

TRANSPORTATION TORT LAW

JAY L. SMITH, LAWRENCE A. DURANT, NORMAN N. HILL,
AND CHARLES RAYMOND LEWIS II

Jay L. Smith is Assistant Chief Counsel for Risk Management, Missouri Highway Transportation Commission; Lawrence A. Durant is General Counsel, Louisiana Department of Transportation and Development; Norman N. Hill is General Counsel, Oklahoma Department of Transportation; and Charles Raymond Lewis II is Planning and Research Engineer, West Virginia Department of Transportation.

As the new millennium approaches, state and local transportation agencies are experiencing a dramatic increase in tort litigation involving claims for personal injury and property damage. The costs associated with these claims have added greatly to the overall cost of constructing and maintaining the nation's highway transportation infrastructure, reducing the percentage of funds available for construction, reconstruction, maintenance, and measures aimed at improving highway safety.

Evolution of Transportation Tort Law

The primary reason for the great increase in claims against state and local transportation agencies during the last 50 years has been a weakening of the doctrine of sovereign immunity among most states. Today sovereign immunity runs the gamut from absolute immunity to none at all. Between those extremes are limited forms such as discretionary immunity, design immunity, and caps on damage awards.

Another driver of the evolution of tort liability during the last century has been the tendency of legislatures and courts to protect and compensate injured persons at the expense of business and government. Product liability, medical and legal malpractice, and class action suits are but a few examples. In most states, absolute bars to recovery, such as contributory negligence and assumption of risk, have been eliminated and replaced by the doctrine of comparative negligence.

The exposure of public entities to tort liability has also increased as the practical science of transportation engineering has improved, resulting in greater public expectations of the transportation system. During the period of rapid highway expansion, national engineering organizations were formed, including the American Association of State Highway and Transportation Officials. These

organizations established and adopted standards that serve as guidelines for the design, construction, and maintenance of safe roads, highways, streets, and bridges. These guidelines have been adopted by most states.

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. Yet such guidelines naturally change as new engineering techniques for construction and safety are developed. 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 department of transportation has the resources needed to immediately bring all older roads and bridges up to current AASHTO guidelines. Nonetheless, the issue of AASHTO guidelines has become a fertile field for tort litigation and is often raised by plaintiffs' attorneys in an effort to establish negligence on the part of state DOTs.

As the current millennium draws to a close, an established legal principle in tort law is that DOTs have 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 following are the most common DOT activities that give rise to tort claims:

- ◆ Design, construction, and reconstruction of roads, streets, highways, and bridges
- ◆ Maintenance of the driving surfaces 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 obstructions—such as trees, rocks, utility poles, culverts, signs, mailboxes, and debris—on roadways and adjacent rights-of-way, or the placement of warnings and protective devices

◆ Signing, signaling, and maintenance of at-grade railroad crossings

Very few highway crashes, however, are solely the fault of roadway conditions or the activities of DOT employees. Drivers cause or contribute to crashes through negligence, the use of drugs and alcohol, and fatigue. Transportation agencies can point to these causal or contributing factors in their defense against tort claims.

Impacts of Technology

The most significant influence on the practice of transportation tort law in the 21st century is likely to be technology and innovations in its use. Transportation tort lawyers will have to address a number of issues that arise when new technology is implemented, as well as when the technology fails and a loss results. In addition, transportation lawyers face the challenge of using existing and emerging technologies to enhance the accessibility of information, experts, and legal authority, as well as to organize and present the information needed to represent the transportation agency.

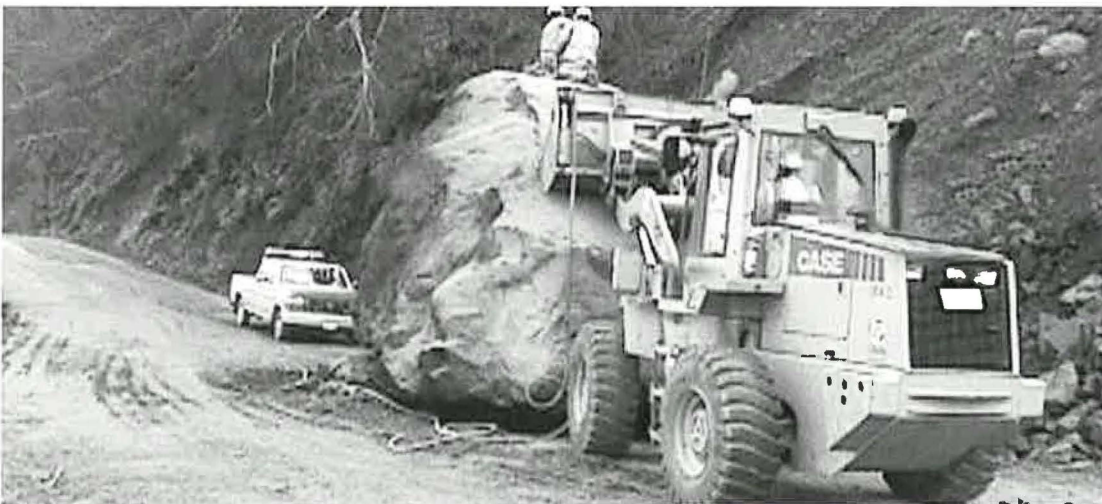
Transportation Systems and Operations

New technologies such as traffic management systems offer great potential for improving the safety and efficiency of the nation's transportation infrastructure. At the same time, use of these systems can involve new duties, risks, and liabilities for the

