

Legal Winter Road Questions and Answers

Legal Information

Jim Katsiaficas Senior Staff Attorney, Maine Municipal Association

I. Overview.

Source of Liability/Limits on Liability. The primary type of liability that concerns municipalities and their employees with regard to public works is tort liability, because tort claims demand that the municipality pay money damages. A "tort" is a civil wrong against person or property, usually compensated for by the payment of money damages. For example, the entry onto a person's property without that person's consent is the tort of trespass, and threatening to harm a person is the tort of assault. While some of these acts also may be crimes for which the State could punish a person by imprisonment, the law of torts concerns a person's recovery of damages for harm done to his person or property, such as the property damage caused by trespass or the physical or psychological harm caused by an assault. Torts can be intentional (such as trespass, assault or battery) where the person committing the tort is substantially certain that the harm will occur as a result of his or her act. Torts also can involve negligence. Negligence occurs where a person owes a duty to others to act in a certain way and either acts inconsistently with that duty or fails to act (an omission) in the required way; where the act or failure to act results in personal injury or property damage, the person may be liable to another for his or her negligent acts or omissions. For example, each driver owes a duty to all other drivers on the road to drive in a reasonably safe manner. If a person violates this duty and it causes injury to a person or damage to the property of another person, the driver may be liable to that other person for money damages to compensate that person for the injury or damage caused by the driver's negligent act or failure to act.

1. Maine Tort Claims Act. This law limits the liability of a municipality and its employees for torts committed by them.

- Replaces former rule of sovereign immunity (the old common law, or judge-made, rule) that a person couldn't sue the State except where allowed by the courts or Legislature on a case-by-case basis).
- Not really a source of liability, but a grant of immunity and a limit on liability where not immune.
- Under this Act, a Municipality generally is immune, but where it is liable, liability limited to \$400,000 for all claims arising out of a single occurrence. However, immunity and the limit on liability can be waived if a municipality purchases insurance where it otherwise would be immune or purchases insurance in excess of the \$400,000 limit where it is liable. Some examples of liability that might involve plowing and sanding operations are:
 1. Negligent acts or omissions in its ownership, maintenance or use of any motor vehicles, machinery and equipment (snow plows, graders and dump trucks).
 2. Negligent acts or omissions in the construction, operation or maintenance of any public building or its appurtenances (including sidewalks leading to public buildings).
 3. Negligent acts or omissions during construction, street cleaning (does not mean snow and ice removal) or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including street signs, traffic lights, parking meters and guardrails. (However, lack of a street sign or failure to replace otherwise missing street sign does not lead to liability).
- Municipal employees generally are liable for their negligent acts or omissions, but not where performing discretionary function or duty, and are not liable for good faith intentional acts or

omissions; where liable, liability capped at \$10,000 and municipality has duty to defend and pay claim so long as: employee was in scope of municipal employment; employee is not determined to be criminally liable; and if intentional act, act was in good faith.

2. Highway Defect Act (the "Pothole Law").

A municipality is liable for property damage and personal injury in amount of up to \$6,000 (\$25,000 for death) caused by defect in highway of which municipal officer (selectmen or councilors), road commissioner or their authorized representatives had 24 hours' actual notice.³ Federal Civil Rights Act. Person whose federal civil rights are violated by municipal official or employee acting "under color of State Law" can sue municipality for damages and if prevails, also is entitled to reasonable attorneys' fees and costs. No limit on damages.⁴ Conclusion. So long as a municipal employee is acting within the scope of his or her employment, is acting in good faith, is not engaging in criminal activity and is exercising due care, the employee will be immune from liability for discretionary acts and will have the benefit of the municipality's defense and indemnification if there is liability. In other words, if you act within the scope of your job, if you act in good faith and avoid committing a crime in your work and if you act responsibly and professionally in doing your job, you will minimize your liability and the municipality's potential liability.

II. Application to Specific Issues: "Questions & Answers"

1. Question: Mailboxes--how do you handle mailbox damage done by your truck or plowed snow/ice from your truck? Any difference if the mailbox is within your right-of-way or outside the right-of-way boundary? What if someone is going to "fix you" by erecting an immovable "deadly fixed mailbox" made of concrete, steel, brick, etc.?

Answer: Mailboxes are in the right of way by permission of municipality and if damaged, there is no legal entitlement to replacement or payment. Each municipality has its own policy regarding mailbox replacement. If the mailbox is within the right-of-way, the municipality has a legitimate concern for the safety of drivers and for its own potential liability under the Highway Defect Act, since a mailbox that is a "deadly fixed object" may be a highway defect. If outside the right-of-way, however, the mailbox is on private property and is beyond the municipality's jurisdiction. No municipality should tolerate the presence of "deadly fixed object" mailbox posts (such as concrete, granite or steel I-beam posts) in the right- of-way since this could constitute a "highway defect." Municipality should request immediate removal of post by landowner (who also could be held liable for property damage or personal injury). However, if landowner does not cooperate, it is better to obtain a court order for removal instead of municipality exercising "self-help" and removing post itself.

