

# Liability for Public Agencies

LINLEY E. PEARSON

Attorney General

State of Indiana, Indianapolis

During the time that I have held the office of Attorney General for the State of Indiana, it has become clear to me, and I am sure to all other attorneys in the state who defend public highway agencies in the field of tort litigation, that there has been a consistent and dramatic increase in lawsuits filed by drivers and passengers of vehicles who sustain injury as a result of accidents on public roadways. This increase has certainly been reflected in the number of tort claims filed against the State of Indiana. State statutes require an injured party to file a notice of claim within 180 days after an accident before a formal lawsuit may be filed against a public entity. Statistics maintained by the Office of the Attorney General indicate that in 1975, the first full year after the adoption of the Indiana Tort Claims Act, 361 notices of claim were filed against the State of Indiana. In 1981, the first year of my administration, 614 claims were filed and in 1985, this total rose to 1,497. Of the total notice of claims filed in these years, approximately 75% to 80% involved claims directly against the Indiana Department of Highways. I am sure that local county and city governments have also experienced similar increases in roadway-related tort claims within the last ten years.

The increase in claims and lawsuits filed against public highway agencies has, of course, corresponded with a rise in the number and size of jury verdicts in the last ten years. Increasing litigation and judgment costs have particularly strained the resources of local government agencies.

At this point, I would like to shift emphasis away from methods and means by which public entities may insure for monetary damages resulting from lawsuits to the type of actions you as state and local highway officials may take both on a day-to-day basis and also after the occurrence of a serious injury or fatality accident to minimize the possibility of uncalled for plaintiff verdicts.

In the typical vehicle crash case, a formal lawsuit is not filed until one to two years after an accident has occurred. Obviously, the attorney defending such a lawsuit on behalf of the public highway entity will have had no prior knowledge of the particular circumstances of the case. As an attorney, his immediate goal will be to assemble all relevant facts surrounding the accident and the character and nature of the roadway in the vicinity of the accident at the time it occurred. This is often difficult to do after a lawsuit is filed because, naturally, memories of eyewitnesses,

policemen investigating the accident, and public highway employees with particular knowledge of the roadway will fade with time. Good record keeping of the character and nature of highways and prompt investigation of serious injury crashes will often spell the difference between a possible zero verdict or low settlement and a large verdict or high monetary settlement.

Perhaps the most effective tool in defending the typical serious injury or fatality lawsuit, and one that may be utilized on a day-to-day basis by the public highway agency is simply the implementation and maintenance of good and accurate record keeping concerning the roadway itself. Records will aid the attorney and eventually a jury in reconstructing the physical characteristics of a roadway at the time a particular accident occurred. The need for good record keeping can easily be seen in the typical road design or road defect case. In a road design case, an attorney will require an accurate set of construction, design and as-built plans and will also need accurate written documentation of design modifications which have been implemented after a particular roadway was built. In a road defect case, it will be crucial to an attorney to determine when repairs were made in a given stretch of roadway and the precise nature of such repairs.

Perhaps the most important area where accurate and complete records are necessary is in the typical case involving traffic signs or signals. Record keeping in this area has become crucial for the simple reason that the majority of cases filed against the public highway agency involve issues of traffic signs or signals. In my office approximately 75% of all tort lawsuits presently pending against the Indiana Department of Highways involve allegations of negligence in the installation or maintenance of traffic signs or signals. In these types of lawsuits, it is important for the attorney to be able to establish such things as the date traffic signals were erected or taken down; the exact placement of traffic signals; the specific types of traffic signs involved in a particular accident; and, the timing sequences of automatic traffic signals. To successfully defend these types of cases, your attorney must have this information at his or her disposal.

In addition to complete an accurate day-to-day record keeping, the prompt investigation of the serious injury or fatality accident scene is of paramount importance in recreating and presenting evidence of the characteristics of the roadway at the time of the accident after a lawsuit has been filed. By prompt investigation, I am referring to an investigation of the scene as soon as the accident is brought to the attention of the public agency, either through local police sources, local newspapers or general word of mouth. Prompt investigation is necessary for two reasons. First, a notice of claim is not required to be served on the public agency until 180 days after the accident has occurred. Even in this six months time, crucial evidence may be lost or destroyed—chuckholes may

be filled or signs taken down. Secondly, more often than not, the general police investigation of the accident is inadequate and incomplete for purposes of defending these types of lawsuits. The investigation may be hurried by the need to clear the roadway for traffic. Policemen tend to focus their investigations on the physical aspects of the accident which point to violations of traffic laws. Also, policemen tend to focus only on the immediate accident scene and rarely do they confirm the existence of signage in the general vicinity of the accident scene. While police accident reports are important tools in defending vehicle crash cases, they should not be used as a substitute for an independent investigation by the public highway entity.

