
The Impact of Tort Liability On the Provision of Transportation Services

by David C. Oliver

Much has been written on the subject of tort law in recent years. Newspapers, magazines, and professional journals have focused on the role of lawyers and insurance companies. Most of these articles have created a cacophony of crisis.

Another side exists, however, that evokes a depth of human emotion. For example, there is the young quadriplegic who feels like a "trapped animal caught inside his own skin," or describes herself as "a prisoner locked inside a body that cannot make purposeful movement or express pain, apprehension, or fear." Or how about the words of a young woman with terrible facial scars, who says:

Going to a supermarket can be devastating. People passing you in the aisles . . . each trying not to stare, turning their eyes away in shock or fear or pity . . . the checkout girl who must face you across the counter for what seems like an eternity. Going to a new doctor . . . having to disrobe. Passing a group of playing children who have not learned enough to keep silent as their tactful elders do.

Another paraplegic, 21 years old, describes her feelings:

I wish there was some place I could go . . . someone I could tell about how I want so very much to run around in blue jeans this summer and be a part of the crowd; to be normal, and do normal little things, like splashing in the rain, or riding my motorcycle, and making guys stare and being real and a

girl and alive instead of being half dead.

No amount of money can restore these people—economic compensation is little consolation to someone blinded in an automobile crash who will never see another sunset. Tort law, however, is not about sympathy or charity—it is about compassion, fair play, and justice. And if tort law makes you reconsider one action in the design, construction, and maintenance program under your command, if it provides you with an insight into new developments and standards, if it leads you to incorporate thinking about safety in your everyday operations, then tort law has done its job.

General Duties and the Law of Negligence

We are in an era of confusion because we are in an era of transition both in the fields of law and government service. For several centuries systems based on principles of English common law incorporated protection of its governmental entities under the theory of sovereign immunity—in essence a theory that held that agents of the king could not be held liable for conduct in the course of the king's business. But this wall of immunity has been reduced to rubble and, with its dismantling, the public treasury has been exposed to lawsuits. The availability of public funds is supposedly infinite, at least in comparison with the funds available to individuals.

Thus, we have seen the development of the "deep pocket" theory in tort law. In essence, this theory holds that an injured party seeking redress is best advised to go after the most available source of funds.

The Four-Point Test

Tort law at its most basic is that branch of law that provides a remedy in a situation where one party is injured at the hands of another. Thus, tort law concerns itself with negligence—conduct that creates an unreasonable risk of harm to others. In establishing negligent conduct, there is a four-point test that must always be satisfied:

1. It must be shown that there was a duty to conform to a particular standard of conduct that would protect the plaintiff against unreasonable risk. In this regard you should be aware of the concept of the "reasonable man." The reasonable man concept means that you as a highway engineer, planner, or administrator will be required to exercise the knowledge and skill of a reasonable and competent engineer, planner, or administrator in dealing with the design, construction, and maintenance of highways—and not that of the average or common man as has often been mistaken. This is a critical point because it brings into play manuals (e.g., *Manual on Uniform Traffic Control Devices* [MUTCD]) and specifications (e.g., standard operating procedure), as well as guidelines and statutes.

2. It must be shown that the defendant breached this duty. Liability does not spring forth fully clothed from the loins of Athena. Before your agency is found liable it must be shown that you should have done something that was not done (e.g., erected warning signs) or that you did something less than adequately (e.g., placed a slippery when wet sign at a flood site).
3. It must be shown that some harm (e.g., death or injury) came to the plaintiff as a result of your behavioral deficiency.
4. It must be shown that there was a connection between your conduct and the plaintiff's injury—that but for your negligence the injury would not have occurred. This is called proximate causation and it is the most difficult concept in tort law for a lay person to understand. It is also the concept undergoing the most rapid judicial liberalization today.

General Guidelines

In seeking to satisfy this four-point test, the courts have developed certain general guidelines.

The state is not an insurer of the roads or a guarantor of absolute safety. However, a motorist does have the right to presume that a highway is safe for usual and ordinary traffic and is not required to anticipate extraordinary dangers, impediments, or obstructions to which attention has not been directed or for which warnings are not in place.

Highways must be maintained in a way that is reasonably safe for travel. This includes a duty to exercise reasonable care and prudence. Although wide latitude does exist in the exercise of administrative discretion, a road reasonably safe for travel, at least in the eyes of

the courts, is one maintained within accepted and understood criteria, under generally promulgated engineering standards.