2. Question: You've been plowing all day and night. You're tired and you want to go home but your boss tells you to keep going for another 3 hours. Unfortunately, you fall asleep at the wheel and hit a car and seriously injure the driver. Who's liable? (Is this the "tired trucker" syndrome?)

Answer: You and the municipality may be liable. As to the individual employee/plow operator, driving the plow is not a discretionary act. To the extent that you as a driver breach the standard of care owed by one motorist to another or owed by a reasonably prudent plow operator to the public, you may be negligent, and if that negligence causes the accident, you may be liable to the limits of liability. Examples of negligence can include reckless operation of a motor vehicle inattention, tiredness and distraction. There also could be a claim for negligent supervision against a supervisor who keeps tired operators on the road. As to the municipality, the operation of a plow by a person who is too tired to do so may be the negligent operation of a motor vehicle, and if personal injury or property damage is caused by such negligent operation, municipality may also be liable. There are no limits in State or federal law on the amount of time a plow operator may plow snow. Your municipality may have a policy or your union may have a collective bargaining agreement that sets a maximum time on plowing. In the absence of a limit by policy or agreement, road crews and their supervisors should use common sense in this regard.

3. Question: Is it "OK" to provide "free" sand to taxpaying citizens in your town? Should there be a limit?

Answer: Strictly speaking, because it is unlawful to spend public funds for private purposes (the "Public Purpose Doctrine"), it technically may be unlawful to give a bucket of sand per storm to taxpayers. Most municipalities provide this as a courtesy, but draw the line at contractors attempting to obtain free sand for their businesses. This is a reasonable distinction, since a municipality certainly shouldn't be subsidizing a private business. However, the municipality must be careful because it may be liable for injury caused by slip and fall in a municipal sand/salt shed or associated walkways.

4. Question: A "little old lady", your neighbor, or mother runs off the road into a ditch and you drive up while you're plowing or sanding. Do you stop to help? What if you hook on to their fender and innocently yank it off?

Answer: At least stop to check on the situation and the condition of the occupants of the motor vehicle and call in the accident. However, if you attach a chain to the bumper and attempt to pull the car out of a ditch, both you and the municipality could be liable for damage and injury caused by the negligent operation of a motor vehicle, and as to the individual, there is a question as to whether the plow operator is operating within the scope of employment when taking such as action. The municipality should have a policy on this type of situation, and if it decides to provide assistance, the operator at least should obtain a signed waiver and release from the driver before providing assistance.

5. Question: Your garage doesn't have fuel tanks, so you use the Mobil station in town for refueling your snowplow vehicle. The owner is your buddy and he asks you to "put a little sand" in his entrances. After all, "I pay taxes in this town"! Do you sand or not?

Answer: Again, because it is unlawful to spend public funds for private purposes (the "Public Purpose Doctrine"), it is not appropriate to sand the entrances to the private gasoline station business. There is also the question of whether the plow operator is within the scope of employment when doing this "favor" and so there may not be insurance for the employee if a person should make a claim against the gas station and the municipality and its employee..

6. Question: A local car wash is creating icing problems as cars/trucks pull out of the car wash. As they pull onto the road, water runs out of the pickup trucks or off the cars and instantly ices the road. What do you do?

Answer: Strictly speaking, the municipality's legal obligation is only to plow the snow and ice from the town ways. If a motorist or pedestrian should slip and fall after the road has been plowed, the municipality and its employees are not liable. While there is a State law that prohibits pushing of snow into the public way, it does not prohibit the placement of water in a public way, even if it is likely that the water will freeze. Therefore, it probably is best for the municipality to place more sand and salt on the ice to protect the public, even though the ice does not pose any potential liability to the municipality and its employees.

7. Question: Does your town pay for windshield damage claims? If you don't, how do you "prove" that you didn't damage their windshield? If you do, why?

Answer: If windshield damage results from a municipality's negligence in the operation of a plow, sanding truck, street sweeper or other motor vehicle, then the municipality is liable and should pay the claim. However, the municipality should investigate these claims to minimize its exposure, and vehicle operators should be careful to minimize the number of such claims.

8. Question: Does your town plow private roads? If you do not, what do you tell individuals who want you to plow because "they pay a lot of taxes! If you do, how do you justify the increased costs/liability potential when this practice is illegal?

Answer: Once again, because it is unlawful to spend public funds for private purposes (the "Public Purpose Doctrine"), it is unlawful for a municipality to plow private roads, including camp roads and logging roads. Municipalities are required to plow and remove ice from town ways. A municipality may, if so directed by the town meeting or town or city council, plow snow and ice from public easements. However, it is unlawful to use public money to plow private roads. Moreover, although there are no

court decisions in Maine on this issue, a plow operator who plows private roads may be outside the scope of employment and therefore liable without limitation, defense or insurance.