transportation agency. For example, 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 an agency has begun providing this warning service, it may then have assumed the duty to do so. The plaintiff's bar can also be expected to argue that the transportation agency has assumed liability should the service fail to live up to some standard of care and timeliness. Indeed, there have already been cases in which transportation agencies have faced claims based on the contention that they failed to warn of dangerous traffic conditions ahead. And as the next logical step is taken from monitoring and warning to positive control of traffic flow through such measures as closing of ramps and alternative routing, agencies may well be assuming additional duties and corresponding liabilities.

Transportation tort lawyers are also likely to encounter new issues in commercial motor vehicle operations. Systems that automate the checking of a vehicle's credentials and weight are already in place. The near future could see the implementation of technology that would allow for automated safety checks of vehicle systems. Use of such systems could pose tort liability for the transportation agency should it fail to detect and stop an illegal or dangerous vehicle that is subsequently involved in an accident.

Vehicles that use the transportation infrastructure are changing as well. Pressure continues to increase for safer, cleaner, and more efficient vehicles of every type; this pressure is felt in the form of federal legislation and regulations, state and local requirements, and public demand. Both improvements in current technology and the implementation of new technologies will be needed to meet these demands.



DON CLOTFELTER, *ExpressTransportation News*, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Among the most common department of transportation activities that give rise to tort claims are control measures and warnings involving erosion and falling rocks. This landslide closed State Route 112 in Washington State.

The benefits of cleaner, safer, and more efficient vehicles are self-evident; however, some of the technologies designed to achieve these benefits may have other effects on the transportation system. Alternative-fuel vehicles, such as electric cars, for example, would reduce the amount of pollutants in the atmosphere, but their extensive use would also decrease the traditional funding base of motor fuel taxes used to build and maintain the transportation infrastructure. Thus whether the electric car or a different alternative-fuel engine became accepted into general use, the new technology would likely necessitate revisions in the funding for the transportation infrastructure of highways and mass transit. Failure to meet this challenge could lead to a chain of consequences: decreased funding, resulting in less maintenance and new construction, followed by deterioration of the highway system, leading to greater numbers of crashes and claims and to increased tort exposure and payouts, resulting in further reductions in funding for transportation infrastructure.

Litigation Practice

Technology can also be expected to change litigation practice in the 21st century. Today, for example, there are jurisdictions in which it is no longer necessary to travel 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 the click of a mouse; opposing counsel can receive a copy simultaneously. In the near future, voice recognition technology will begin eliminating the need to spend hours drafting documents with pen or keyboard; associated word processing systems will format and formalize the resulting draft into a final document. By reducing the mechanical burden, these systems may enable practitioners to devote more effort to the creation of clear, comprehensive, and convincing documents.

Going to court will likely take on new meaning in the future as well. Already a significant number of disputes are being settled through one of the many forms of alternative dispute resolution, without a lawsuit being filed. When a case is filed, courts are encouraging, and even requiring, various forms of alternative 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, one can easily foresee trials taking place with the judge, witnesses, and attorneys interacting through video from different locations. It may even be possible for a jury to hear

evidence and view exhibits by electronic means. The technology needed for the purpose, although rather costly, already exists. Starting a trend in this direction may simply be a matter of refining the technology and having some innovative court try the experiment.

Technology will affect not only the physical location of court proceedings, but also the methods used by transportation tort lawyers 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 increasingly created and retained in electronic format only. The discovery production of such documents on disk has both advantages and disadvantages. There is a certain attraction to being able to fulfill discovery demands with a few disks instead of boxes of paper documents. Yet there are also concerns about potential alteration of the documents after production, and about whether the documents can be accessed without the sometimes very expensive programs and hardware with which they were created. Before discovery in electronic format becomes the norm, jurisdictions may need to impose program and format rules. Given the speed at which current technology and software become obsolete, however, mandatory requirements may not be a practical answer.

The ability to transfer documents directly from the computer disk on which they are stored to a courtroom video display already exists. The practice will grow increasingly common as the technology becomes more widespread and affordable, and more courtrooms become equipped with the necessary hardware. The ability to use this and other new technologies during trial will allow for better-organized and more effective presentation of evidence, while eliminating the need to search through boxes of documents and stacks of exhibit boards for a particular item. In the area of both fact and expert witness, moreover, technology that enables tort lawyers to illustrate their testimony through graphics, reproductions, and simulations continues to evolve. Such technology can be used to present to the court what the advocate believes occurred at a crash scene.

Conclusion

Advances in technology are enhancing the ability of transportation tort lawyers to represent transportation agencies, yet each such advance raises issues that must be addressed if the new capabilities are to be used effectively. Technology will eliminate some methods for content-based retrieval

continued on page 37