Continual supervision and inspection are axiomatic. There is a noticeable connection here between positive administrative attitudes and negligence cases. Negligence is predicated on knowledge or information of the existence of a dangerous or defective condition and a subsequent failure to safeguard such condition.

The common thread in these principles is awareness. For example, the motorist is not required to anticipate defects, you are. Although the courts recognize that we may never have a perfect highway system, and although you are not required to go to the limits of human ingenuity to make certain each and every instance is completely safe, what defense can you raise if you don't have a good, documented system of review and inspection?

Documentation

Documentation means keeping records. But I would caution you here that keeping records in a file drawer without incorporating them into project reviews, rehabilitation, and upgrading programs is as worthless as not having any records. Be aware, document and establish priority lists for repair work, incorporate temporary warning signing, and you will be able to defend yourself in almost any tort action.

On daily travel, work related or not, transportation employees should be on the lookout for problems—vandalized signs, malfunctioning traffic signals, pavement or guard rail problems, or even shoulder drop offs. Also, supervisory personnel can be innovative in using sources to identify problems. In addition to routine personal inspection, you can review police accident reports, headquarters computer printouts, citizen complaints, reports from regional maintenance personnel, review of federal and state manuals and research reports, and even newspaper articles.

Forensic Engineering

I note with dismay the emergence of a new practitioner, the forensic engineer. When used in a legal sense forensic

means belonging to courts of justice. Forensics is the use of a branch of science to enable a court of law to arrive at a proper conclusion on a contested question involving life or property. A person involved in forensics is an advocate or a pleader of causes who practices in a court.

Obviously, professional engineers develop expertise in one or more areas. Our transportation networks and our traffic control systems have reached a level of complexity difficult for a lay jury and even a judge to understand. Your professional expertise is valuable to the resolution of complex problems in a litigation scenario. But forensic engineers, as opposed to civil engineers or traffic engineers, are in danger of becoming the emues of the profession.

Professionalism and Ethics

A trend exists today to expand on the meaning of professionalism. For example, we now know the emphasis that must be placed on the marketing of services. True professionalism must remain disinterested, responsible to others, and specific in function. For all of us who deem ourselves to be professional, our influence derives in part from the performance of specific functions necessary to the operation of the social system as a whole.

The success of forensic engineers will depend on sound engineering, and it is necessary for organizations such as ITE to promote sound engineering as a goal. Advocacy has its dangers—when it becomes self-serving it will result in the loss of respect and prestige. Some in the profession are touting their experience as the key to providing a client with an "extra edge" in a tort liability case. This to me crosses the fine line of ethical behavior.

When you enter the realm of the court the sole end is to serve the interests of justice by rendering honest and impartial opinions. I caution you not to think for one moment that because you are under oath and attorneys are not that there is a distinction in our responsibilities. Attorneys are bound by a Code of Professional Ethics and must neither subvert the truth nor seek from others untrue opinions. And, if you believe that we practice law differently or if you have encountered attorneys who did not seek the truth, then you should remove your-



David C. Oliver is an attorney advisor in the Office of Chief Counsel, Federal Highway Administration. He is currently the senior attorney for truck sizes and weights and the 55 m.p.h. speed limit. Oliver was previously with the Transportation

Research Board and the Copyright Office of the Library of Congress. He received his J.D. from Washington and Lee University and his L.L.M. in international law from Georgetown University. He also has a certificate in oceanic education from the University of Virginia.

self from forensics altogether and report the miscreant. If you do less, beware, for the old adage holds true, "If you lie down with dogs, you will share their fleas."

If you do become an advocate, you must never think in terms of serving a client in a judicial context, that is a lawyer's role. In the current onslaught on government agencies tort suits are increasing every year. Highways once thought to be engineering marvels are now being categorized as "killer highways." You could be sued for deficient design, poor maintenance practices, and defective operations in allocating budgetary resources. And yet in each and every legal challenge there will be at least one and maybe more of your fellow professionals testifying against you. The wheel appears to have come full turn. To my way of thinking the proper practice of forensic engineering is within the government agencies under attack. Forensic engineers should be registered and certified and should be available at the call of the court—to either party—and at established hourly rates.

