

MANUALS FOR TRAFFIC ENGINEERS:
AN ENGINEERING TOOL OR LEGAL WEAPON?
THE CALIFORNIA EXPERIENCE *

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Introduction

In an age of ever-expanding liability, plaintiffs have been seeking new ways to tap tax dollars as a source of recovery for their injuries. Whether this trend is justified as a necessary and appropriate way of sharing societal responsibility for taking care of innocent victims or, more cynically, whether it is acknowledged as simply finding the deep pocket, the result has been an increase in the number of lawsuits against public entities.

Along with greater interest in suing public entities has been a proliferation of legal education courses, expert witnesses and general knowledge of the subject matter. Government tort liability is no longer the esoteric domain of a few specialists. What is becoming known is that bureaucracy's bent for creating paper also creates a rich storehouse for plaintiffs to sift through. Looking for contradictions, discrepancies, variances from policy or good engineering practice, plaintiffs and their experts search for the scrap of paper or the absence of a record that will impeach the public entity engineering witness.

One of the most fruitful areas of inquiry for a plaintiff consists of the policies, guidelines and manuals of the public entity. These publications, often called "bibles" by engineers, carry the imprimatur of governmental authority and mandate. Traffic engineering manuals contain the standards, warrants and procedures for implementation of the traffic engineering aspects of a highway program. Because it has the most direct impact on the driver, traffic engineering suffers the most scrutiny when plaintiffs try to build a case against a highway department. If a plaintiff can find a discrepancy between what a manual prescribes and what exists in the field, he is halfway home. His expert can then explain to a jury why the manual is correct and why variance from it increases the hazards to a driver and consequently is the cause of the accident. The closer a particular traffic manual approaches gospel, the more serious it is to deviate from it.

* For a comprehensive discussion of this subject on a nationwide perspective as of December 1982, see: "Legal Implications of Highway Department's Failure to comply with Design, Safety or Maintenance Guidelines" by Larry W. Thomas, Counsel for Legal Research, Transportation Research Board, published in Selected Studies in Highway Law, Vol. 4, Robert W. Cunliffe, editor. National Cooperative Highway Research Program (pp. 1966-N1 through N32). A project to update this treatise is now under way.

Mandatory Duty - Negligence Per Se

One contention often made is that the traffic engineering manual sets forth the standards that a public entity is to follow and, as such, creates a mandatory duty. Deviating from the manual is a failure to discharge a mandatory duty and gives rise to liability. In California, this liability is expressed in Government Code section 815.6 as follows:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."
(Emphasis added.)

California Government Code section 810.6 provides:

"'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation."

In addition to direct liability, a public entity may be indirectly liable under the doctrine of respondeat superior. This may occur when a public employee is found presumptively negligent (i.e., negligence per se) under California Evidence Code section 669:

- "(a) The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
- "(b) This presumption may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law or ... "

The question has been: Is a standard, warrant, or guideline contained in the Caltrans Traffic Manual a "regulation", violation of which is a failure to discharge a mandatory duty? Old Government Code section 811.6 defined regulation as:

"'Regulation' means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency."

In Clemente v. State of California (1985) 40 Cal.3d 202 [219 Cal.Rptr. 445, 707 P.2d 818], the California Supreme Court held that it was not error to instruct the jury that a California Highway Patrol officer's violation of a provision of the California Highway Patrol Accident Investigation Manual was negligence per se. The court relied upon Peterson v. City of Long Beach (1979) 24 Cal.3d 238 [155 Cal.Rptr. 360, 594 P.2d 4771] and California Evidence Code section 669, supra. Because it was not briefed and was not timely raised, the court specifically declined to rule on the defense contention that the manual was not adopted in accordance with the Administrative Procedure Act and did not have the force of law.

The court ruled on this issue in Posey v. State of California (1986) 180 Cal.App.3d 836 [225 Cal.Rptr. 830]. It held that despite the word "shall" in an internal California Highway Patrol "guideline", the guideline did not have the force of law, had not been adopted pursuant to the Administrative Procedure Act, and did not impose a mandatory duty.

The matter was apparently laid to rest by an amendment effective January 1, 1988 to Government Code section 811.6, which now defines a regulation as:

"'Regulation' means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States pursuant to the federal Administrative Procedure Act (Chapter 5 (commencing with Section 500) of Title 5 of the United States Code) or as a regulation by an agency of the state pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2)."

Likewise, California Evidence Code section 669.1, effective January 1, 1988, provides:

"A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669,

unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local government entity in this state empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code), or by an agency of the United States government pursuant to the federal Administrative Procedure Act (Chapter 5 (commencing with Section 5001) of Title 5 of the United States Code). This section affects only the presumption set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law."

Since traffic engineering manuals in California are "guidelines", not "regulations", they do not impose a mandatory duty; and variance from those guidelines is not negligence per se.