9. Question: How do you respond to citizens who claim: You never get to their road until the end? You always "plow in" my driveway after I shovel? You always plow up all the sand just after you've put it down!

Answer: This is a public relations issue rather than a legal question. It requires the road commissioner/public works director to be prepared to explain the municipality's snow removal plan and its execution. There should be a written plan available to the public outlining the order in which roads are plowed and establishing all other duties for snow and ice removal.

10. Question: What do you do about parked vehicles while you're plowing? How do you interact with law enforcement to enforce parking bans?

Answer: Under State law, law enforcement officers may order the towing of an automobile that is interfering with snow removal operations. Also, check local ordinances, since many municipalities have ordinances that establish emergency parking bans or prohibit or limit parking on streets from November through April.

11. Question: What about riders in the snow plow - friends, family, town officials, media, hitchhikers?

Answer: Because the municipality is liable for damage or injury caused by negligent acts or omissions in the operation of motor vehicles, a municipality should have a written policy prohibiting friends, family and hitchhikers from being in the plow while it is in operation in order to reduce opportunity for driver inattention or distraction. There may be situations in which a municipal official (selectman or councilor) or a reporter may accompany a plow operator, but this should only be in accordance with municipal policy and the "guest" passenger should be required to sign a release in favor of the municipality for any and all claims he or she might have against the municipality caused by traveling in the plow vehicle.

12. Question: Is an operating snowplow or sander an "emergency vehicle" under State law? Are you exempt from stopping at STOP signs? Are you exempt from liability on 1-way streets when a city/town ordinance allows snowplows to operate in the "wrong" direction?

Answer: No. Under 29-A M.R.S.A. § 2054, an "authorized emergency vehicle" has certain privileges, such as proceeding through a red light, stop signal or stop light and may disregard regulations concerning the direction of movement or turning in specified directions, but only when responding to an emergency call or fire alarm or when in "hot pursuit" of a suspected or known violator. However, municipal snow plows, sand trucks and graders are not "authorized emergency vehicles." This section does require highway maintenance vehicles such as plows, graders and sand trucks to be equipped with amber lighting, including several auxiliary lights and a rotating flashing light, and permits these vehicles to be equipped with a spotlight. The lighting requirements apply to highway maintenance vehicles whether these are owned by the municipality or owned by a private contractor providing service to the municipality under contract.

Related to one way operation, if a municipality enacts a traffic ordinance allowing vehicles to drive against traffic, then it has an argument that it can legally do so. However, there is no specific statutory authorization for snow plows to drive against traffic, and the ordinance provides only an argument -- not certainty, since there are no Maine cases testing the validity of such an ordinance.

13. Question: Is an operating snowplow or sander exempt from State weight limits during snow & ice control operations?

Answer: While enroute to or from plowing and sanding and while plowing and sanding, a municipal truck is exempt from gross vehicle, axle and tire weight limits, and a vehicle modified to be a snowplow is exempt from tire weight limits at all times (29-A M.R.S.A. § 2353(6)).

14. Question: Can a person drive a plow vehicle without a CDL (commercial drivers' license)?

Answer: [Under 29-A M.R.S.A. § 1252 1 \(C\) \(5\)](#), a person who is employed by a city, town, county, district or other local government that has a population of 3,000 or fewer persons may operate a commercial motor vehicle within the local government's boundaries in order to remove "snow or ice from a roadway by plowing, sanding or salting," but only if the employee with a CDL who normally operated the motor vehicle is "unavailable," and the local government determines that an emergency exists that requires additional assistance.

15. Question: What must the municipality worry about when it hires a private contractor to perform plowing and sanding?

Answer: Private contractors are liable without limitation to private parties for property damage and personal injury caused by their negligent acts or omissions and intentional acts when plowing snow for the municipality. However, if someone is injured by acts or omissions of a private contractor, that person is likely to sue both the municipality and the private contractor. Therefore, the private contractor must have adequate insurance (at least \$400,000) naming the municipality and its officers, agents and employees as additional insureds and should be required to defend, indemnify and hold the municipality and its officers, agents and employees harmless against any and all claims caused by, relating to or arising out of the plowing operations. Also, the municipality should require the contractor to post a performance bond to guarantee satisfactory performance of work.

16. Question: Citizens are cleaning out their driveways and leaving snow in the road or piled against the snowbank in the road creating a mess and a hazard. What do a Town do?

Answer: There is a State law (29A M.R.S.A. 2396) that prohibits pushing of snow into the public way.
" 4. Snow. A person may not place and allow to remain on a public way snow or slush that has not accumulated there naturally."