An Example

To illustrate some of the above points, I'd like to discuss the case of *Ofstedahl v. City of Phoenix*, 628 P. 2d. 968 (Arizona, 1981). A driver was injured in a two-automobile accident at a construction site. Conflicting evidence indicates that coning at the approach to the lane closure at the site was either 16 or 80 feet. There was one warning sign—a tripod with three red flags and a sign advising motorists to "Keep Left." The sign was located within the taper at the start of the taper near the closed right-hand lane. The accident occurred adjacent to the start of the cones. The MUTCD was introduced into evidence. It requires two advance warnings, one at 1,500 feet and another at 1,000 or 500 feet displaying a graphic pictorial illustration of the lane change. It also provides that the taper should be extended 500 feet. The court cited the MUTCD as follows: "An inadequate taper will almost always produce undesirable traffic operations with resulting congestion and possibly accidents through the area." On this point the court found the city negligent, "It is therefore clear and such issue is not disputed . . ." But, for our purposes here, I would like to discuss the involvement of

plaintiff's expert witness, an accident reconstruction expert, who testified extensively on the negligence of the city in not properly warning the public of the lane change. He also testified that the accident was directly related to the failure of the city to have proper warnings and taper to the warning cones, as follows:

In my opinion the movement of the Ofstedahl vehicle initially, the brake application was from something in front of her because her lane was open. She was in that lane . . . The skid marks clearly show she was already in that lane, so, that would have been something from in front of her, other traffic, the movement, whatever it was went away because that hazard was eliminated because she then released her brakes and turned her vehicle to the left. That type of evasive action is generally from a stimulus from the side and not from the front. So, it would be my opinion that a vehicle was in front alongside Mrs. Ofstedahl at that time and was crowding and then in response to that she put left steering input into the car and lost control of it.

The defendant city moved to strike that portion of the testimony insofar as it related to inferences and speculations based on conjecture and surmise and not on the physical facts. The expert's foundation for expertise was also challenged as he was an accident reconstruction expert and not a "human fac-

tors" expert. The testimony was stricken and on appeal this was upheld as the court found that his attempt to read the mind of the injured party was not proper opinion evidence in his line of expertise because he was not a human factors expert.

In the case, there was an obvious indication of negligence on the part of the city, but the "expert" overstated his client's case. We are unable to ascertain the final outcome of the case as it was remanded for a jury. In this case, plaintiff would probably receive a substantial settlement because the MUTCD performed the same role as a human factors expert. Remember, the MUTCD clearly warned of the dangers present in inadequate taper situations.

The Human Factors Expert

What role could a human factors expert have played? There are over 3,000 such practitioners currently available in the United States.

What questions are they normally equipped to answer? Obviously, there are several types of error-inducing design features, among them a failure to account for human limitations (i.e., requiring an unrealistically short reaction time). For example, the American Association of State Highway and Transportation Officials geometric design standards cite 2.5 seconds as the value to

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be used for the time required from the moment something becomes visible until the brake is applied. But even this number may be too low for many situations. As a recent article in *Trial* (October 1984) titled, "Human Factors Specialist," states that when the stimulus is unexpected or complicated or when the decision about how to react is difficult, the time required to respond may rise sharply. Designs that require difficult sensory discrimination are design problems—this is why the MUTCD was developed to relieve the pressure on drivers to make these sensory discriminations. In *Ofstedahl*, the violation was so obvious as not to be in doubt, but in a close call situation, a human factors specialist could provide invaluable proper forensic engineering.

Conclusion

So, where are we heading in the future? You are aware that we face a problem with the current tort system. Resources are limited and it seems that more effort is currently being expended to defend against tort suits than in providing transportation and other services. Many approaches are being proposed under the heading of tort reform.

The most popular approach currently being taken is to limit the amount of recovery in a court case. Legislatures in 28 states have taken action this year ranging from the abolition of joint and several liability to placing a cap on noneconomic damages, limiting awards for pain and suffering, and requiring periodic payments rather than lump sum payments.

Other proposals address the current system of contingency fees whereby a lawyer is paid by a percentage of a judgment. The most talked about reform would institute a sliding scale of compensation, which would be designed to provide more of a settlement for the injured party while assuring the attorney a fair payment.

Another proposal is to use alternative methods of resolving disputes (e.g., arbitration, mediation, or mini-trials in an administrative forum), which will relieve the pressure on the current system.

Finally, there are ongoing discussions on ways to discourage those who bring frivolous suits, by fining an attorney who files such an action or by forcing the losers to pay court costs or winner's expenses.

Whether these methodologies will succeed remains a question for the next decade. However, I would like to finish this discussion by emphasizing the fact that one of the primary goals of tort law is to bring about behavioral modification. In considering tort liability and what it means to you, I would ask you to reflect on your maintenance practices and your compliance with engineering standards and your use of professional engineering judgment. Finally I am asking you to recommit yourselves to building and providing the best and safest highways known to man. If we can do this collectively, the problem of tort liability will resolve itself. ■