Even if a standard does appear in a statute, one must look carefully to see if a mandatory duty is indeed created. A good example is California Vehicle Code section 21459 concerning no passing striping:

- "(a) The Department of Transportation in respect to state highways and a local authority with respect to highways under its jurisdiction, is authorized to place and maintain upon highways distinctive roadway markings as described and with the effect set forth in Section 21460. {California Vehicle Code section 21460 provides for the use of double stripes.}
- (b) The distinctive roadway markings shall be employed to designate any portion of a highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of the marking or to indicate no driving to the left as provided in Section 21460, and shall not be employed for any other purpose.
- (c) Any pavement marking other than as described in this section placed by the Department of Transportation or any local authority shall not be effective to indicate no driving over or to the left of the marking."

Because subdivision (b) of the statute provides that "distinctive roadway markings shall be employed", plaintiffs have contended that failure to do so is a violation of the statute and is negligence per se. It is a failure to discharge a mandatory duty. The statute satisfies

the requirements that the "duty" be imposed by an "enactment"; however, is the duty mandatory? At least one court, in an unpublished opinion on the issue, held that it was not. Subdivision (a) provides that a public entity is "authorized" (but is not required) to prohibit passing. If it elects to do so, it is then required to use the distinctive roadway markings under subdivision (b). This construction is consistent with subdivision (c) which prohibits the use of any other type of pavement markings. Thus, when read together, Vehicle Code sections 21459 and 21460 provide the exclusive means for prohibiting passing by the use of double stripes, but the decision to do so at any particular location is discretionary, not mandatory. (See also Gov. Code, section 830.4, providing immunity for failure to provide distinctive roadway markings and Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) section 3.39, p. 249).

Standard of Care

Failing to establish that a traffic engineering manual provision creates a mandatory duty, a plaintiff will contend that it is nevertheless relevant on the issue of standard of care. That is to say, the manual represents the public entity's own determination of what standards of performance apply in a given traffic engineering situation. While the standards do not have the force of law, the failure to meet its own standards is certainly probative evidence of negligence. The rationale for this is that presumably the public entity was in the best position to make, based upon sound engineering judgment, a realistic appraisal of what level of performance could reasonably be attained. It would not set unachievable goals. As a result, failure to follow the manual is "one factor to be considered" by a jury in making its factual determination of liability. (Curreri v. City etc. of San Francisco (1968) 262 Cal.App.2d 603 (69 Cal.Rptr. 20); Van Alstyne, supra, section 2.48.)

Plaintiffs are not limited to using only the public entity's own traffic manual as a standard of care. Other recognized guidelines may serve equally well. The Manual of Uniform Traffic Control Devices is not the "bible" in California, but it is nevertheless a widely recognized authority and is the official standard in many states. Plaintiffs have argued that since it is the so-called "national standard" the MUTCD should carry greater weight than a state's own traffic manual. This can be a compelling argument, especially when the accident involves an out of state driver. Thus, a public entity can be judged by a jury against a standard of care that is different than the standard of care the public entity itself uses. This obviously puts pressure on a state to make sure its traffic engineering manual conforms to the MUTCD and, if not, that there are documented sound engineering reasons for not doing so.

The language in the traffic engineering manual is extremely important. Most directions are couched in terms of "shall", "should" or "may". The

word "shall" refers to a mandatory situation where certain requirements must be met. The word "should" is advisory; the direction is recommended but not mandatory. The word "may" is permissive; no requirement is intended. Keeping in mind that these words do not have automatic legal consequences because they do not refer to "regulations", they nevertheless will have legal significance for a jury. If a public entity deviates from a "guideline" that is considered by the public entity to be "mandatory", it is assured that a jury will find that such a deviation falls below the standard of care appropriate to the circumstances. This is negligence. As the guideline moves from "mandatory" to "advisory" or "permissive", the particular facts of the case will tend to dictate the result rather than the mere deviation from the guideline. Failure to follow a recommended guideline (i.e., "should") can be explained away if it is based on sound engineering judgment and is well documented.

Conclusion

Thus, traffic engineering manuals are fertile ground for plaintiffs and their experts to uncover evidence to build a case against a public entity. They can no longer be viewed as "cookbooks", mere in-house directions to staff so that the job of running a highway program can get done. Depending upon the state jurisdiction, these manuals may have the force of law. In California, by case law and statute, their effect is less compelling at present. Although they do not create a mandatory duty, traffic engineering manuals are, even in California, strong evidence of a proper standard of care. Since engineers deviate from the manuals at their peril, their standards and warrants must be attainable. Finally, recognizing that the manuals cannot cover all situations, the engineering staff must document its decisions. Undocumented decisions can be made to look like an act of whimsy, indeed, turning the manual into the legal weapon both engineers and state attorneys seek to disarm.