

# Chapter 12

## TORT CLAIMS

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## CHAPTER 12 - TORT CLAIMS

### 12-1.00 INTRODUCTION

Mn/DOT personnel, particularly those involved with maintenance and traffic control are becoming increasingly involved in a field of litigation that was recently of concern only to attorneys. Today, it is essential that state and local transportation agency staffs become aware and keep abreast of highway law in general and the legal elements of functional operational practices in particular.

This Chapter is a basic discussion of a complex subject. It is intended to alert Mn/DOT personnel of the need to recognize and respond to the possible consequences of failure to maintain and safeguard the highway system. It also provides guidance on responding to outside requests for information and for responding to a lawsuit.

#### 12-1.01 Background

At one time, government entities were generally immune from lawsuits on the theory of "sovereign immunity" derived from English common law. Under the sovereign immunity doctrine, a government entity can be sued only if it consents to the suit in advance.

Over the past few decades this situation has changed dramatically. Sovereign immunity has been eroded through the actions of courts and/or legislatures and now survives in less than five States.

The State of Minnesota lost its Sovereign Immunity in 1976. At that time the State Legislature passed the Tort Claims Act which defines the conditions under which the State, their agencies, and their employees may be held accountable for damages resulting from the State's negligence.

#### 12-2.00 Glossary

**Claim** - A request for compensation for damages caused by the negligence of Mn/DOT or a Mn/DOT employee, authorized by Minnesota Statutes Section 3.736.

**Claimant** - The person filing a claim.

**Defendant** - The person or persons in a lawsuit against whom the plaintiff has initiated a claim seeking some kind of relief.

**Lawsuit** - A legal action filed in a court-of-law alleging negligence by Mn/DOT or a Mn/DOT employee and requesting compensation for damages.

**Plaintiff** - The person or persons in a party who initiates a lawsuit for some kind of relief, typically monetary damages.

**Tort** - A tort, in legal terminology, is a civil wrong other than breach of contract, for which a court of law will provide a remedy in the form of an action for monetary damages. Torts can be either intentional (e.g., assault and battery, false imprisonment, trespass, and theft) or unintentional (e.g., negligence). The primary concern to highway agencies are allegations of negligence.

**Tort Liability** - Liability for a tort (or tort liability) is the legal obligation to pay money for damages to the person injured or damaged. More than one person or organization may be liable for damages arising out of the same incident. In the case of a traffic crash, there may be several negligent parties, including the driver(s), contractor(s) working in the area or the Department of Transportation.

## 12-3.00 TORT LIABILITY

### 12-3.01 Basic Characteristics of a Tort

In order for Mn/DOT to be liable for a tort claim, three elements must be present:

1. Mn/DOT must have a legal duty to the plaintiff to perform a particular task;
2. Mn/DOT must have been negligent in its duty to perform that task; and
3. The damages incurred by the plaintiff were caused by the negligent performance of that duty.

### 12-3.02 Legal Duty

In tort law, duty is an obligation requiring persons to conform to a certain standard of conduct for the protection of others against unreasonable risks. Mn/DOT owes certain duties, specifically or generally imposed by law, to all travelers on the Trunk Highway system to avoid creating unreasonable risks for those travelers, and to meet the standard of care imposed upon the Department.

Each Mn/DOT employee concerned with highway construction, operations, and maintenance shares that obligation to the traveling public to maintain the roadway in a reasonably safe condition. This involves inspection, anticipation of defects, and conformity with generally accepted standards and practices. Significantly, this requirement does not call for a perfect condition or for actions "beyond the limits of human ingenuity."

### 12-3.03 Negligence

Negligence is defined as the failure to do something which a "reasonable person" would ordinarily do, or the doing of something which a reasonably prudent person would not do. The reasonable person is a criteria used to set the standard of care in judging conduct. In effect, this test of negligence represents the "failure to use ordinary care," and is most often used in determining liability.

In the context of this Manual, the State may be found to be negligent if the conduct of its employees does not measure up to that of a hypothetical reasonable, prudent, and careful employee under similar circumstances.

