



Roadway Management and Tort Liability in Wisconsin

In 1988 there were 134,270 traffic accidents on Wisconsin's roads. In about 18 percent of those accidents (25,101), the reports cited such conditions as snow and ice, narrow shoulders, rough pavement, construction zones, and obscured visibility as possible contributing factors. These thousands of accidents and possible highway defects represent many potential lawsuits against highway agencies.

Town, village, city and county highway officials should be aware of their community's risk exposure and act to limit it. The most effective ways are to: check and improve road safety, reduce accidents on road systems, and keep accurate records of decisions and work.

This bulletin describes tort liability as it applies specifically in Wisconsin. It recommends ways to manage for safety and for defense against claims, and describes some of the legal decisions which shape Wisconsin's liability case law. It's purpose is to give general information. The information is accurate, but it should not be relied on in lieu of legal advice in a specific situation.

Furthermore, tort liability case law varies greatly from state to state. Do not assume that Wisconsin statutes, guidelines and legal decisions are necessarily applicable elsewhere. Nor is the experience of other states directly applicable here.

The Wisconsin situation

In the last 25 years state courts around the country have ended the concept of sovereign immunity for governments. This means that government agencies can be sued under liability laws for injuries or damages arising from their negligence. Since then, the number and size of liability claims and payments has mushroomed. In 1987, New York, California and Pennsylvania paid between \$11 million and \$17 million each in tort



Photo credit: Forrestal Photographics

Wisconsin courts have been conservative in their awards, but the size and number of successful claims is growing.

liability claims and judgments against their state highway agencies, according to a 1988 AASHTO survey.

Although there is little reliable data, it seems that, fortunately, Wisconsin municipalities do not yet face the tremendous burden of liability claims common in other states. The same AASHTO survey reports that Wisconsin paid only about \$86,000 in tort claims against the D.O.T. — more than double the amounts paid in 1985 and 1986. (The laws in Wisconsin make it quite difficult to sue the D.O.T. The situation may be different in those states with high liability claims.)

Wisconsin's relatively low settlement costs are probably related to two factors: state laws give partial immunity to governments and their employees, and state courts have been conservative in their awards in liability suits. However, insurance premiums are rising and the size and number of successful claims is growing. It may be just a matter of time.

Liability of governments and their employees

Liability is legal responsibility. When a person is injured and believes another person was the cause, the injured person can sue. The court decides whether the second person was *liable* — legally responsible for injury. This judgment can be based on the person having either performed a task wrong, or not performed a task which should have been done. Then the court can impose a penalty or require compensation.

Of most concern for highway agencies is *tort* (a civil wrong) liability. This area of law is based primarily on decisions in specific cases rather than on written codes as are criminal and contract laws. As a consequence, tort liability judgements and awards vary noticeably from state to state. Wisconsin's courts have made quite different decisions in tort liability cases than California, for example. Another consequence is that it is difficult to draw general conclusions or answer hypothetical questions of the type "would I be liable if . . ."

Tort liability serves two important social purposes: it helps to compensate people who are injured and encourages others to prevent similar injuries in the future.

Specific areas of liability related to roadway management

Wisconsin statutes do not define specific areas of liability for municipalities as related to building and maintaining highways. Under Section 81.15 of the *Wisconsin Statutes*, a municipality has a duty to build a roadway (and sidewalk) safely when it is originally constructed, and to exercise *reasonable care* in locating and repairing defects which occur later.

The area of governmental liability is broad, and extends far beyond what is described in this bulletin, ranging from civil rights to the open meetings law. Some of the duties under other statutes and administrative rules which are related to roadway building and maintenance and are not covered in this bulletin are:

- Municipalities must properly post load limits on bridges.
- A person who plans to do any excavating must notify the owners of underground facilities three days in advance.
- Municipalities are responsible for supervising runoff controls from construction sites.

- Municipalities are responsible for road conditions created by abutting property owners who may negligently permit mud, garbage, gravel, loose papers, etc. onto the roadway.

This list should not be considered exhaustive. In Wisconsin, government agencies generally are liable for the acts of employees which are part of the job responsibility. This is true even when the employee may be immune under the law.

Governments do have a partial immunity under the statutes for "legislative, quasi-legislative, judicial and quasi-judicial acts" (893.80 *Wisc. Stats.*) These are sometimes called *discretionary acts*.

