Feature Articles

Responding to Tort Litigation

A Michigan Case History

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Before 1965, lawsuits against the state of Michigan could only be initiated with prior approval of the state, which effectively discouraged such action. As a result, tort litigation was of little concern.

Michigan's Act 170 (Public Acts of 1964) drastically modified procedures followed in litigation against the state and defined (though rather ambiguously) the state's responsibility to construct, maintain, and operate safe roadways. According to the Act, "Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel . . . . Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agencies." The statute of limitations permits suits to be initiated up to 2 years after damages have occurred.

The impact of this law has been tremendous. At the present time, we have 184 damage suits pending. They claim more than $151 million and allege damages ranging from a few dollars to more than $10 million. The consequence of losing all these cases would be catastrophic. Fortunately, however, most judgments and settlements are usually a small fraction of alleged damages. For example, during 1973, the Department of State Highways and Transportation paid approximately $2 million in settlements and judgments. It is common to claim large sums in hope of ultimately obtaining a more reasonable settlement. We believe through our experience that the practice of plaintiff attorneys of accepting cases on contingency for a percentage of the final settlement has contributed to both the number of pending cases and the size of alleged damages.

Three significant judgments issued between 1965 and 1975 gained some national attention and served to focus our attention on the seriousness of governmental liability.

In 1973, the plaintiffs in Williams versus the state highway department were awarded $1.1 million as a result of a collision at a signalized intersection in which a young woman was seriously and permanently injured. The plaintiffs alleged the traffic signals were green in all directions. Our engineers thoroughly investigated this claim and concluded that for the signal to be green in all directions would have required correction by maintenance forces and our records revealed no such maintenance activity. However, the testimony of several defense experts appeared to be disregarded in favor of a few undocumented, nonspecific claims that "all greens" had occurred previously. In our opinion, the verdict was significantly affected by the presence in the courtroom of the injured plaintiff and the resultant reaction to her serious injuries and substantial medical bills.

Woods Estate versus the state highway department involved a motorist traveling through a construction zone on the state trunk-line system. He lost control of his vehicle, struck some temporary guardrail, and was killed. The construction zone was well signed, including over-

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Examples of traffic control devices that do not conform to the Manual on Uniform Traffic Control Devices are (a) stop sign used in conjunction with traffic signal, (b) single signal face for approaching traffic, (c) inadequate vertical clearance of signal head, (d) no railroad cross buck for approaching traffic, and (e) poorly maintained pavement markings and no advance markings for the railroad crossing.

head lighting and flashing beacons, and incorporated a reduced speed limit. In our opinion, the driver's failure to heed some 17 advance warning signs plus his high blood alcohol level were primary factors in the accident. However, the court concluded that some pavement markers were faulty and awarded $380,000 even though contributing negligence on the driver's part was acknowledged.

The third case did not occur on the state highway system but involved an accident in the small resort community of Wolverine Lake. A pickup truck ran through a T-intersection and down an embankment. The passenger was paralyzed. The details of the trial were predictable: The community's traffic control signs were obsolete, in disrepair, and not in conformance with the Manual on Uniform Traffic Control Devices. The court awarded the plaintiff $500,000. An unusual and unfortunate aspect of the settlement was that the village had only $100,000 in liability insurance. As a result, the judgment dictated that an additional $20,000 a year be paid for 20 years, causing fears that it would be necessary to increase property taxes to cover the annual payments.

Although these awards are unusual, they do reflect emerging judicial attitudes toward roadway responsibility. We must accept litigation as a fact of life and look critically at every roadway for its potential liability. Judicial decisions are establishing new precedents and are liberalizing areas of responsibility and liability. We can no longer resist our participation; it is mandatory. We can only seek to protect resources by developing effective and judicially sound responses to the problem (and thus protect ourselves from unjustified litigation) and by improving the safety on highways.

Development of a positive program in response to tort litigation requires, first, a clear definition of what the considerations of liability are. We are able to identify 5 factors that we believe represent those necessary to establish liability: existence of a hazard that is the proximate cause of the accident; knowledge by the responsible agency of the hazard; failure to correct the hazard; failure to warn the motorist of the hazard; and availability of a method, sufficient time, and adequate funds to correct the hazard.

Although the requisites of liability are clear, much interpretation remains to be given by the courts. What constitutes hazard and knowledge of hazard are not yet clear and require interpretation of the term "reasonably safe for travel." Ultimately this question is faced in every case.

Warning the motorist of the hazard may suffice for the short term in certain instances such as slippery-when-wet pavements, bumps, and washed-out shoulders. However, the courts do not appear willing to accept warnings as acceptable in the long term. Furthermore, warning may not suffice, even for short periods, for certain hazards, such as potholes and inoperative traffic signals, that should be immediately rectified.

In our opinion, effective response to tort legislation is very much related to the last condition of liability: availability of time, method, and money to correct the hazard.

