Recommend a rewriting of Part 6 of the Manual of Uniform Traffic Control Devices.

There is concern that current designs may be ignoring a large percentage of drivers "legally" using the roadway. More consideration should be given to designing for the "impaired" driver (e.g., a driver with a 0.02% BAC level). This might approximate those drivers using the roadway who are impaired by stress, fatigue, etc. Such an approach would be considered reasonable by juries.