For example, if no state law or rule requires a stop sign at a type of intersection, the local government's decision to place one there is a *legislative act*.



Deciding to install a stop sign where no rule requires it is a discretionary act (immune). Keeping it in good repair is a ministerial duty (not immune).

This immunity helps maintain the separation of powers between branches of government, so that courts are not second-guessing legislative decisions.

Government employees generally have immunity, under a decision by the Wisconsin Supreme Court, for acts which:

- involve discretion and judgment
- are performed in good faith
- are within the employee's powers

There are two exceptions. One is for *ministerial duties*. These are duties which are so clearly "absolute, certain and imperative" that "nothing remains for judgment or discretion" and that involve merely performing a specific task. For example, once a government has put a stop sign at an intersection, keeping it in good repair is a ministerial duty. However, the timing and extent of the maintenance are subject to judgement and expected to be reasonable.

The second exception is for disregarding the state's open meeting laws. In such cases officials are personally liable and required to personally pay any penalties.

Legal limits of liability

The legislature has placed limits on the amount of money that can be awarded in liability claims against municipalities (any county, city, village, town, school district, sewer district, drainage district or any other political subdivision of the state). Beginning in 1988, the maximum award is \$50,000 per person from a tort liability judgment against a municipality or its officials and employees, for official acts.

The statute also limits to \$250,000 the amount recoverable for motor vehicle accidents involving municipal vehicles (*Sections 893.80 (3) and 345.05 (3) Wisc. Stats.*). These limits apply even when the municipality has purchased insurance. They do not apply in other states or in federal lawsuits where federal laws are involved (such as suits for police brutality brought under federal civil rights laws).

Carrying insurance

For small communities, even claims limited to \$50,000 can take a severe toll on the budget. Since the limit is for each claim, accidents involving several claims could become very costly. Beyond that, there are the exceptions: for federal law and other states. If one of your employees has a motor vehicle accident in Illinois, for example, and it came under Illinois law, the Illinois court may not recognize the \$250,000 limit.

Insurance for governments is still widely available in Wisconsin, unlike some states. How much insurance coverage to carry depends on several factors. Some of these are:

- How close you are to metropolitan areas where risk of law suits and large awards may be higher.
- How affluent or educated the residents are since such persons may be more likely to bring suit.
- The general trend to higher damage awards.
- Your community's attitude toward risk.
- How much the insurance will cost.

Managing risk

Safe, well-maintained roadway systems are at less risk of liability suits. Good management helps achieve this. You can do a better job operating the highway system and be better prepared to prove your case, should a suit be brought, if there are well-defined, rational procedures to:

- Identify and analyze road maintenance, safety and construction needs.

- Develop and periodically review written policies and plans for maintenance, snow removal, and roadway reconstruction, and to inform and train employees in proper procedures.
- Keep records on maintenance, accidents, repairs, construction decisions, etc.
- Require contractors to perform according to appropriate safety and other standards and to have liability insurance and inspect their work.

Gather, record and analyze information

Collect information on your roadway system by inspecting road surface conditions, bridge safety, roadway drainage systems, traffic signals, signs and markings, and temporary traffic controls. Record traffic accidents and keep written records of inspections and actions.

Inspect on a regular schedule, by day and by night. The period between inspections will vary but a good guideline for most agencies is a six-month review. Traffic control in construction and maintenance areas should be reviewed at the close of each work day.



Police, solid waste collectors, utility workers—every municipal employee—should watch for defects like this pavement blowup.

Assign responsibility so immediate or emergency conditions are identified and responded to. In addition, all municipal employees should be trained to look for and report any defects in roadways, signs, signals, guardrails, sidewalks etc. This is particularly important for police, solid waste collection personnel, utility workers, and other personnel who routinely work on the street system. Each municipal vehicle should contain a reminder card or display of the appropriate telephone number or office to notify when a defect is identified.

It is not enough to collect and record information. You must also use it. Regional Planning Commissions, county safety committees, private consultants, and others can help you look at inspections, reports of accidents, roadway and bridge conditions. Courts expect you to use reasonable judgment and a rational method in evaluating road defects or accident situations and deciding on a course of action.

Having a roadway management system, and evaluating road surface conditions using a system like the Wisconsin Pavement Surface Evaluation and Rating (PASER) system, for example, helps your agency and community government set maintenance priorities logically. This helps in planning road projects and securing public support for them, and it also helps satisfy the legal expectation of rational, documented decision making.

