

THE EFFECT OF THE NO-FAULT
AUTOMOBILE INSURANCE LAW ON
ROAD COMMISSION
LIABILITY FOR DEFECTIVE ROADS

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April 1979

Prepared for
Oakland County Road Commission

by

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**THE UNIVERSITY OF MICHIGAN
HIGHWAY SAFETY RESEARCH INSTITUTE**

Technical Report Documentation Page

1. Report No. UM-HSRI-79-19		2. Government Accession No.		3. Recipient's Catalog No.	
4. Title and Subtitle The Effect of the No-Fault Automobile Insurance Law on Road Commission Liability for Defective Roads.				5. Report Date April 1979	
				6. Performing Organization Code	
7. Author(s) Hal O. Carroll; Dennis M. Powers				8. Performing Organization Report No. UM-HSRI-79-19	
9. Performing Organization Name and Address Policy Analysis Division Highway Safety Research Institute The University of Michigan Ann Arbor, Michigan 48109				10. Work Unit No. (TRAIS)	
				11. Contract or Grant No. N-2	
12. Sponsoring Agency Name and Address Oakland County Road Commission 31001 Lahser Road Birmingham, Michigan 48010				13. Type of Report and Period Covered Special Report	
				14. Sponsoring Agency Code	
15. Supplementary Notes A companion report (UM-HSRI-79-29) discusses the effects of No-Fault law on road commission as an employer and owner of vehicles, equipment, and other property.					
16. Abstract The No-Fault automobile insurance law apparently conflicts with other state laws providing that a road commission is liable for injuries caused by its failure to provide highways free of defects. No Michigan court cases have as yet addressed this question. When a court does, it will likely examine the legislature's intent in enacting those laws. This study examines the statutes themselves, the legislature's intent in enacting them, and potential resolutions of the conflict.					
17. Key Words No-Fault, Road Commission Highways, Unsafe Roads, Liability				18. Distribution Statement	
19. Security Classif. (of this report) Unclassified		20. Security Classif. (of this page) Unclassified		21. No. of Pages 17	22. Price

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THE EFFECT OF THE NO-FAULT AUTOMOBILE
INSURANCE LAW ON ROAD COMMISSION LIABILITY
FOR DEFECTIVE ROADS

Introduction

Michigan's No-Fault automobile insurance law [No-Fault] made substantial changes in the way persons involved in automobile crashes are compensated for injuries and for damage to their property. Under No-Fault the litigation system, in which compensation depends on fault, is replaced by a system in which an injured person receives insurance benefits without regard to fault.

The General Highway Law and the Governmental Immunity Law [road liability laws] both provide that road commissions are responsible for injuries caused by their fault in failing to provide safe roads.

This report will discuss the situation in which the No-Fault law and the road liability laws intersect, that is, where a defective road causes a crash which results in damage to a car or injury to its occupants, and where the No-Fault law would otherwise apply. The report begins with a discussion of road commission liability in general and the No-Fault law in general, considers how No-Fault affects road commission liability, and concludes with recommendations regarding possible courses of action.

Road Commission Liability

The General Highway law imposes a duty on road commissions to maintain all roads under their jurisdiction in a condition that is "reasonably safe and convenient for public travel" (1). If a road commission fails in this duty, then any person injured because of the defective condition of the highway can sue the commission for the resulting personal injuries and property damage. Before a

road commission can be held liable for the defective road, however, it must have had an opportunity to repair the defect before the accident happened. This requirement is met when the commission in fact knew of the situation prior to the time of the accident and had reasonable time to correct it. However, if the situation was "readily apparent to an ordinarily observant person" for at least 30 days before the accident, Michigan law requires courts to conclude that the commission had knowledge of the defect and had ample time to repair it, even though the commission may actually have had neither (2).

This liability is based on the concept of negligence. Negligence exists where a person or organization which has a duty to use reasonable care fails to do so, the result being injury to a person or to property. In the case of a road commission, the duty (to maintain the roads) is imposed by statute. The commission is not required to guarantee that the roads will be safe, but to use ordinary care to make them safe. As will be seen later in the discussion of the No-Fault law, this duty of care is similar to the one that applies to all drivers and was the basis for determining who bore the loss resulting from an accident.

