

CHAPTER 24: RISK MANAGEMENT

24.1 INTRODUCTION

- 1 Road authorities undertake work that carries a substantial risk of litigation resulting from cases of loss of property and injuries arising from accidents (collisions). It is therefore imperative that risk management procedures should be introduced in order to minimise the potential for accidents, thereby reducing the risk of litigation and being held liable for damages.
- 2 In South Africa, road authorities have permissive duties to provide, maintain and repair roads and related facilities, but are under no obligation to do so. There can thus be no liability for damages occasioned by non-performance of powers which are merely permissive. Where, however, a road authority undertakes such work, it would be liable for any damages caused by its negligence, even where no obligation rests on the authority to undertake such work.
- 3 A road authority has an active duty to guard against introducing a new source of danger when undertaking work on a road or street. The condition after completion of work should not be more dangerous than before the work was undertaken.
- 4 An important consideration is that a road authority cannot ensure absolute safety to the user of the road system. There is a limit to the measures that can be introduced to improve road safety and the road user also has some responsibility in this regard.
- 5 In the United States of America, all liability suits are founded in a particular area of law, called *tort* law. A tort is a private or civil wrong that results in injury or loss caused by the *tortuous* acts of a person or a legal body. In South Africa, the delictual liability for damages caused by a person's actions is governed by common law.
- 6 In South Africa, liability suits have thus far been less common than in the United States. The outcome of liability cases in South Africa depends on the facts of each case and cannot be predicted with certainty as applicable laws and principles develop and change over time. However, although cases to date have not been unreasonable in their verdicts, it is apparent that a road authority that does not adhere to legislation and guidelines leaves itself open to expensive liability suits.

24.2 STANDARDS AND GUIDELINES

- 1 Traffic signals are specifically controlled by National Road Traffic Regulations as well as the Road Traffic Signs Manual. Non-compliance to these regulations as well as the requirements contained in the manual will increase the risk of litigation and the possibility that the road authority will be found in neglect of its duty.
- 2 Non-compliance with the National Road Traffic Regulations is a criminal offence and may lead to criminal prosecution being instituted against a road authority.
- 3 Standards and guidelines must be applied professionally and objectively, without undue interference by outside influences. It is unlikely that the standards and guidelines will be questioned, as well as deviations that were justified objectively. Arbitrary deviations that cannot be justified objectively, however, would increase the likelihood of an authority being found in neglect. On the other hand, "going by the book" may not be sufficient and additional consideration may be required to ensure safety over and above that provided by the minimum prescribed standards.
- 4 A particularly important requirement of the National Road Traffic Regulations is that a professional engineer or technologist must approve traffic signal installations. It must furthermore be designed in accordance with the regulations and the Road Traffic Signs Manual. Non-compliance with the regulations could be interpreted as an abuse of the duty of the road authority and could create liability.
- 5 A road authority can use its discretion in selecting amongst alternative solutions, as long as all the alternatives meet the required standards and guidelines.
- 6 Even if the standards and guidelines have been properly followed when the traffic signal was installed, it is the duty of road authorities to ensure that a design does not become manifestly dangerous following its adoption. Road authorities may not have an ostrich-like approach in which problems are ignored with the hope that they will disappear.
- 7 At traffic signals, it is imperative that operations should be reviewed immediately after installation, or after any changes that materially alter the operations of signals, to determine if the changed conditions have not inadvertently resulted in dangerous conditions. Failure to do so would increase the risk of liability.