Make it a job responsibility of someone to be aware of liability issues and to offer that perspective whenever decisions are being made and actions taken. But be sure that awareness of liability problems does not become only one person's sole responsibility. Every municipal employee should be trained in common roadway problems and defects and how to report them so they are taken care of.

Common defects which are frequently cited in lawsuits are:

- Missing, damaged, obstructed or hidden stop signs.
- Stop signs improperly placed at a wrong height, wrong location, wrong angle, or not of proper quality (non-reflectorized).
- Absence of *Stop Ahead* signs where necessary.
- Shrubbery or other obstructions restricting view of signs or road conditions.
- Failure to warn of *T* intersections.
- Lack of an inspection program to determine various road defects and signing problems.
- Failure to comply with the *MUTCD*.
- Allowing known defects to continue to exist without remedy.

Set standards and use expert advice

Identify and select appropriate standards and expert advice for design and maintenance. State statutes consider it negligence when roadways are not constructed safely. However, existing roads only have to meet the standards that were in effect when they were constructed.

In designing and building new roads, governments are expected to use currently accepted professional standards. These are available from many sources. The *Wisconsin Statutes* specify standards for town road improvements. The Wisconsin Department of Transportation also has standards and specifications for road and bridge design and construction. For signs and signals, *The Manual of Uniform Traffic Control Devices* is the state-adopted standard. The American Association of State Highway and Transportation Officials (AASHTO) is a national organization which researches, tests and publishes widely accepted professional standards.

Standards for maintenance are not so widely available or accepted as those for design and construction. In Wisconsin a municipality is expected to exercise *reasonable care* in locating and repairing defects in the highways for which it is responsible. However, in establishing what is reasonable, a court may consider what professional advice and training was readily available, whether it was used, and what are the common, reasonable practices of surrounding communities.

Write policies and train employees

Develop and periodically review written policies and plans for such activities as maintenance, snow removal, and roadway reconstruction. Inform and train employees in proper procedures.

It is always good management to ensure that employees understand the who, which and how of their positions: *who* is responsible for *which* tasks and *how* they are expected to do them. Verbal assignments can easily be misunderstood or forgotten. Workers may not know the best way to do a job, or even how to do it at all.

The process of putting job responsibilities in writing helps administrators gain perspective on problems, gaps, and changed priorities. Having them in writing also helps you train new employees and remind current employees of their duties.

Periodic training, especially with question and answer sessions, can reveal problems or situations that managers may not know about. Reviewing policies regularly helps point out where conditions have changed or old methods proved unworkable.

This process also helps with two areas of liability: employee immunity based on job responsibilities, and governmental duty to exercise reasonable care. Verbal assignments and casual training methods are much harder to prove in court than written ones, and much harder to recall months or years later when lawsuits finally come to trial.



Keep written records

Almost any organization, governments included, has a few "old timers" who know everything about it. Often they are too busy to keep notes on what they have done and what they know. When they leave, or die, the information is lost. Keep records on maintenance, accidents, repairs, construction decisions, etc.

Written records preserve information, whether it is for other workers, for managers, or for lawyers and courts. They help you manage by reminding you of problems or situations that might be forgotten, by recording reasons why decisions were made, and by giving you a way to analyze more objectively. They also support your position in a liability suit.

An especially important kind of written record to establish and keep is a complaint form. Many liability cases turn on whether the municipality knew of a defect, that is, *had notice*, and had sufficient time to respond appropriately. Police reports are one form of notice. Citizen complaints are another. Once you have notice, then you must respond within a reasonable amount of time. Designate one person to receive all such reports and to take appropriate action. Develop a standard complaint form (like the sample shown here). Make sure that the actions taken are recorded as well.

Most highway agencies are basically doing a good job managing their roadway systems, but when it comes to court, they can't prove it to the jury. They don't have written records.

Good records should be:

- prepared at or close to the time of the event
- complete
- dated
- signed
- filed so they can be retrieved

They also should be uniform throughout the agency, used by everyone, and stored efficiently. However, be cautious in written records with using words such as "hazardous" and "unsafe." Describe the conditions objectively, and indicate what corrective action should be or was taken. If no action was taken, be sure to write down why.