It has long been the rule in Michigan, as in other states, that the government and its agencies cannot be sued for negligence. The liability of a road commission for its negligence in maintaining the roads has long been an exception to this rule of governmental immunity (3). When the Michigan Supreme Court attempted to do away with governmental immunity in general, the legislature enacted a statute re-establishing it. That statute, however, expressly continues the exception which permits a road commission to be sued (4).

Because a state cannot be sued without its consent, it can impose conditions on the right to sue where it does consent. As to a road commission the legislature has established two conditions. One of these

has already been described: the injured person must show that the commission knew of the defect and had time to repair it. The other condition is that the injured person must notify the commission of the injury and give it information on the location and nature of the defect, the accident, and the injury. The statute requires that this notice be given within 120 days of the injury (5), but the courts have held that a later notice is sufficient unless the delay hampers the commission's efforts to prepare a defence (6).

Except for these two conditions, a road commission remains liable to persons injured by its negligence in maintaining the roads under its control. This concept of negligence, or failure to use care, was also the one used to assign responsibility for an accident to one of the drivers in the litigation system. At least in the area of driver liability, the use of the negligence theory was changed by the No-Fault law.

The No-Fault Law

The law has traditionally determined responsibility for injuries in a traffic crash on the basis of fault. This was expressed in the concept of negligence, the failure to use ordinary care in the situation in which the accident occurred. Thus, the injured party, in order to receive compensation, was required to prove that the "other driver" had been careless. However, the other driver, even if he was negligent, could avoid paying the injured party by showing that the injured party was also negligent (7). This concern with establishing fault often led to numerous and long trials and was thought to be a major cause of court congestion. The result was that a legitimate claim for a large amount of money, where the injuries were severe, was likely to be settled for less than it was worth, because the injured party needed the money. On the other hand, a small claim could often be settled for more than it was worth because it was cheaper to settle it than to pay to defend it.

Dissatisfaction with the operation of the negligence system led to the passage of the No-Fault law in 1972. This law has been upheld by the Michigan Supreme Court (8). Because the No-Fault law is fairly

recent and complex, it will be described relatively completely in the rest of this section. In general, it can be said that No-Fault changed the focus of the injury compensation system. Before No-Fault, the focus was on the personal fault of the driver. After No-Fault it is on the insurer of the vehicle.

The No-Fault law eliminated liability for negligence and replaced it with insurance benefits available from the injured person's own insurer. There are two important exceptions to this rule. Liability for negligence is retained where (a) the damages for "economic loss" (wages, expenses, etc.) exceed the amounts paid for these losses under the insurance, and (b) the injured person suffers "death, serious impairment of body function or permanent serious disfigurement" (9). These exceptions establish a "threshold." Below the threshold, liability for negligence is abolished. Above the threshold, lawsuits for damages based on fault are still permitted. Therefore, it is clear that the No-Fault law is intended, not to abolish liability for negligence altogether, but to limit it to the more serious cases. It follows that if it does apply to suits against the Commission, No-Fault will eliminate only the lesser ones, and not those where the injuries are serious.

No-Fault changed the focus of the compensation system to insurance of one's own vehicle rather than the conduct of the other driver. Insurance is mandatory under No-Fault. In order to register a motor vehicle in Michigan, its owner must present proof of insurance (or be an approved self-insurer) (10). Three types of insurance are required: personal injury, property damage, and "residual liability." Residual liability insurance covers accidents occurring out of state, but more important, it covers cases where the driver covered by the policy is at fault and the injuries are above the threshold. These are the cases where claims against the negligent driver are still permitted by No-Fault. Personal injury and property damage coverage are discussed below.

No-Fault's personal injury provisions make the insurers of owners and operators of motor vehicles responsible for "economic" losses suffered by the occupants of their vehicle (11). Personal injury insurance covers these losses. Economic losses include lost wages, loss of support, and out-of-pocket expenses. Out-of-pocket expenses include the cost of supplies, services, and accommodations during treatment and recovery. Lost wages are limited to the first three years after an accident (12). As long as a person's injuries are below the No-Fault threshold, he is not permitted to sue for damages. But if the losses exceed the No-Fault benefits, or if the injuries involve death, serious impairment of body function, or permanent serious disfigurement, then the injured person is above the threshold and can sue for damages based on negligence.