24.3 NOTICES OF DEFECT

- 1 Knowing about a problem means that a road authority has been given notice that a problem exists. A notice of a problem creates the duty for the road authority to remedy a defect or face liability risk when operations are continued without addressing the problem. Negligence stems from notice of a defect and the subsequent failure to safeguard against the consequences of the defect.
- 2 A road authority may receive *actual* or *constructive* notices of a defect. An *actual* notice occurs when an authority has received communications from the public or its own employees. A *constructive* notice occurs when the authority should have known of a defect.
- 3 A particularly important constructive notice is an actual notice that was given to an authority, but which was not handed over to the traffic signal division. It is unlikely that internal communication problems would be treated as a mitigating consideration - it is the responsibility of authorities to ensure that such communication problems do not exist amongst departments or divisions. A local authority is treated as a legal entity, but not its internal departments. Passing blame from one department to another will not assist a case – in most cases, it will aggravate the matter as it shows the lack of proper management and care.
- 4 A constructive notice would also occur when an employee of the traffic signal division has been in a position to observe a problem. In such a case, it would not even be necessary for the employee to have notified the road authority about the problem, since this would be treated as an internal communication problem that should have been addressed by the authority.
- 5 Constructive notice can also arise if the road authority has allowed a problem to exist for an unreasonable period of time without taking action. It may be found that the road authority had sufficient time to discover the problem if they were acting in a reasonable prudent manner. An unreasonable period of time would among other things, depend on the nature of the problem, the extent of the danger to the public and the financial situation of the authority.
- 6 Constructive notice also occurs when the road authority did not follow required standards and guidelines, even if they were not aware of the existence of such standards and guidelines. It is incumbent on a road authority that it is aware of the latest standards and guidelines. The authority has created the problem, therefore they have constructive notice and they could be negligent in this regard.
- 7 *Repeat accidents*, particularly if of a similar nature, can also be construed as constructive notice of a defect at a traffic signal installation. Accident statistics should be reviewed on a regular basis with the purpose of identifying signal installations where such repeat accidents occur.

24.4 CONSTRUCTION AND REPAIR

- 1 The construction and repair of a facility are considered to be a simpler operation than design, and it is therefore more likely that a road authority will be found in neglect for deficiencies during the construction or repair of a signal installation, even if the driver was mostly to blame for an accident.
- 2 Lapses in the provision of appropriate protective measures during the construction or repair of a traffic signal installation would probably result in a relatively simple negligence suit. It would be simple because the elements of the suit would be easy to prove, particularly that the breach of duty owed to the road user by a road authority, was the proximate cause of the accident, even if a driver had some duty to take due care.
- 3 Road authorities should be aware that in the employment of contractors, their basic responsibility to maintain roads in a reasonably safe condition can not be contracted away. The road authority should implement appropriate procedures to ensure that contractors abide by safety requirements. Contractors should be treated as if they are contracted employees.

24.5 RISK MANAGEMENT STRATEGY

- 1 A risk management strategy should address possible risks of failure resulting from all phases over the full life cycle of a project (planning, construction, maintenance and operations). It is particularly important that appropriate standards and guidelines be complied to, while steps should be instituted to ensure that faults and defects are speedily attended to.
- 2 **The most important method of reducing the risk of litigation is by employing personnel with the required skills and knowledge to ensure the safe operation of traffic signals.**
- 3 Good records are the foundation of any good risk management programme as they can provide a good defence for actions against a road authority. However, the same records can be used against the road authority when appropriate responses have not been taken or when notice of a defect is observed in the records. Such notice would indicate that the authority had knowledge of a defect, and that it failed to eliminate a known defect.
- 4 A good risk management programme would include appropriate preventative procedures for the identification of possible defects, either in the design or in the operation of traffic signals. The preferred procedure is one which seeks out problems by inspection and which does not rely entirely on complaints from the public or the police. This programme should not only seek out the problems, but should also address the need to rectify the problems.
- 5 Where there is a priority list for repairs or improvements, it is important that a road authority should not deviate from this list when there is no rational reason for such deviation. The priority list should also be established using rational and objective criteria.

- 6 Provision should be made for a 24-hour response to rectify emergency faults. It is not necessary to repair a fault immediately, as long as steps have been taken to safeguard a situation or to erect adequate warning signs. It must, however, be understood that temporary measures cannot be left indefinitely and that permanent repairs should be completed within a reasonable period of time. An authority leaving a traffic signal in flashing mode for days on end could find itself open to claims in the event of accidents.
- 7 An essential aspect of fault response procedures is to institute procedures whereby complaints are received and passed through appropriate channels. Appropriate records should be kept of such complaints as well as the responses to the complaints.

24.6 PERSONAL LIABILITY

- 1 Employees of road authorities are normally protected against liability suits while working within the scope of their employment. However, where gross negligence can be proven, it may be possible that such protection will fall away, or that the road authority itself could institute litigation against the individual concerned.
- 2 In the private sector, consulting engineers and contractors are most vulnerable. They have none of the protection available to employees of the public sector. Under these circumstances, there is a definite need for consulting engineers and contractors to obtain liability and professional indemnity insurance. A road authority should, in fact, insist on such insurance as part of the contract between the authority and the consultant or contractor.
- 3 Alternatively, a road authority can agree to indemnify consultants and contractors from any claims once traffic signals have been commissioned and approved by the responsible engineer or technologist of the road authority. Such indemnity should be part of the contract between the road authority and the consultant or contractor.