Pass liability to contractors

When roads and traffic are disrupted by maintenance or construction, the potential for traffic accidents — and the liability risk — is higher. In 1988 Wisconsin recorded 2588 accidents in construction zones (about two percent of the total).

Highway agencies are responsible for the safety of their roads, no matter who is doing the work. Using written contracts and inspecting the work are two important ways to insure that road work is done properly and safely. These contracts, and written inspection reports also can be used to assess liability in case of an accident.

Written contracts should clarify exactly what work will be done, how, by whom, and when it will be completed. These are standards of performance. They can be used to determine if the work was satisfactory. For highway maintenance and construction, contracts should specify that the contractor will provide a written work zone safety and traffic control plan based on the *Manual of Uniform Traffic Control Devices*.

COMPLAINT REPORT FORM

Date _____ Time _____ By _____

Report received by telephone in writing
 in person other

Name _____ Phone _____

Address _____

Nature of report _____

Described location _____

Other comments _____

Report given to _____
Date _____ Time _____

What done _____

Assigned to _____

Proposed action _____

Actual action taken _____

By whom _____
Date _____ Time _____

Sample complaint reporting form



Inspections ensure the work was done according to the agreement. When contractors are working on your roads, inspect their work zone traffic control and signing at the close of each work day. Inspect the work immediately after it is completed. It is also a good idea to inspect again several months later, especially after the winter, to make sure that it hasn't failed under traffic and weather conditions.

People make mistakes, and mistakes can cost money and cause injury. Make sure contractors have liability, property damage and performance insurance. Otherwise your agency may pay for the mistakes.

Accident management

Accidents happen, and they are more likely to happen during road construction or maintenance. A very common type of insurance claim among Wisconsin municipalities involves highway equipment like snow plows, graders and loaders, damaging cars, other equipment, themselves, mailboxes and other property.

Have an accident management and review plan that prepares your workers for both major and minor accidents. Set up guidelines for responding to accidents, and make sure everybody knows what they are.

Training can help workers respond effectively under the stress of an accident. Written policies, training, accident investigation, and periodic evaluation of accident reports will also help protect against negligence claims in liability suits.



Photo credit: Rich Rygh, The Capital Times

Severe personal injury and fatal accidents may result in large claims. Investigate the accident site yourself for road defects which may have contributed to it.

Establish lines of authority

If an accident occurs at a construction or maintenance site, determine who should take charge until the law enforcement officers arrive. Make sure police, fire officials, and supervisors know who to call for emergency road maintenance: salting and sanding, barricades, sign or signal repair.

Set priorities of action

At an accident scene some appropriate actions may be:

1. prevent secondary accidents by alerting other traffic.
2. Find out how many people are injured and how badly.
3. Determine the potential for fire or explosion.
4. Check for and identify hazardous cargo or spills, downed electric lines, possibly dangerous fumes, and other hazards.
5. Call police.
6. Call for medical, fire, wrecker, utility or other services.
7. Address traffic control needs.

Investigate accidents

It is important to recognize whether a significant claim is likely to result from the accident. You can anticipate that severe personal injury and fatal accidents may result in large claims. Your municipality will be included if at all possible. Even when liability is not an issue, site reports and photographs can help substantiate insurance claims.

Although police do prepare accident reports, the reports may not arrive quickly enough, they may not provide you with enough information, or officers may not report road conditions accurately. An Alabama field study found that of 400 accident reports citing a roadway defect as a contributing factor almost none of the urban accident sites and only 7% of the rural accident sites actually had road defects. Yet these reports can be evidence in liability suits.

Where accidents are not reported and damage is discovered later, or when damage is minor, police may not be called at all. Wisconsin recently changed reporting requirements. If damage is less than \$500 at an accident, no police report is required. However, the limit remained at \$200 for damage to government property.

Gather roadway data yourself and do it quickly

This is particularly important when accidents take place in work zones where signs, signals, and road conditions are temporary. Police will typically identify vehicles, get the names and addresses of witnesses, locate skid marks, etc., but they are unlikely to look closely at road conditions.

