

## CHAPTER 12 - TORT CLAIMS

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## 12-1.00 INTRODUCTION

This Chapter is a basic discussion of a complex subject. It is intended to inform MnDOT personnel of the need to recognize the importance of maintaining and safeguarding 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 could be sued only if it consented to the suit in advance.

The State of Minnesota lost its Sovereign Immunity in 1976. At that time the State Legislature passed the Tort Claims Act ([Minnesota Statutes Section 3.736](#)) which defines the conditions under which the State, its agencies, and its 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 alleged negligence of MnDOT or a MnDOT 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 MnDOT or a MnDOT employee and requesting compensation for damages.

### Legal Hold

A formal directive issued by the Office of Chief Counsel or Responsible Authority directing MnDOT employees, contractors, and consultants to identify, preserve, and not alter, delete, or destroy any evidence that may be relevant to any reasonably anticipated litigation or other legal proceedings in which MnDOT is or is reasonably likely to be a participant. A Legal Hold may convert to a Litigation Hold with the commencement of legal proceedings.

### Litigation Hold

A formal directive issued by the Office of Chief Counsel or Responsible Authority directing employees, contractors, and consultants to identify, preserve, and not alter, delete, or destroy any evidence that may be relevant to any actual litigation in which MnDOT is a named party or witness.

### Plaintiff

The person, persons, or entity that initiates a lawsuit for some kind of relief, typically monetary damages.

### Responsible Authority

The state official designated by law or by the commissioner as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data.

### 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).

### Tort Liability

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.

## **12-3.00 TORT LIABILITY**

### **12-3.01 Basic Characteristics of a Tort**

In order for MnDOT to be liable for a tort claim, three elements must be present:

1. MnDOT must have a legal duty to the plaintiff to perform a particular task;
2. MnDOT must have been negligent in its duty to perform that task; and
3. The damages incurred by the plaintiff must have been 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. MnDOT 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.

### **12-3.03 Negligence**

Negligence is defined as the failure to do something which a reasonable person would ordinarily do, or doing something which a reasonable person would not do. The reasonable person is a criterion used to set the standard of care in judging conduct. Determining whether a particular act or omission is reasonable is dependent upon the facts of the specific situation.

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*

MnDOT has a duty to correct a dangerous condition when it has received actual or constructive notice of the hazard. The courts have held that MnDOT must have had notice of the defect or hazard for a sufficient or reasonable time to afford them an 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 MnDOT. 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.

This notice requirement does not apply when the dangerous condition is the result of MnDOT'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 [Federal Manual on Uniform Traffic Control Devices \(MUTCD\)](#) states that “The U.S. Secretary of Transportation under the authority granted by the Highway Safety Act of 1966, decreed that traffic control devices on all streets and highways open to public travel in accordance with 23 U.S.C. 109(d) and 402(a) in each State shall be in substantial conformance with the Standards issued or endorsed by the FHWA.” The [MN MUTCD](#) is the Minnesota document in substantial conformance with the Federal MUTCD.

The MN MUTCD has been adopted by the State of Minnesota through a Commissioner’s Order, and applies to all public roads and private roads open to public travel in Minnesota. As regulated, this requirement has the full force and effect of the law.

A failure by government personnel in Minnesota to conform to 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 on a claim against MnDOT, a claimant must demonstrate that a negligent action or failure to act by MnDOT was a greater cause of the damages than any negligence on the part of the claimant, or in other words, MnDOT 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/her 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 MnDOT to have liability for tort damages, a claimant must prove that:

1. MnDOT had a legal duty to use reasonable care towards the plaintiff,
2. MnDOT breached that duty by falling below the standard of care thus committing an act of negligence,
3. The damages (injuries, property damage, pain and suffering, loss of income, etc.) incurred by the plaintiff were caused by MnDOT’s negligence, and,
4. In order 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 Statutory 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 is commonly applied to MnDOT is called statutory discretionary immunity ([Minnesota Statutes Section 3.736, Subdivision 3\(b\)](#)).

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.

Statutory 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 statutory discretionary immunity is based on this constitutional principle, claims of negligence are barred since the immunity applies “whether or not the discretion is abused”.

Examples of MnDOT 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 statutory 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 MnDOT (i.e., the executive branch), the official immunity doctrine exists to encourage the exercise of discretionary judgment by governmental employees. While the immunities analysis is dependent upon the facts of a given situation, generally, official immunity extends to non-policy type discretionary judgments such as professional engineering decisions. Official immunity prohibits plaintiffs from suing the government for 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 that are not dictated by policy and 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 employees, and ensures that the threat of personal liability does not unduly inhibit the exercise of judgment required of public employees 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 employee, 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 a public employee would be chilled if immunity were not granted to the agency.

Together official immunity and vicarious official immunity may apply to many situations in MnDOT.