Within the limits of No-Fault coverage, however, financial responsibility for an accident is on the insurer of the owner or operator of the vehicle occupied by the injured person. Thus, the personal injury protection carried by the vehicle (i.e., by its owner) applies to all the occupants of the vehicle. This protection applies whether the vehicle is privately owned or is owned by a company and driven by an employee. Therefore, if the owner of the vehicle is driving it and he and a passenger are injured, they both receive compensation from the owner's insurer. If the vehicle is uninsured, then the occupants are compensated by the insurer of that vehicle's driver. If neither the owner nor the driver is insured, then the occupants look to the insurance on their own vehicles (13).

No-Fault's property damage provisions make the insurers of owners and operators of motor vehicles responsible for the cost of accidental damage to physical property "arising out of" the use of such vehicles in Michigan (14). Covered damages include loss of use of property but are limited to the lesser of repair or depreciated replacement cost. The maximum liability of an insurer in any single

accident is limited to one million dollars. No-Fault property damage benefits will not pay for damage to the motor vehicle itself unless, at the time of the accident, it was properly parked and was struck by another vehicle (15). Insurance for damage to one's own vehicle can be obtained by purchasing a separate "collision rider," usually with a "deductible" provision, whereby the insured pays a certain amount and the insurer pays the excess. These riders typically waive the deductible if the driver was not at fault in the accident. However, collision riders are not mandatory under No-Fault. They are options available to those who want this protection in exchange for additional premiums. The extent of the collision coverage is a contractual matter between the insurance company and the vehicle owner and is spelled out in the insurance policy.

In summary, the following factors are relevant in evaluating the impact of No-Fault on a road commission's liability for defective highway maintenance:

- First, the General Highway Law makes a road commission liable for damages caused by its failure to maintain the highways under its control in a condition safe for use by the motor- ing public
- Second, the Governmental Immunity Law allows suits against a road commission when it fails to correct a defect which it knows or should know of, so long as the injured person gives timely notice of the injury
- Third, No-Fault limits suits for damages "arising out of" the operation of motor vehicles in Michigan to the more serious cases

The effect of the No-Fault law on road commission liability for defective roads is discussed in the next section.

The Effect of the No-Fault Law on Road Commission Liability

The General Highway Law and Governmental Immunity Law both impose liability on a road commission when its negligence in constructing or maintaining the highways causes damage or injury to an automobile or its occupants. On the other hand, the No-Fault law abolishes liability for negligence arising out of the use of an automobile except where the injuries are serious enough to be above the threshold. Thus these laws appear to be in conflict. This section discusses that conflict and possible resolutions of it.

Two points should be made at the outset. First, even if No-Fault does apply to claims by injured persons against road commissions, it does not entirely bar them; rather, No-Fault would still permit such claims where the claimed injuries are above the threshold (16). Second, an authoritative resolution of the conflict between the statutes can only come from the legislature itself, or from an interpretation of the statutes by the courts. At present, there are no decisions from the Michigan courts on this question. Therefore it is necessary to examine the statutes themselves, and the legislature's intent in enacting them.

Read literally and by itself, No-Fault appears to bar suits against road commissions for injuries or property damage caused by defective highway maintenance, since all such injuries arise out of the use of motor vehicles in Michigan.

The No-Fault law reads in part (16):

Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance or use within this state of a motor vehicle...is abolished [.]

The Supreme Court has explained the legislature's intent in enacting the personal injury portion of the No-Fault law (17). It stated that the legislature sought:

- to end the delays in settling claims that were common under the negligence system,
- to reduce pressure on injured parties to take less than their claims were worth, and
- to lessen the number of motor-vehicle accidents litigated in court.

The Court also summarized the purposes of the property damage provisions of the No-Fault Law. In this regard the legislature sought:

- to create safer cars by keying premium costs to repair costs of the insured's car and so promote development of more crash worthy cars,
- to eliminate accident investigations, thereby lowering premiums by reducing administrative costs, and
- to make group insurance feasible and so reduce premium costs because of its relatively lower administrative costs.