Use photographs and independent observation of:

- Pavement surface condition.
- Damage to road, signs, vehicles, etc.
- Type and location of all pertinent traffic control devices.
- Type, size, condition, height, and lateral position of signs.
- Type and locations of traffic signal displays, controller type, settings, etc.
- Description of pertinent highway hardware and appurtenances.
- Grades, cross-slopes, drop-offs, etc.
- Dimensions of roadway, shoulders, median, etc.
- Identification of agency personnel who witnessed the accident or who had firsthand knowledge of conditions at the site.

It might be a good idea to make these photos and observations under light and weather conditions similar to those of the accident. Be sure to record pertinent information on photographs: date, time, location, direction facing, name of photographer, etc.

You may want to supply road foremen with inexpensive cameras to record accidents, damage to highway structures, and other problems. The Oregon (State) Highway Division has done so for years, and the pictures have saved many thousands of dollars in defending lawsuits that were frivolous. They have also allowed the highway division to collect more easily on insurance claims for damage to highway structures.

Make sure road defects are reported to supervisors and repaired as necessary

Police and other accident reports are official notice of a road defect. To avoid further accidents, and claims of negligence, you must respond to this notice in a timely fashion.

Record and periodically evaluate accident reports

When a location has several accidents, or a lot of one kind of accident, maybe there is a problem with the roadway, signing, or traffic management there. Easily reviewed summary reports will make these clear.

However, don't wait for a statistical summary if an accident reveals an immediate need for action. There is no increased liability for making repairs. It can not be used against you.

Each governmental unit should record accident reports as they come in. Larger communities should have computer or manual systems to record and summarize these. Small communities can record accidents using a street map and color coded pins. The Wisconsin Department of Transportation publishes *Accident Facts* which summarizes accident reports by county. The Traffic Accident Section also can produce individualized accident reports for specific areas.

Knowledgeable people should review the reports periodically, perhaps annually. A good time to do the review is when you are preparing the annual budget or planning the next year's highway maintenance and improvements. County and municipal safety committees may be involved, as might highway commissioners, traffic safety engineers, or elected supervisors.

Communicate with law enforcement personnel

Police and sheriff's reports can be used in liability lawsuits against highway agencies, yet officers often receive little training in what to look for in citing road defects in accident reports. Furthermore, officers are constantly driving over your roads. They can be your eyes and ears, warning you of maintenance problems — if they know what to look for.

A Green Bay/Brown County program has proven quite successful. Law enforcement officers are introduced to salting and sanding and other maintenance policies, given information on likely response times, and provided with lines of authority to the maintenance department. Officers understand what kinds of maintenance response to expect in different conditions, and they know how to get immediate response to hazards they discover.

In return, road crews can get patrol cars to help with hazardous traffic areas or temporarily blocked roads. This takes cooperation between agencies. It can be accomplished by top management insisting on and encouraging this cooperative approach to highway safety.

What to do if you are sued

If your agency is sued for tort liability, immediately contact the attorney who has been retained to represent your government and follow whatever advice you are given. You may also wish to contact your government's insurer.



Specific roadway problems —

A summary of Wisconsin municipal liability case law

Tort liability law has developed over the years as courts have ruled on specific cases. One way to understand how Wisconsin courts are likely to judge future liability cases is to review the important ones from the past.

For a detailed review, see *Municipal Liability in Wisconsin* by Wileman and Rhines, from which this discussion is abstracted.

Construction of streets, roadways and sidewalks

Very few Wisconsin cases address the question of adequate construction of roadways and sidewalks. The *Statutes (Sec. 81.15)* allow an injured person to make a claim for damages arising from the *insufficiency* of any highway. The Supreme Court has said the statute also applies to sidewalks.

With so few cases available, and most of those from the first half of the century, it is difficult to say how courts would rule in this area. The following rules are *likely* to apply:

- Insufficient construction is negligence as a matter of law. (The roadway must be reasonably safe in construction.)
- The nature and intended purpose of the roadway may be considerations. Town, city and county roads may be different, as might those with differing uses and different normal speeds.
- The amount and type of traffic is a consideration.
- Professional engineering and other standards will be applied in deciding the sufficiency of construction.

Given a choice of construction methods, one case suggests, a municipality will not be forced to comply with the highest available standard. For example, it would not be forced to use the most expensive method when a less costly one is adequate. (*Wisconsin Power and Light Co. v Columbia County, 18 Wis. 2d 39 (1962)*)

Highway construction and design appear to pose the least potential liability for a municipality. To minimize risk, the municipality should: obtain specifications that meet current engineering and DOT standards for the type of roadway to be constructed, let bids requiring compliance with the specifications, and insist that the contractor construct the road properly.