The courts do not seem disposed to superimpose their judgment as to the proper engineering solution to an alleged hazard. If it can be shown that a system exists

Obsolete traffic signing in the resort community of Wolverine Lake resulted in a half-million dollar law suit.

that adequately identifies hazards, that programs have been implemented that address these hazards on some rational priority system and that successful results have been documented, the courts are inclined to rule more conservatively.

What then is an effective response to this problem? In Michigan, we are using a system that we are actively seeking to improve.

The foundation of any legally defensible safety program is an effective accident surveillance system. Most states, including Michigan, have some type of locating system to identify concentrations of accidents. Although such a system is certainly useful, we believe that a much greater degree of sophistication is necessary to ensure that all problems are identified. Most operational surveillance systems use a minimum number or rate (or a combination) to isolate high-accident locations. Such a method fails to account for the varying characteristics of the different road types as well as year-to-year accident fluctuations, which have been significant since imposition of reduced speed limits and awareness of energy conservation.

We believe a system must be developed that categorizes road types with similar accident characteristics and, on an annual basis, calculates average experience and statistical deviation bands. In our opinion, the true definition of a high-accident location is one that experiences a significantly greater number of collisions than the average for that roadway type.

Perhaps even more important, an effective surveillance system must address concentrations of accident types. For example, a location experiencing 10 right-angle collisions could well merit more attention than one with 20 random occurrences. Our present reporting system includes this information. We believe a statistical analysis of accident categories on each roadway must be accomplished annually, and locations must be identified that experience disproportionate concentrations of accidents. We believe such a system will yield the most cost-effective safety projects and operational treatments.

The question, Why does somebody have to be killed before something is done? is commonly asked and reflects a lack of understanding of the methods used to develop safety-oriented projects and the emphasis placed on solving existing documented accident problems. Techniques to predict accidents are being developed, particularly relative to roadside features on freeway systems.

Identification of high-accident locations is, of course, only the first step in an effective response to safety problems. A clearly defined method of review, analysis, and action is necessary to ensure that all identified locations are subjected to critical engineering appraisal. The courts appear to accept that a cost-effective solution is not possible for all locations, but we must be able to show that every location identified has been subjected to some degree of review.

We believe the following 11-step review-analysis procedure in Michigan has been successful in satisfying these criteria.

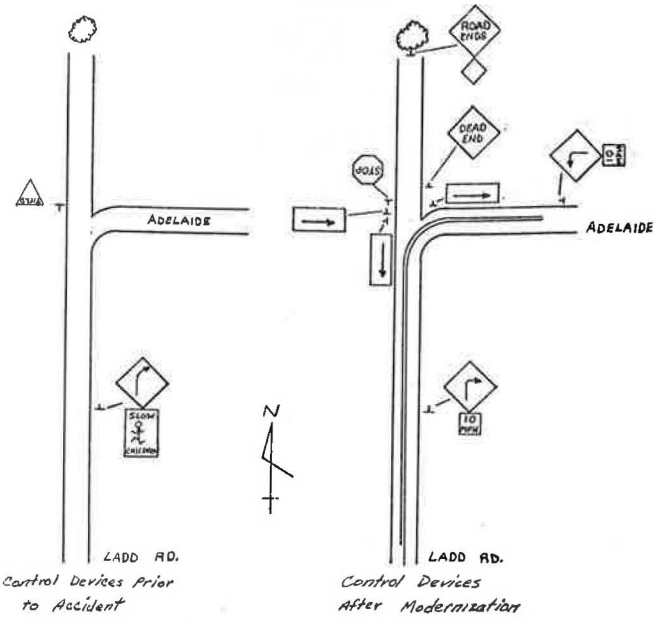

Figure 1. Control devices at the Wolverine Lake accident site before and after modernization was carried out subsequent to the accident.

1, Review high-accident lists, screen out those locations where recent projects have been completed, projects are proposed, or traffic patterns have changed;

2. Assemble collision diagrams and other supporting data for remainder of locations;

3. Review collision diagrams in the office, identify accident patterns, and collect any additional data, such as signal timing and skid tests, before field review;

4. Review in the field with a multidisciplinary team composed of operations, geometrics, safety, and district engineers;

5. Define the problem and possible alternate treatments;

6. Develop alternate schemes and cost estimates;

7. Evaluate cost effectiveness of alternate schemes;

8. Select the most cost-effective treatment for each location;

9. Program most cost-effective treatments based on some priority system;

10. Document action for all high-accident locations identified, including those where treatment was deemed not cost effective; and

11. Follow up to ensure implementation.

Step 9 is most important. The courts will not overlook, and we should not, our method of project selection. It must be based on some rational priority system, designed to justify that all available funds were expended in the best interests of safety. A system of this design will also justify not reacting to every accident problem.

The era of governmental immunity has passed. We cannot eliminate litigation or responsibility for negligence. We can only strive to protect the public's investment against adverse judgments that result from our failure to respond quickly and effectively to unsafe highway conditions.