Obviously, the most effective means of preserving the physical characteristics of a roadway in the vicinity of a serious injury or fatality accident is by photographing the accident area. It is often said that a picture is worth a thousand words. In a recent case in our office, one photograph was worth thousands of dollars. We had a case involving a teenage driver with three passengers who crossed a centerline and was struck by a van traveling in the opposite direction. The three passengers were killed and the driver was seriously injured. The accident occurred in November and a notice of tort claim was not filed until April of the next year. In their notice of claim, the Plaintiffs alleged, among other things, that the accident was caused by a series of chuckholes located 200 feet prior to the impact of the two vehicles. Police photographs taken at the scene focused only on the area of impact and the roadway itself was obscured by emergency vehicles. When the tort claim investigation was done some six months after the accident in the spring, photographs showed the existence of patching in the area referred to by the Plaintiff. Five relatives and friends of the plaintiffs were deposed and all testified that the chuckholes referred to were present immediately before and after the accident. Records indicated that general patching had been done in the area some four months after the accident and five months prior to the accident. From that evidence alone, it was difficult to determine what the roadway was like on the day of the accident. Prior to the trial of the case, however, it was discovered that an insurance investigator for the injured driver had taken pictures in the area of the accident approximately 36 hours after the accident. One picture clearly depicted the area referred to in the plaintiffs' notice of claim and no chuckholes were present. The obvious inference from this evidence was that the chuckholes formed and were patched during the winter or spring in between the time of the accident and the filing of the notice of claim. The state ultimately received a verdict in its favor at trial based on this photographic evidence.

In addition to the need for accurate record keeping and prompt investigation of the scene of a serious injury or fatality accident, a third obvious tool in defending public entities from liability is the investiga-

tion which should occur after the filing of a notice of claim with the public entity which must occur within 180 days of the accident itself. Obviously the purpose of the notice of claim statute is to insure that public entities have notice of a claim and an opportunity to investigate a claim within a reasonable time after an accident has occurred. Since a plaintiff has two years to file a formal lawsuit, it is important that the public entity promptly investigate claims soon after a notice of claim is received to preserve necessary evidence. When filing a notice of claim, an injured party must state his theories of liability, a statement of facts, and also must list all witnesses to the accident known to them at that time. Written statements may be taken of the witnesses listed in the notice of claim which will aid your attorney in evaluation of the case and which will serve to perpetuate the witnesses' memory of the accident. In cases of minor accidents the notice of claim will often be the public entities' first notice of a potential claim. In more serious cases, the post-notice of claim investigation can be used to expand upon investigations of the scene conducted immediately after the occurrence of the accident in question. Theories of liability alleged in the notice of claim which were not obvious from prior at-the-scene investigations can be explored.

For example, a police report in a particular case may indicate that a vehicle rounding a curve left a roadway due to driver intoxication and struck an off-road obstacle. The initial investigation by the public highway employee would naturally tend to focus on the existence of signage prior to the curve, the absence of guardrail, the type of obstacle the vehicle struck and its distance from the actual roadway. A tort claim filed later might, in addition to the issues mentioned, raise as an additional allegation of negligence that the speed limit was excessive based on the angle of the curve. Such an assertion would tend to negate intoxication as a causative factor in the accident. At that point, the public highway entity could then begin an investigation of this particular allegation and also begin to accumulate the necessary records that the attorney will need to defend the case.

The benefits to the public entity of prompt investigation and the timely accumulation and preservation of evidence in the serious injury or fatality case are numerous. In good cases, the attorney is better able to present his case to a jury. In particularly bad cases, the attorney may be able to obtain a settlement. In cases where liability is questionable, bad facts may be minimized and good facts may be maximized at the outset of the lawsuit. Prompt and aggressive investigation of the serious injury or fatality case will also serve to better prepare expert witnesses, such as accident reconstructionists and transportation engineers, who may be called upon to testify at trial.

In summary, the expanding nature and increasing cost of highway tort litigation to public agencies now forces us as employees, officials and

representatives of public agencies to take a more aggressive posture toward defending these types of lawsuits. Tort liability is now a daily fact of life for the public highway employee and his employer. Recognition of this fact at both the local and state level and the implementation of policies and procedures designed to minimize the potential for uncalled for plaintiff's verdicts, a few of which I have briefly touched upon today, will certainly help to alleviate the increasing strain on local and state budgets.