Roadway and sidewalk maintenance

A municipality is liable under *Section 81.15* for defects in the highways for which it is responsible. Sidewalk maintenance cases generally follow the standard negligence rules of highway maintenance cases. The municipality must exercise *reasonable care* under all the circumstances. The circumstances to be considered are:

- Whether the municipality was, or should have been, aware of the defect.
- Whether it had the time or opportunity to repair the defect.
- Whether it was reasonably foreseeable that the defect, if left unrepaired, would cause injury to persons using the roadway.

Suggestions for local policy

Case review suggests that local governments should have several policies:

1. Inspect excavations, such as utility openings, new culverts, or pot hole repairs, completely and carefully. It probably is a good practice to re-inspect them six months, or one winter, after they have been filled.
2. Inspect streets and sidewalks for defects to identify potential problems.
3. When a defect is found, take some action so others are not injured. This need not be immediate repairs. Warning barriers may be sufficient in the short-term.



Excavations and defects caused by nature

In accidents involving holes and trenches created by human activity, Wisconsin courts have applied a general rule: one who makes and negligently fills an excavation in a public highway is liable for any injuries or damages resulting from it.



The one who makes an excavation in a roadway is liable for any injuries or damages if it is filled negligently.

For example, a plumbing contractor got a city permit and made and filled a street trench. But it settled 15 to 20 inches in a month, and a bus fell into it. Experts testified that a properly filled trench, as required by the permit, could not have settled like that. The contractor was found negligent and held liable. (*Becker v Milwaukee*, 8 Wis. 2d 456 (1959))

However, if a municipality does not adequately inspect the work, it may be held liable for an excavation and negligent backfill by another party. (*Murphy v Milwaukee*, 11 Wis. 2d 554 (1960)) It also may be liable if it has notice of a defect and does not take short-term action, like putting up barricades and warning devices.

Courts recognize that natural deterioration can cause defects in streets and sidewalks. The analysis in these cases focuses on questions of ordinary negligence: notice (either by inspection or discovery), time to repair, and reasonably foreseeable potential to cause injury.

One case involved a woman injured when her auto dropped into a depression in a city street. The city had made temporary repairs two days before, but police had investigated a similar accident two hours earlier. The Wisconsin Supreme Court found the city negligent because it should have *anticipated* the temporary repairs would wash out under the conditions, frequent police patrol of the street gave the city sufficient *time and opportunity* to observe the developing conditions

and correct them, and the city had actual *notice* of the situation through the police investigation of the prior accident. (*Forbus v LaCrosse*, 21 Wis. 2d 171 (1963))

Sidewalks

In general the question in sidewalk maintenance cases is whether the municipality failed to keep them reasonably safe for public travel. The courts have been unwilling to adopt a rule of inches. There have been cases involving deviations of $\frac{3}{4}$ inches and $2\frac{3}{4}$ inches where no negligence was found. And negligence has been found in cases where the deviation was less than that.

Sidewalk defect cases also have been applied to crosswalks, curbs, and the parking lane of the street. It also is not necessary to be a pedestrian. A child thrown from a tricycle by a difference in sidewalk elevation also won a claim. (*Lemay v Oconto*, 229 Wis. 65 (1938))

Snow and ice removal

Snow and ice are hazardous. In 1988 15% of all Wisconsin traffic accidents, about 20,500, happened in snowy or icy conditions. State laws make removing snow and ice the duty of the municipality. Liability is based on a standard of ordinary care: what is reasonable under the circumstances.

The laws also give municipalities immunity from liability for naturally occurring accumulations of snow and ice which exist for less than three weeks. Municipalities can require property owners to make public sidewalks safe, but this doesn't protect the municipality. It still has overall responsibility for sidewalk maintenance and safety.

The Wisconsin Supreme Court occasionally has disallowed liability against a municipality even though the facts of the case may prove negligence.

For example, in a case of a traffic accident caused by pile of snow in the median blocking the driver's vision the court felt requiring the county to clear medians would place an unreasonable burden on the county. Also, by allowing liability in such a case, future cases would turn on the height of snowbanks, with no sensible or just stopping point.