#### **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 three that are applicable to MnDOT:

1. **Snow and Ice Immunity.** The State and its employees are not liable for a loss 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 a loss incurred by a user arising from the construction, operation, or maintenance of the outdoor recreation system, as defined in [Section 86A.04](#). This immunity is most commonly applicable to MnDOT at rest areas, which by definition are part of the outdoor recreation system.
3. **A loss involving or arising out of the use or operation of a recreational motor vehicle, within the right-of-way of a trunk highway, as defined in [Section 160.02](#), except that the state is liable for conduct that would entitle a trespasser to damages against a private person.**

### 12-5.00 RECORD KEEPING

Good records are crucial in reducing MnDOT'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 MnDOT 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 MnDOT had notice of a defect. The log should include 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 MnDOT's use of due care.
3. Written records of decisions involving the use of engineering judgment 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. Many claims and lawsuits are filed months or years after the incident and these reports are a way to reconstruct past events.
5. Photographs or videos may be useful in certain situations. The Department of Administration (DOA) encourages taking photos when a fleet vehicle is involved in a crash. Photos are also helpful if safety personnel want to document a chemical spill or a situation related to employee personal safety. However, if an incident occurs in a MnDOT work zone, and does not involve a fleet vehicle, caution in taking photos should be used by employees on the scene:
  - Camera settings should be checked to ensure accurate date and time stamps.
  - Shutter speeds should be adjusted if taking photos of changeable message signs or other electronic devices.

It is usually best from a legal perspective to rely on the State Patrol's photos to document the crash scene.

In general with respect to tort liability, the more documentation that is kept, the better it is for MnDOT to demonstrate that it was not negligent. While it is not practical to record and maintain documents on every activity, MnDOT 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. 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 (MnDOT) 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 related documents could jeopardize the State's efforts to present the best defense possible.

All other documents are considered public record and are subject to review at any time, with the exception of any crash data retrieved from the DPS MnCRASH database or any information generated from crash data from

the MnCRASH database. MnCRASH 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 MnCRASH 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 MnDOT 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 Office of Chief Counsel or the Data Practices Office.

If the information is being requested as the result of a crash, personal injury, or property damage, or if the requestor is an attorney, investigator, member of the media, or insurance representative, refer the requestor to the Data Practices Office: <http://www.dot.state.mn.us/information/datapractices/index.html>

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, the Chief Counsel's Office, or the DOA Risk Management Officer.

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

When a person reports damages that the person believes were caused by MnDOT's negligence, the following steps should be taken:

1. Determine if the incident occurred at a location that is under MnDOT jurisdiction. If not, refer the person to the appropriate agency.
2. Determine if the incident directly involved a MnDOT vehicle (such as a collision). If so, refer the person to the District Safety Officer who will handle the claim with MnDOT's insurance carrier.
3. Determine if the incident occurred within the project limits of a MnDOT construction project. If so, refer the person to the prime contractor of the project.
4. If the incident is at a location under MnDOT jurisdiction and did not directly involve a MnDOT vehicle or a MnDOT construction project, send a Claim Report and Demand form to the person. The claim forms are produced by the DOA Risk Management Officer and are available from the Office of Chief Counsel. Inform the person that their claim will be investigated and they will be notified of the results by the Department of Administration (DOA) Risk Management Officer.

If a claimant has any questions after filing a claim, they may be referred to the DOA Risk Management officer.

### **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 or Office regarding the case. This file should include any and all correspondence that has occurred as a result of the claim.

The claim file should be kept by the District Tort Claims Coordinator or District Traffic Engineer. This file is not public information. It is considered attorney work product and, by law, is confidential. Work with the Office of Chief Counsel to provide information for lawsuits and claims.

Any questions regarding this procedure may be directed to the Office of Chief Counsel.

### 12-8.02 Investigating Claims

After a claim has been filed, the Department of Administration (DOA) Risk Management Officer will send a copy of the claim and a request for information to the Office of Chief Counsel, which 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 District Tort Claims Coordinator to conduct an investigation.

The investigation will usually entail gathering documents from various District files, copying entries in logs or diaries, interviewing involved employees, and possibly a site visit. The State endeavors to respond to claims within a 3-4 week period, 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 Office of Chief Counsel 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 notice of claim or a lawsuit is filed, a more formal investigation process called discovery will begin. A litigation hold will likely be instituted through the MnDOT Office of Chief Counsel, and an attorney from the Minnesota Attorney General's Office will be assigned to the case. If the lawsuit was not preceded by a claims investigation, then the Office of Chief Counsel will likely request that all information relevant to the lawsuit be gathered by the district.

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 MnDOT's possession which are not privileged or otherwise protected by law. Generally this includes the contents of the construction, maintenance, and/or design files and any supporting manuals or documents.

Discovery documents are prepared jointly by the District Tort Claims Coordinator and key personnel, MnDOT's Office of Chief Counsel, and the Attorney General's Office. It is extremely important to provide the requested information by the deadline in the request to avoid legal sanctions against the Department. If the deadline cannot be met an extension must be requested.

If a lawsuit continues to proceed, the next phase of discovery is depositions. The purpose of a deposition is for the plaintiff's attorney to gather additional information by directly questioning specified MnDOT employees. Employees subpoenaed or designated to appear at a deposition will be briefed prior to their appearance by the Assistant Attorney General assigned to the case on procedures and the nature of the questioning. The assigned Assistant Attorney General will also represent the MnDOT employee at the deposition.

### 12-9.00 EFFECT OF LITIGATION ON MnDOT

The incidents of civil litigation, primarily in the area of torts, have increased greatly in the last 30 years. This strong tendency toward legal action is closely followed by the trend towards large awards to plaintiffs.

It is more economically effective to expend public funds on sound management practices and on proper highway operations than on the settlement of claims or payment of adverse judgments. Consequently, it would seem appropriate to review operations activities and reporting procedures to reduce our risk of and limit exposure to tort liability. All agency employees involved in such activities should be properly trained and informed of the legal implications of their function.