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LIABILITY & RESPONSE ISSUES ASSOCIATED WITH ICE AND SNOW

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Road agencies have a legal duty to perform winter maintenance. Winter maintenance of highways has changed a lot over the past 20 years, opening new opportunities to minimize agency liability exposure in winter maintenance.

Some legal background regarding liability may be helpful. Typically State law governs tort liability; and every State has different laws. Even within the same State, different laws may apply to State versus local government winter maintenance liability exposure. And liability exposure for the same unit of government due to one type of winter maintenance activity [snow plow involvement in a crash] may be quite different than liability exposure for another winter maintenance activity [crashes and condition of the roadway for which the unit of government is responsible for winter maintenance].

There are three primary legal bases of liability for winter maintenance activities. For example:

- **Common law tort liability** – This is court-made law and involves negligence.
- **Statutory liability** – Enacted state laws can modify common law. A statute, for example, may limit liability to \$50,000 for “whenever damages happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway that any town, city, or village is bound to keep in repair.”
- **Contractual liability** – Liability can also accrue by contract when you or someone else agrees to accept responsibility to defend and pay for someone else’s negligence. Contractual liability really does not affect legal liability; it is just an agreement as to who accepts responsibility and pays for it as between the two or more folks making the contract. Indemnification is contractual liability between private parties. Insurance is contractual liability between private parties and insurance companies.

Remember, crashes are not the only thing which may give rise to liability for damages resulting from winter maintenance activities. Consider such matters as environmental impacts, drainage damage, people who get stranded for long periods on snowed in highways, salt spray damage to orchards, etc. This article concentrates on crashes alleged to be attributable to winter road conditions.

Immunity. You may be shielded from some liability. As with liability laws, there are different laws in each State that provide immunity or protection from liability for damages due to winter maintenance activities. For example:

- **Constitutional** – this is “Sovereign immunity” generally available at the State level. It can make a big difference. Wisconsin has modestly modified sovereign immunity and collects more than it pays out. California and Pennsylvania have waived traditional sovereign immunity with respect to dangerous conditions of highways with consequently more damage lawsuits and pay outs.
- **Common law immunity** – Courts also have created Governmental Immunity - Discretionary Decision Immunity.

- **Statutory immunity or limits** – These include laws granting procedural immunity and liability limits involving such things as caps, no punitive damages, short notice of claim requirements, procedural hurdles, required distance behind snow plows; reasonable period of time to remove natural accumulations of ice and snow; no liability for snow on median blocking visibility; no liability for 100-year storms. State law can shield governmental contractors by granting some degree of vicarious governmental immunity.

There are many other potentially complex legal issues that differ from State to State, including different limits on damages that can be collected due to crashes involving winter maintenance vehicles, as opposed to condition of roadway, availability of insurance with limits that exceed statutory limits, applicability of joint and several liability, availability of contribution, workers' compensation and related issues.

There are three universally-accepted goals. These include:

Reduce the number and severity of crashes and injuries to persons and property
While improving quick, comfortable, convenient and efficient transportation
With available technology and resources.

With this foundation, let's examine the critical distinction between policy issues and legal issues.

Policy issues include the identification and evaluation of factors leading to crashes and damages and the selection of ways to reduce the number and severity of crashes and damages. This is the snowfighter's job. It affects everyone.

Legal issues are significantly different. The law does not deal with finding ways to reduce crashes and damages. The law concentrates on who is going to pay for the loss either before (insurance or indemnification) or after the crash or damages event occurs (liability). This is your attorney's job. Tort liability is not a valid, scientific tool for allocating winter maintenance resources to promote safety and efficiency.

Despite the lack of solid, consistently-collected data on the point, there is a general consensus that over the years there has been an increase in tort cases related to winter maintenance. States tend not to brag about their tort liability losses or victories or point out legal vulnerabilities. [2003 NCHRP Project 11-7](#) determined that it was feasible to develop a national data management system for collecting and disseminating highway tort claims information.

Today, however, there is no nationwide database or information system to track key indicators of highway tort liability. Such a database would include the magnitude and growth rate of claims and settlement payments, the resources devoted to tort claim prevention/risk management, and even the types of roadway conditions/features associated with tort losses.