Suggestions for local policy

Roads The three week rule gives local officials great discretion. When there is such discretion, it often helps if community residents participate in developing policies. Some communities have developed written snow removal policies. These may, for example, divide

the streets and sidewalks into categories depending on traffic volume and emergency use. Highest priority streets are cleared first, lowest last. The policy may also say how thoroughly a class of street or sidewalk should be cleared.

Sidewalks A snow removal ordinance for sidewalks is a good tool for any municipality. The authority is found in *Section 66.615(5) Wisconsin Stats.* In writing one, consider:

- The period of time by which the sidewalk should be reasonably safe for travel.
- What type of material may be used when it is not possible to clear the sidewalk.
- Under what circumstances the city will issue a citation for a violation.
- The amount of a forfeiture and the cost for the city to clear the walkway.

Rules for analyzing a snow and ice removal case

A series of three Supreme Court cases fairly well established the rules for snow and ice removal cases. In the first, *Stippich*, a pedestrian, was injured when she fell on a public sidewalk. It had been covered with snow and ice for more than three weeks, and was rough from footprints.

The court said that the city was not liable just because the sidewalk was in that condition for more than three weeks. It considered the following factors as well: location, climatic conditions of the area, amount of accumulation, impracticality of circumstances, and

many others. (*Stippich v Milwaukee*, 34 Wis. 2d 260 (1967)) Other cases show these factors and that the duty of reasonable care apply in small towns as well as large metropolitan areas, even where snow is heavy and frequent and pedestrian traffic minimal.

By comparing two other cases you can see how the courts applied the factors identified in the *Stippich* case.

In one, *Kobelinski* was injured getting out of a bus in a residential area. She slipped on a mound of ice which covered the area from curb to sidewalk. It was about three inches high, three feet wide, with a rough uneven surface. The city had cleared the sidewalk, and a section of curb about 35 feet back from the corner. But when *Kobelinski* got off the bus, another one was stopped in front of hers, occupying the cleared area. There was no evidence that the mound was more than three weeks old.

In the other, *Schattschneider* also got off a bus stopped behind another and slipped on a mound of snow. The mound was three feet high and two to four feet wide. The sidewalk extended from the storefronts to the curb. The marked bus stop was 80 feet long, but only about 35 feet had been cleared.

Effect of sidewalk ordinances

It is probably wise to have an ordinance requiring abutting property owners to clear sidewalks or pay a fine, but it will not protect the municipality from liability. The Supreme Court has consistently ruled that the duty given a municipality by state law may not be delegated to another.

Comparison of two court cases about snow and ice covered sidewalks

Factor	<i>Kobelinski</i>	<i>Schattschneider</i>
Location of sidewalk	Residential corner	Commercial area; designated 80' bus stop.
Climatic conditions	Mound existed less than three weeks	Mound result of shoveling after several snow-falls; last addition more than one month ago.
Amount of accumulation	Two to three inches	Three feet
Practicality	Not determined	Took city crews 11 minutes to clear first 30-34 feet.
Amount and character of traffic	No heavy traffic	Commercial area; in heavy traffic periods, entire sidewalk used.
Intended use by pedestrians	Corner stop; no heavy pedestrian traffic	Regular and heavy use, needed by mass transit and others.
Result:	City not liable	City liable

From: *Wileman, Fred A., and Rosemarie A. Rhines, Municipal Liability in Wisconsin: Highway Problems.*





Photo credit: Chris Corsmeier, Wisconsin State Journal

Municipalities must exercise ordinary care in removing snow. Written snow removal policies help agencies implement local priorities.

When the Seventh Circuit U.S. Court of Appeals reviewed Wisconsin law in this area, it found only two circumstances where an abutting landowner can become liable to those injured on a public sidewalk (*Jones v United States, 703 F. 2d 246 (1983)*):

- Where the landowner exercises such dominion and control over the public way that it becomes a place of employment (as in front of a hotel especially when there is a doorman stationed there).
- Where the landowner creates defects or dangerous conditions in the public way by active negligence (as when the landowner spills water on the sidewalk and does not remove it before it freezes).

Signs and barriers

There are two general kinds of liability cases relating to signs and barriers: failure to warn of defects and failure to warn of other traffic problems. Liability is determined by the factors of notice and opportunity to remedy. That is, did the municipality know of the defect, or had sufficient time passed that it should have found it, and had it had sufficient opportunity to remedy the problem.