#### 12-3.03.01 *Notice of Defect*

Mn/DOT has a duty to correct a dangerous condition when it has received "actual" or "constructive" notice of the hazard. The courts have held that Mn/DOT must have had notice of the defect or hazard for a sufficient or reasonable time to afford them a reasonable opportunity to repair the condition or take precautions against the danger.

Actual notice occurs when an employee, law enforcement official, or any other party reports the existence of a hazard to Mn/DOT. Receipt of actual notice should be recorded in a dispatcher's log, diary, or other type of recording system.

Constructive notice occurs when the hazardous condition has existed for such a time and is of such a nature that the State should have discovered the condition by reasonable diligence. In this instance, the State's knowledge of the condition is said to be implied (i.e., the State should have known).

In deciding whether the State had notice, the courts may consider whether the defect was latent and difficult to discover. That is, the court will consider the nature of the defect, its location and duration, the extent and use of the highway, and whether the defect could be readily and instantly perceived.

Routine inspection and correction procedures are important in light of the trend by courts to permit less and less time before finding "constructive notice".

This notice requirement does not apply when the dangerous condition is the result of the Mn/DOT's own negligence. For example, it is not required for the State to have notice of faulty construction or poorly performed maintenance of its highways, because the State is expected to know of its own actions.

#### *12-3.03.02 Standard of Care*

The standard of care may be established by a multitude of factors. As a minimum, all persons are required to avoid the creation of unreasonable risks, where feasible. In addition, statutes and regulations governing conduct are also components of the standard of care by which conduct is judged. (For example, Rules of the Road for Operating Vehicles.) In general, a violation of a uniform law or regulation may be evidence of negligence or may constitute negligence per se.

The accepted standards and practices of a profession, trade, or industry may also define the standard of care by which conduct is judged. Included in the definition of "accepted standards and practices" is the MN MUTCD, this manual, and other similar manuals.

The MN MUTCD is unique in that it has been adopted by the State of Minnesota through a Commissioner's Order, and applies to all public roads in Minnesota. As regulated, this requirement has the full force and effect of the law. A failure by government personnel in Minnesota to conform with the requirements of the MN MUTCD may be sufficient to establish negligence (and therefore liability) should a crash result from failure to conform. On the other hand, as the MN MUTCD only sets forth minimum requirements, compliance may not in itself be sufficient to establish reasonable care. If more than a "minimum" is required by a specific situation, it should be done.

#### **12.3.04 Causation**

The third element in tort liability is causation. Causation is defined as an action or inaction which leads to or contributes to a particular event. To collect in claims against Mn/DOT, a claimant must demonstrate that a negligent action by Mn/DOT was a greater cause of the damages than any negligence on the part of the claimant, or in other words, Mn/DOT must be comparatively more negligent.

Comparative negligence is a rule of law adopted by this State whereby the negligence of both parties is compared, and recovery is permitted despite the negligence of the plaintiff. However, plaintiff's damages are decreased proportionately to his own negligence. If the plaintiff is found to have a higher percentage of negligence than a defendant, then the plaintiff is not entitled to collect from that defendant.

#### **12-3.05 Liability**

In order for Mn/DOT to have liability for damages, a claimant must prove:

1. that Mn/DOT had a legal duty to use reasonable care towards the plaintiff,
2. that Mn/DOT breached that duty by falling below the standard of care thus committing an act of negligence,
3. that the damages (injuries, property damage, pain and suffering, loss of income, etc.) incurred by the plaintiff were caused by Mn/DOT's negligence, and,
4. for the claimant to recover the damages suffered, the claimant must have had a percentage of fault that was less than or equal to the fault of the defendant.

## 12-4.00 IMMUNITIES

### 12-4.01 Discretionary Immunity

When the Torts Claim Act was passed in 1976, and the State lost its sovereign immunity, the legislature created other limited immunities for state agencies from liability for negligence. The first of the immunities which commonly apply to Mn/DOT is called discretionary immunity (Minnesota Statutes Section 3.736, Subdivision 3(b)).