The increase in tort cases is puzzling because there is solid evidence that highway authorities are providing better levels of winter service now than 20 years ago. Some of the increase in the number of tort cases may be attributed simply to the increase in vehicle miles traveled, but it should have been offset by advances in effective, timely and reliable winter maintenance activities and better, safer vehicles and tires. Here's why we think tort cases have become more frequent:

- Increased level of service expectations due to greater number and variety of users. The way we use roads now is fundamentally different than 20 years ago. People expect roads to be more "reliable" than they used to be. In particular, we do not expect to be unable to drive because of winter weather. Whole industries rely on roads being usable. Some industries have always needed good winter maintenance (tourism and ski resorts), but others have more recently started needing this. "Just-in-time" manufacturers use the road as a warehouse. Travel times do not need to be short, but they must not vary significantly from day to day, or season to season. Drivers have grown to expect to travel at usual speeds despite the weather.

- Public familiarity with and demand for use of technological advances. Parallel to and driving the

demand for a higher level of service is the general public knowledge that there have been improvements in winter maintenance equipment and available chemicals, and advances in communications that warrant more immediate responses with more information available. The public is aware of greatly enhanced storm predictive technology and accuracy and they know that cars and tires are more capable today than ever.

• The public is impatient with government. People are increasingly intolerant of any government failures. Examples abound.

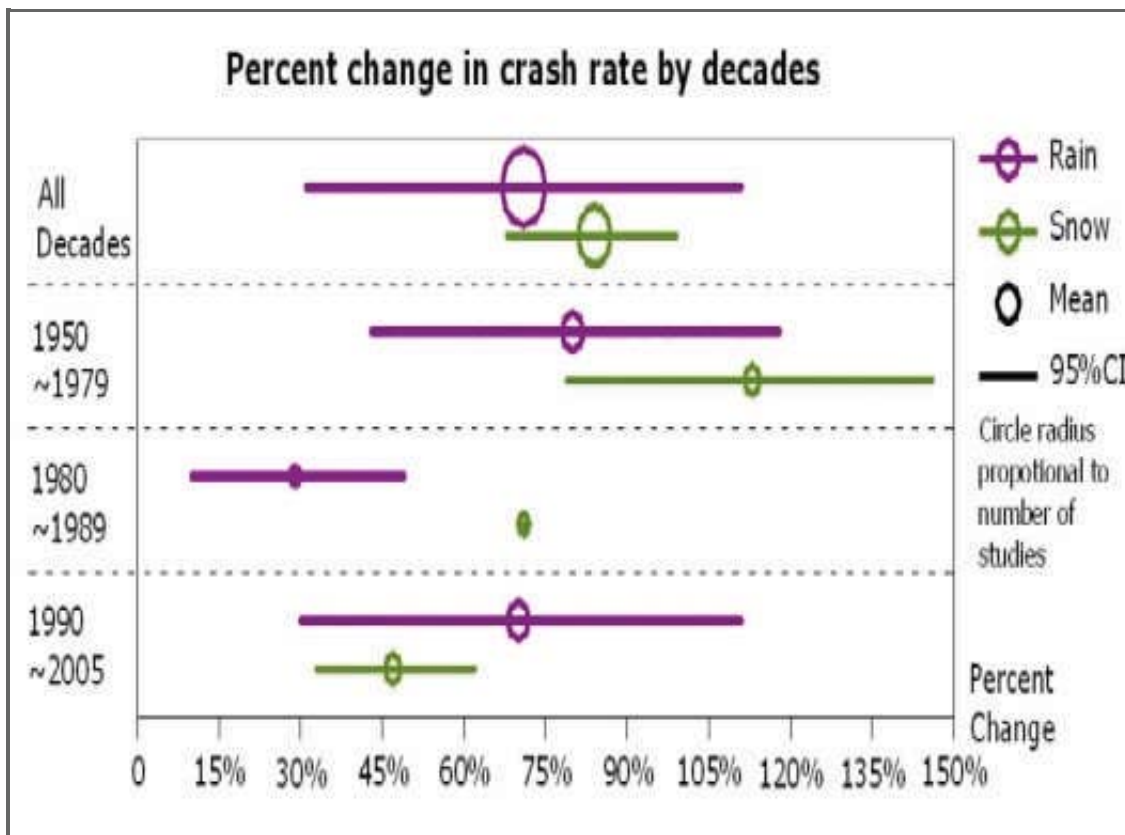
Iowa – Lesson: The job's not done until the clean up is done. The State of Iowa was sued due to a crash in which a car collided with a vehicle that had been left in the median by its owner and by a State Trooper. The Court held that discretionary function immunity defenses applied to the actions of the State Trooper as towing was clearly prohibited during the storm and there was no **immediate** danger to traffic by leaving the vehicle in the median. However, the Court decided the injured party could sue the State for its failure to remove the vehicle after the Trooper left the scene and the storm was over. *Waters v. Deeds* 2009 WL 1218718 (Iowa 2009)