All of these stated rationales would apply to suits by drivers against a road commission, and therefore support the conclusion that No-Fault bars suits against road commissions for defective highway maintenance.

The nature and strength of these purposes must be weighed against the purpose of the road liability laws, which impose liability on road commissions. The purpose of the liability provisions in the General Highway Law and the Governmental Immunity Law is twofold: to provide an incentive to road commissions to be diligent in carrying out their responsibility to provide safe roads; and to provide a means for compensating anyone injured by a road commission's failure to do so.

The No-Fault law limits liability for negligence to cases involving serious injury. The road liability laws establish liability for negligence against road commissions. The purpose of No-Fault is to provide a fairer and swifter system of compensation by eliminating the expense and delay of litigation. The purpose of

the road liability laws is to provide a means of compensating persons injured because of defective roads and to provide an incentive to road commissions to provide safer roads (18).

A court that tries to resolve the conflict between these laws will likely base its decisions on the intent of the legislature in enacting the statutes. In addition to referring to the language used in the acts, the court will use some general principles of interpretation which apply whenever statutes seem to be in conflict. The following discussion describes the reasoning that a court might follow and summarizes the results a court might reach.

There are several reasons which support the conclusion that No-Fault bars claims for negligence against a road commission. As was stated above, No-Fault's purpose is to create a fairer compensation system by substituting insurance for negligence liability. Since the use of litigation to determine fault is an expensive and time-consuming in a defective-road case as in any other case, No-Fault's benefits should apply in those cases and the Commission should not be liable.

The very specific language in the No-Fault act also supports this conclusion. As stated earlier, the act provides that:

Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance or use within this state of a motor vehicle...is abolished [.]

These words would appear to include any injury or damage to a vehicle caused by the roadway, since the use of the vehicle was a factor in the crash.

Finally, if No-Fault does conflict with the road liability laws, it can be argued that it has priority because it is the more recent statute, and when two statutes deal with the same area and are in conflict, the more recent one ordinarily takes precedence (19).

While the arguments in favor of No-Fault's limiting road commission liability are substantial, there are also substantial arguments for the opposite conclusion.

The first of these is the strength of the policy, underlying the road liability statutes, that road commissions be held responsible for damage caused by their failure to exercise care in making the roads safe for travel. This principle is not a new one. It has been recognized for at least a century (20). Its strength is reflected not only in the fact that it has continued to exist for so long but also in that it was never questioned during a recent dispute between the Michigan Supreme Court and the legislature over governmental immunity. The Supreme Court twice issued opinions which reduced the scope of state and local governments' immunity from liability (21). The legislature twice responded with statutes which re-established that immunity (22). However, neither of those statutes changed the rule that road commissions were responsible for failure to use care in keeping the roads safe. Thus, the legislature never contemplated immunity for road commissions.

Moreover, in a recent case where a road commission attempted to use another statute to reduce its general liability to maintain safe roads, the Michigan Supreme Court nonetheless found the commission liable. In Mullins v. Wayne County (23), the road commission was charged with negligence under the General Highway Law for failure to erect a sign indicating the end of a road at a T-intersection. The commission raised as a defense that its failure to erect a sign was justified by the Uniform Traffic Signal Control Statute (24), which gave the commission discretion as to erecting signs. The court rejected that argument, stating that the road commission could not use the more lenient statute "as a shield to its statutory liability for construction of an unsafe road." While the Mullins case does not deal with the effect of the No-Fault law, it does illustrate the importance that the court attaches to a road commission's statutory obligation to provide safe roads, even where another statute apparently reduces that liability.

Second, if the No-Fault law does limit road commission liability for defective roads, then No-Fault is, in effect, a partial repeal of the statutes which establish that liability. However, when the legislature enacts a statute which repeals or modifies an earlier one, the repealing statute generally names the affected statute explicitly. If this were not done, it would become very difficult to tell which laws were currently in force. It sometimes happens that a more recent statute will repeal or modify an earlier one "by implication." This repeal happens when the application of the newer statute necessarily conflicts with the earlier one. Such repeals are possible, but as the Supreme Court in Mullins said, it is "a well-established principle that repeals by implication are not favored."