The term "discretionary" refers to the power and duty of Mn/DOT to make informed choices among alternatives. Discretionary actions are planning level decisions involving questions of public policy, and are usually made at a high level in the organization. Discretionary actions require the evaluation and weighing of factors such as the financial, political, economic, and social effects of a given plan or policy.

Discretionary immunity is based upon the principle of separation of powers. This immunity prevents the judiciary branch of government from using tort suits as a medium to second guess, or otherwise to engage in, policy-making activities reserved to the legislative and administrative branches. Because discretionary immunity is based on this constitutional principle, claims of negligence are irrelevant since the immunity applies "whether or not the discretion is abused".

Examples of Mn/DOT activities which would likely be protected by discretionary immunity include; project selection, design standards, and snow removal priorities.

### 12-4.02 Official Immunity

Official immunity, in contrast to discretionary immunity, is a common law doctrine which survives the abolition of sovereign immunity. Official immunity serves a different purpose than statutory discretionary immunity. While statutory discretionary immunity exists to preserve the separation of powers by preventing juries and courts (the judicial branch) from second-guessing the policy decisions of Mn/DOT (i.e., the executive branch), the official immunity doctrine exists to encourage the exercise of the discretionary judgement by governmental officers. Therefore, official immunity extends to non-policy-type discretionary judgments such as professional engineering decisions. Official immunity prohibits plaintiffs from suing the government for difficult discretionary judgments when the threat of litigation will chill the exercise of this independent judgment.

Official immunity distinguishes between discretionary and ministerial actions. Discretionary acts are immune; ministerial acts which do not require the use of discretionary judgment, are not immune. Ministerial acts are defined as those which are "absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." An example of a ministerial act may be the installation of a sign where the engineering decision has already been made that a sign is necessary.

In contrast, discretionary decisions are those which involve the exercise of judgment, including scientific or engineering judgment. For example, an engineering decision that a sign should not be used in a particular location may be an immune decision under official immunity.

Official immunity applies to individual public officials, and insure that the threat of personal liability does not unduly inhibit the exercise of judgment required of public officials in discharging their duties. In order to avoid defeating this purpose in cases where a claimant brings suit against the governmental employer claiming negligence by a public official, the Minnesota Supreme Court has recognized the concept of vicarious official immunity. Vicarious official immunity may be granted to an agency if it can be shown that the exercise of independent judgment by the public official would be chilled if immunity were not granted to the agency.

Together official immunity and vicarious official immunity apply to many situations in Mn/DOT.

### 12-4.03 Other Immunities

Minnesota Statutes Section 3.736, Subdivision 3 contains several other immunities relevant to various departments of state government. Following are two that are used by Mn/DOT:

1. **Snow and Ice Immunity.** The State and its employees are not liable for losses caused by snow or ice conditions on a highway or public sidewalk that does not abut a publicly owned building or a publicly owned parking lot, except when the condition is affirmatively caused by negligent acts of a state employee.
2. **Outdoor Recreation Immunity.** The State and its employees are not liable for losses incurred by a user arising from the construction, operation, or maintenance of the outdoor recreation systems, as defined in section 86A.04. This immunity is most commonly used by Mn/DOT at rest areas.

### 12-5.00 RECORD KEEPING

Good records are crucial in reducing Mn/DOT's exposure to liability. Complete written or photographic records often provide the grounds for denying a claim, being granted immunity from a lawsuit, or in proving that Mn/DOT was not negligent.

Some suggestions for helpful records to keep are:

1. Logs of complaints or reports of defects. This is used for establishing when Mn/DOT had notice of a defect. It is most helpful if the log includes when the reported defect was repaired.
2. Diaries or other daily work record sheets that indicate when and where routine work is performed. This has proven particularly useful in defending against pothole and traffic control claims by documenting Mn/DOT's use of due care.
3. Written records of decisions involving the use of engineering judgement or which involve policy considerations, such as those made in design of traffic signals, are valuable in establishing discretionary or official immunity.
4. Contact or incident reports are frequently helpful for preserving facts surrounding a particular incident. Since many claims and lawsuits are filed months or years after the incident, these are often the best or only way to reconstruct past events.
5. Photographs can be used for inventories or to document conditions before or after an incident, and are always helpful to reconstruct previously existing conditions.