South Dakota – Lesson: You have to follow your own rules. The winter Maintenance Supervisor certainly had discretion to determine such things as how many workers to call in for a storm, how many snowplows to put on the road, and where to place them. But the Maintenance Supervisor did not have discretion to ignore standards or policies established by the South Dakota DOT itself. No discretionary immunity defense. *Wulf v. Senst* 669 N.W.2d 135, 147 (S.D.,2003)

• Insurers like to reduce their pay outs by blaming winter maintenance. This is not a new phenomenon, but insurers do seem to be tightening their belts more than ever. Or perhaps attorneys representing insurance companies have greater incentives to reach out, expand litigation, and reduce and delay pay outs. Their legal arguments find fertile ground among juries because the public demands increased service levels and the public is aware of technological advances. The Courts also seem willing to narrow discretionary immunity defenses to the extent they are based on common law.

• People are more impatient. Twenty years ago they would have cancelled a trip if the weather seemed bad but they are less likely to do so today. They are also used to winter maintenance folk doing an excellent job – so when that job is not done so excellently, bad things may happen. People sometimes forget that just because you can start moving with better tires and all wheel drive does not mean that you can stop safely. Frankly, TV and radio stations too often exaggerate storm severity and that certainly doesn't help folks distinguish between storms or realistically weigh risks and uncertainties. Part of the problem is media oversimplification and failing to point out variations based on location, topography, time of expected events and estimation of accuracy. Consider the greater precision of forecasts for aviation related to specific times and specific location, etc.

There is evidence that highway authorities have provided better and safer levels of winter service. The following chart developed by the University of Iowa study of national data shows that there has been a consistent decline in crash rate by decades attributable to snow (shown in green):



Highway winter maintenance authorities are making the roads safer, and providing better mobility.

Highway winter maintenance authorities can and do perform extremely well, keeping roads safe and traffic moving. So, when a bad storm or weather event hits, people do not expect poor road conditions. In the back of their mind they are saying, "If you could do it for that storm, why not for this one?" Our primary goals haven't and shouldn't change: safety and mobility.

The answer is we need to try to improve what we do continuously. First, let's try to establish excellent highway maintenance authority communication and trust with the traveling public, so when we say it is bad, they stay home. We can do better than the typical statement that people shouldn't drive unless absolutely necessary for every storm.

Second, there is nothing we do that we couldn't do a little bit better. We need to figure out which areas we should choose for improvement, and to measure how we know if we are getting better. Some sort of formal system is entirely consistent with goals of safety and mobility.

Some legal tips too: don't box yourself in by the wording in your winter maintenance manual.

Don't write winter maintenance "policies" that choke off the exercise of informed discretion. Consider using the MUTCD style of "shall," "should," and "may." Make sure you have an introductory disclaimer that says it is guidance and not a substitute for flexibility for reasoned professional discretion and adjustment to the circumstances encountered. The South Dakota case, above, is illustrative. The Maintenance Manual Policy specified that sanding between 7 PM (evening) and 5 AM (morning) is discretionary. The Court felt that meant sanding was required at other times.

Be alert to the common legal issues in your area. Know the legal rules in your jurisdiction so you don't blunder into a more easily addressed liability exposure situation. Consider the following common issues:

- How long do you have to remove natural accumulation of ice and snow?
- Is the ice or snow an obvious obstruction to safe travel?
- Has your agency received notice of problem condition or location?

- Was this an isolated - one of kind or 100-year condition?
- Where have you had inadequate drainage, holes or ruts?
- Is there a history of prior winter crashes? Due to what winter condition?
- How long has condition existed? Did condition exist in previous years?
- Was it on surface of bridge or overpass or under bridge or overpass?
- Were there any warning signs, traffic officers? Road closed signs?
- What are typical defenses in your jurisdiction such as speed, contributory/comparative negligence?

No, you don't have to become a tort lawyer, but it wouldn't do any harm to find out from your attorneys and risk managers what situations are and have been sure losers in Court. You may be surprised at how much common sense is involved if you just have the information documented before the incident occurs to back up what you do and did and to back up your attorney. It would also be an opportunity for you to get to know your lawyers and for them to get to know you and the sound ways you are trying to exercise good professional judgment through collection and analysis of data and dissemination of guidance and instructions for continuing improvement.

Conclusions. The great job that is being done in winter maintenance has led to increased expectations. There have been significant changes in driving habits too! We can keep ahead of the curve by being proactive in our methods and instituting continuous improvement. We will need some form of automated record keeping to do our work really well. Most likely we are facing an educational issue. Folks do not know when a storm is really BAD.

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