Signs to warn of defects

The Supreme Court decided that not warning of a physical defect is itself a defect as defined in Section 81.15 of the statutes. Other courts ruled that this applies only to defects located in the traveled portion of a highway. Also, it does not apply to physical charac-

teristics of a street (like a right angle turn) or to the surrounding topography (like natural mounds obstructing a driver's vision).

Municipalities should note a case against Sheboygan county. Highway crews regrading a gravel portion of a road had formed a windrow of gravel nine inches high and 30 inches wide. No signs warned of the work or the windrow. An auto struck the windrow, injuring the occupants. The court found a highway defect existed and held the county partially liable, even though the driver was mainly negligent. (*Heritage Mutual Insurance v Sheboygan Count, 18 Wis. 2d 166 (1962)*)

Signs to warn of other conditions

Governments have a duty to warn of existing highway conditions even when they do not constitute a defect. This arises from common law factors such as the amount and character of traffic and the characteristics of the highway. It also arises from Sections 349.065 and 84.02(4)(e) of the *Wisconsin Statutes*.

These require local authorities to "place and maintain" traffic control devices to regulate, warn, guide or inform traffic, and that they should conform to a manual adopted by DOT "establishing a uniform system of traffic control devices." Wisconsin has adopted the 1989 edition of the *Manual On Uniform Traffic Control Devices (MUTCD)* and some special provisions published as a *Wisconsin Supplement*.

Erecting signs Some signs, such as warning signs in advance of schools and railroad crossings, are required by the *MUTCD*. When they are not, the decision to erect or not to erect signs is immune from liability because it is a quasi-legislative action (discretionary act). However, a 1983 case decision suggests that at some point the presence of real danger could override a public official's discretion, making it a *ministerial duty* to put up a sign. Three *Wisconsin Transportation Bulletins* Numbers 7, 8 and 9 discuss signing in detail.

Non-conforming signs When a sign is placed that does not conform with *MUTCD* and DOT regulations, the court has ruled that employees who did it would be liable for any injuries it caused (*Chart v Dvorak, 57 Wis. 2d 92 (1973)*) However, when there is room for discretion,



Governments have a duty to warn drivers of road conditions with signs that conform to the MUTCD.

an official or employee who exercises the discretion as part of his/her job would be protected by immunity (*Hjerstedt v Schultz*, 114 Wis. 2d 281 (Ct. App. 1983)) This has also been applied to timing traffic signals.

Not maintaining signs Failing to maintain a traffic sign, as in other maintenance situations, is negligence. In one case stop signs put up at an intersection of two town roads were removed by vandals. The town board ordered replacement signs which had yet not arrived 19 days later when a traffic accident occurred.

The court found the town liable. It ruled that the once the town erected the signs it had a duty to maintain them and that 19 days was unreasonable delay (*Firkus v Rombalski*, 25 Wis. 2d 352 (1964)) The court made a similar ruling in a case where trees obscured a warning sign (*Naker v Town of Trenton*, 62 Wis. 2d (1974))

Removing signs There is little case law on removing signs. One possible rule consistent with the Firkus case (above) is that removing signs would be allowed if the public is fairly warned. The DOT has a procedure for removing signs in cases where the MUTCD requires removing them.

Recommendations for sign policies

Local government can take several steps to avoid many liability situations relating to signs. Foremost is to use the MUTCD when making decisions and follow its standards. Second is to inspect, report and replace signs. There is no excuse for significant delay in replacing missing traffic control signs once the municipality has notice.

Third, the municipality should seriously consider investing in portable, stand-alone signs, particularly stop signs, to be carried by squad cars and maintenance trucks. These may prevent an accident which otherwise could occur.

Fourth, consistency is important. It is important to treat similar situations the same way. Also, be aware of what other neighboring agencies are doing, and try to be consistent across government boundary lines.

Multiple signs should be set up in the order of the conditions the driver will have to negotiate. This helps avoid confusion and prepares the motorist for the first action to be taken.

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Summary

Tort liability is a municipal fact of life. It does not need to be a great burden. Building and maintaining safe roads is the best protection your municipality can have against tort liability claims. This includes following good management practices such as using written policies, training staff and keeping written records. And take advantage of professional advice from the Wisconsin D.O.T., the Transportation Information Center, neighboring highway agencies, or hired professionals.

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