In general with respect to tort liability, the more documentation that is kept, the better the chances for Mn/DOT to demonstrate that it was not negligent. While it is not practical to record and maintain documents on every activity, Mn/DOT employees should be alert to situations that are particularly prone to claims and document those situations accordingly.

### 12-6.00 REQUESTS FOR INFORMATION

#### 12-6.01 Purpose

As previously stated, tort claims against the State continue to be filed in large numbers. As these cases are litigated or settled, the public and plaintiff's attorneys are getting a broad data base to draw from in looking for types of claims to submit against the State. As these claims become more sophisticated, it is important that we have uniform procedures within the Department for handling the release of information.

The reason for these procedures is that the investigation to prepare a case is a privileged activity, protected by law. Opposing litigants must abide by the rules for discovery which ensure that all parties to a lawsuit are treated equally and receive only the information that they are legally entitled to receive.

Documents assembled in response to a claim or lawsuit and kept in a claims file are considered confidential discussions between the client (Mn/DOT) and the Department of Administration (DOA) Risk Management Officer (claims), and/or the Attorney General's Office (lawsuits). This protection is only provided to the claims file. It is important to keep an exclusive claim file since discovery of investigated related documents could jeopardize the State's efforts to present the best defense possible.

All other files are considered public record and are subject to review at any time, with the exception of any information retrieved from the Transportation Information System (TIS) crash files or any information generated from data from the TIS crash files. TIS crash data may be privileged and not producible under both the Minnesota Government Data Practices Act (Minnesota Statutes, Chapter 13) and under 23 U.S.C. 409. In each case a decision regarding the release of TIS crash data must be made in light of those statutory provisions.

### **12-6.02 Procedure to Follow When Requests are Made**

Frequently, requests for Department documentation are made directly to Mn/DOT employees by people outside the Department. These requests may or may not involve current claims against the Department.

When a request is received, determine the reason for the request. If the requester is not seeking information to investigate a crash, personal injury, or property damage incident, and it appears unlikely that the information will lead to a claim, the information may be provided without involving the Tort Claims Unit.

If the information is being requested as the result of a crash, personal injury, or property damage, the following procedures need to be followed.

1. All such requests for information must be made in writing. If a crash or incident is involved ask the requester to reference the location and date of the crash or incident in their letter of request.
2. Upon receiving the written request, contact the District Traffic Engineer, the Metro District Tort Claims Coordinator, your Office Tort Claims Coordinator (if one is so designated) or the Tort Claims Unit in the Office of Traffic, Safety, and Technology (OTST) to determine if a claim or lawsuit is pending. At that time, the content of the request can also be reviewed.
3. If no claim or lawsuit has been filed, a response can be provided through the District Traffic Engineer or the Office's tort claims coordinator. If the response is considered sensitive and should be reviewed, contact the OTST Tort Claims Unit, who will ask the Attorney General's Office for a legal opinion prior to the information being sent out.
4. If the request involves a pending claim or lawsuit, the request and the requested information should be sent to the OTST Tort Claims Unit. It will then be forwarded to either the Attorney General's Office or the ROA Risk Management Officer for response. It is not proper for plaintiffs or their attorneys to bypass the Attorney General's Office or the DOA Risk Management Officer when requesting information.

In some cases, responses to requests will result in a claim or lawsuit being filed. When this occurs it will be helpful to be able to retrieve all information that has been provided. Copies of all correspondence should be retained so that it can be easily retrieved for review by the Attorney General's Office or the DOA Risk Management Officer.

## **12-7.00 FILING A CLAIM**

When a person reports damages that they believe to be caused by Mn/DOT's negligence, the following steps should be taken:

1. Determine if the incident occurred at a location that is under Mn/DOT jurisdiction. If not, refer the person to the appropriate agency.
2. Determine if the incident directly involved a Mn/DOT vehicle (such as a collision). If so, refer the person to the District Safety Officer who will handle the claim with Mn/DOT's insurance carrier.
3. If the incident is at a location under Mn/DOT jurisdiction and did not directly involve a Mn/DOT vehicle, send a Claim Report and Demand form to the person or refer them to the Tort Claims Unit. The claim forms are produced by the DOA Risk Management Officer and are available from the OTST Tort Claims Unit. Inform the person that their claim will be investigated and they will be notified of the results by the DOA Risk Management Officer.