A court taking this approach might also rely upon the language in the No-Fault act limiting its application to injuries and damage "arising out of the...use of a motor vehicle." This language could be interpreted to mean that only crashes caused by the operation of a vehicle are within the scope of No-Fault. When an accident is claimed to be caused by defective highway maintenance, it could be said that the accident arose out of the defect rather than the operation of the vehicle.

Finally, a court facing the question of whether the No-Fault law limited road commission liability would also consider the relative breadth of the laws. The No-Fault law covers the entire field of injuries arising out of motor vehicle use. The road liability laws deal with only a part of that field, namely, injuries caused by defective roads. It is a general rule that where two statutes apply to the same situation, but one applies specifically while the other applies in general terms which cover other situations as well, the more specific statute will take precedence over the more general (25). Since the road liability statutes are quite specific, this rule would support the conclusion that the No-Fault law does not limit a road commission's liability for defective roads.

It is clear that arguments can be made for and against the application of No-Fault to limit road commission liability. Based on this analysis, there appear to be three possible results.

First, a court might decide that the No-Fault law takes precedence over the road liability laws and therefore limits claims against a road commission to those permitted by No-Fault. The result of this would be that the commission would be liable only where the injuries were above the threshold, as defined by the No-Fault law.

Second, a court might reach the opposite conclusion and hold that the No-Fault law does not apply at all where the road commission's failure to provide safe roads was the cause of injury. This would mean that an injured person would not be covered by No-Fault benefits and that he could seek compensation only from the commission, by way of litigation to establish that the commission was at fault.

There is a third possibility as well. A court could decide that both No-Fault and the road liability laws apply. This approach would permit an injured person to seek compensation from both the insurer and the road commission.

Because there are substantial arguments to support any of these decisions, it cannot be stated with certainty which approach a court would in fact take. The next section suggests methods of resolving this problem.

Conclusions and Recommendations

The legislative purpose behind the No-Fault law is clear, as is the purpose behind the General Highway Law and Governmental Immunity Law. However, it is not clear which of these laws would take precedence if a road commission were to raise the No-Fault law as a defense in a suit alleging that it was liable for maintaining defective roads. The No-Fault law seeks to provide fairer and swifter

compensation for injured persons. It does this by eliminating liability for negligence where the injuries are not serious, thereby eliminating the delay and expense of lawsuits to determine fault. On the other hand, the General Highway Law and Governmental Immunity Law express a continuing policy of holding road commissions liable for all damages caused by their failure to keep the roads in good repair and safe for public use. The relationship between these policies can be determined only by a decision of the courts, or by the legislature itself.

There are three possible approaches which the Commission might take to obtain such a resolution:

- The Commission could raise No-Fault as a defense in a trial in which it is sued for damages.
- The Commission could bring a declaratory judgment action, asking a court specifically to determine the effect of No-Fault.
- The Commission could ask the legislature to resolve the issue by enacting an amendment clarifying the law.

Each of these approaches has advantages and disadvantages which should be weighed before deciding on any course of action.

If the Commission is sued by a person whose damages are below the No-Fault threshold or are for property damage only, it could raise No-Fault as a defense in the trial. The trial judge would then be required to decide whether No-Fault limits road commission liability. The trial judge's decision could be appealed to the Michigan Court of Appeals and probably to the Michigan Supreme Court. A final ruling from the Michigan courts would resolve the issue as to present law. However, the legislature could, if it chose to do so, change the law as determined by the courts by enacting a new statute to amend No-Fault or one of the road liability laws.

The Commission might also seek a resolution from the courts by way of a "declaratory judgment" action. This is a form of lawsuit, and is like the first approach in that it is begun in the trial court and the trial judge's decision can be appealed. The result of this approach would also be a resolution of the issue under present law, subject to the power of the legislature to change the law. There is also a significant difference between the declaratory judgment approach and the first approach. A declaratory judgment action asks only that the court "declare" the law in a certain area. It is not based on a specific accident or injury, and does not ask the court to determine who was at fault and how much compensation should be paid. Therefore, the declaratory judgment approach would permit the specific question of the effect of No-Fault on commission liability to be raised and decided without considering other issues that are part of an ordinary lawsuit.

An additional advantage of the declaratory judgment approach is that it permits the commission to begin the proceedings at a time of its choosing, rather than as part of a defense to a claim brought by someone else.

Both of these approaches offer the opportunity to obtain a specific answer to the question raised, since it is difficult for a court to avoid answering a question that is properly brought before it. The legislature, on the other hand, cannot be required to enact a law. There are, however, significant advantages to the legislative approach.

The third way to determine the effect of the No-Fault law on road commission liability is to ask the legislature itself to resolve the issue by amending one of the acts. This approach has several advantages. First, since the question involves the interpretation of statutes enacted by the legislature, the legislature itself is the final authority. Its decision, expressed in an amendment to one of

the statutes, would be binding on the courts and would, in effect, "overrule" any inconsistent court decision. Closely related to this is the possibility that any court decision which might result from the first two approaches would ultimately be "reviewed" by the legislature, if those who disagreed with the court decision sought a statutory amendment to override it.

Additional advantages are based on the nature of the legislative process. While a court makes its decisions in seclusion after hearing the arguments of all parties, the legislature operates more openly in moving a bill through the various stages to enactment into law. It is therefore possible to discuss proposed legislation with any member of the legislature at any time. This can provide two benefits. First, it may be possible to determine the legislative sentiment toward a proposed bill before it is introduced. Second, it is easier to monitor and perhaps influence the legislative process so as to maximize the prospect of a favorable result.

Considering the relative advantages and disadvantages of the three possible approaches, the legislative approach appears to be preferable. The legislature is the final authority where the meaning of a statute is in question, and the more open nature of the legislative process may make it easier to estimate the likelihood of, and to bring about, a favorable result. In addition, if the legislature failed to act, the first two approaches would still be available.

Each of the three possible approaches presents the possibility of an unfavorable decision as well as a favorable one. In considering whether to seek a determination, and if so, which course to choose, the Commission should weigh the advantages of each and the probability of a favorable result. Since this weighing process is a matter of judgment, any decision of the Commission should be made only after consultation with its counsel.

FOOTNOTES

1. M.C.L.A. 224.21, 691.1402; M.S.A. 9.121, 3.996 (102).
2. M.C.L.A. 691.1403; M.S.A. 3.996 (103).
3. This liability has existed by statute at least since 1879: Public Acts of 1879, No. 244.
4. M.C.L.A. 691.1401, M.S.A. 3.996 (101).
5. M.C.L.A. 691.1404, M.S.A. 3.996 (104).
6. Hobbs v. Michigan State Highway Dept., 398 Mich. 90, 247 N.W.2d 754 (1976).
7. Since the recent case of Placek v. City of Sterling Heights, _____ Mich. _____, _____ N.W.2d _____ (February 8, 1979), which adopted comparative negligence, each persons negligence reduces his recovery.
8. Shavers v. Kelly, 402 Mich. 554, 267 N.W.2d 72 (1978).
9. M.C.L.A. 500.3135, M.S.A. 24.13135.
10. M.C.L.A. 500.3101, M.S.A. 24.13101.
11. M.C.L.A. 500.3105, M.S.A. 24.13105.
12. M.C.L.A. 500.3107, M.S.A. 24.13107.
13. M.C.L.A. 500.3114, M.S.A. 24.13114.
14. M.C.L.A. 500.3121, M.S.A. 24.13121.
15. M.C.L.A. 500.3123, M.S.A. 24.13123.
16. M.C.L.A. 500.3135, M.S.A. 24.13135.
17. Shavers v. Kelly, 402 Mich. 554, 267 N.W.2d 72 (1978).

18. Pickette v. Manistique Public Schools, 403 Mich. 268, 269 N.W.2d 143 (1978).
19. 73 Am. Jur. 2d Statutes § 256.
20. Public Act No. 244, 1879.
21. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1, (1961).
Maki v. City of East Tawas, 385 Mich. 151, 188 N.W.2d 593 (1971).
22. Public Act 170 of 1964, Public Act 155 of 1970.
23. 16 Mich. App. 365, 168 N.W.2d 246 (1969).
24. M.C.L.A. 257.610, M.S.A. 9.2310(a).
25. 73 Am. Jur 2d Statutes § 257.