If a claimant has any questions, they may be referred to the Tort Claims Unit.

## **12-8.00 INVESTIGATIONS**

### **12-8.01 Claim File**

When a District or office has been notified that a claim or lawsuit has been initiated against the State, only one file should be kept in the District regarding the case. This file should include any and all correspondence that has occurred as a result of the claim.

When an office provides responses for lawsuits or major claims the correspondence should be addressed to the Tort Claims Engineer and the assistant attorney general working on the case. Once a claim has been filed, the only copy of claim related correspondence kept by your office should be in the District claim file. The claim file should be kept by the tort claims coordinator or District Traffic Engineer. This file is not public information. It is considered Attorney Work Product and, by law, is confidential.

Any questions regarding this procedure may be directed to the OTST Tort Claims Unit.

### **12-8.02 Investigating Claims**

After a claim has been filed, the DOA Risk Management Officer will send a copy of the claim and a request for information to the Tort Claims Unit. The Tort Claims Unit will in turn forward the claim and more detailed instructions on information that should be gathered during the investigation to the appropriate District Traffic Engineer or tort claims contact person to conduct an investigation.

The investigation will usually entail gathering documents from various District files, copying entries in logs or diaries, interviewing involved employee., and possibly a site visit. The State endeavors to respond to claims within 3-4 week period, and so the investigation needs to be completed and returned promptly within 2-3 weeks of receipt of the notice.

Upon completion of the investigation, the OTST Tort Claims Unit will respond to the DOA Risk Management Officer with the requested information and a recommendation on payment or denial of the claim. The DOA Risk Management Officer will then respond to the claimant.

### 12-8.03 The Discovery Process

When a lawsuit is filed, a more formal investigation process called *discovery* will begin. If the lawsuit was not preceded by a claims investigation, then the Tort Claims Unit will likely request that all information relevant to the lawsuit be gathered and made available to the assistant attorney general assigned to the case.

If the lawsuit proceeds, then at some point, plaintiffs attorneys are likely to make a formal request for information through the court.

The request for information will include one or more of the following:

*Interrogatories*, which are simply a series of questions requesting information about a particular incident, location, or activity.

*Demand for Production of Documents*, which may include any documents in Mn/DOT's possession which are not privileged or otherwise protected by law. Generally this includes the contents of the construction and/or design files and any supporting manuals or documents.

*Production of Statements*, which is typically defined as a written reproduction of statements made by an individual concerning a particular incident, activity, or location.

Discovery documents are prepared jointly by the District tort claims coordinator and key personnel, the OTST Tort Claims Unit, and the Attorney General's office. It is extremely important that the requested information be provided by the deadline in the request to avoid legal sanctions against the Department. If the deadline cannot be met, then an extension must be requested by contacting the Tort Claims Unit.

If a lawsuit continues to proceed, the next phase of discovery is depositions. Depositions which involve Mn/DOT employees are requested by the plaintiff's attorney. The purpose of a deposition is for the plaintiff's attorney to gather additional information by directly questioning specified Mn/DOT employees. Employees requested to appear at a deposition will be briefed on procedures and the nature of the questioning prior to their appearance by the Department's legal counsel. The same legal counsel will also be present at the deposition.

### 12-9.00 EFFECT OF LITIGATION ON MN/DOT

The incident of civil litigation, primarily in the area of torts, has increased by many orders of magnitude in the last 30 years. This strong tendency toward legal action is closely followed by the trend towards large awards to plaintiffs.

It should be highly obvious that it is more logical to expend public funds in sound management practices and in the proper highway maintenance than in the settlement of claims or in payment of adverse judgments. Consequently, it would seem appropriate to review maintenance activities and reporting procedures to limit exposure to tort liability. It would also seem helpful to assure that all agency employees involved in such activities are well informed of the legal implications of their functions.