SAFETY ANALYSIS WITHOUT THE LEGAL PARALYSIS: THE ROAD SAFETY AUDIT PROGRAM

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ABSTRACT

This report presents results of an investigation into the practice and legal issues of Road Safety Audits and Road Safety Audit Reviews (RSAs and RSARs). These safety analysis approaches focus on identifying safety issues of proposed projects (RSA) and existing roadways (RSAR). In the United States, these approaches are just beginning to be considered. To expedite implementation of the approaches two questions have been assessed in this report:

Does a Road Safety Audit Program (RSAP) using RSAs and RSARs add value to a transportation entity when compared to traditional safety analysis approaches?

Is the transportation entity's use of the RSAP legally defensible?

To address the first question, the Road Safety Audit Program is distinguished from existing road safety programs. To address the second question, the relevant laws of six states from around the United States are examined. Particular attention is paid to the local rural transportation entity. Implementing a Road Safety Audit Program is beneficial for identifying potential safety improvements on streets, roads, and other vehicular thoroughfares. However, other road safety programs exist, which appear to accomplish this same goal of improving road safety. Accordingly, the RSAP may be rejected by a transportation entity based on the belief that it adds nothing to the entity's existing road safety program.

Furthermore, if a Road Safety Audit is undertaken, and potential safety improvements are identified, and if those improvements are not fully implemented, does the RSAP increase liability? People injured in the area of the potential safety improvement may attempt to use the Road Safety Audit to show that the entity responsible for the roadway and being aware of the safety issues

failed to perform its duty and correct the roadway. In other words, the existence of the RSAP potentially poses an increased liability risk for the entity that authorized it.

If the RSAP is perceived to add nothing to a transportation entity's existing road safety program or if the danger of increased risk of liability is significant, then the result will be that the RSAP will be discouraged or simply not undertaken.

The study results show that the Road Safety Audit Program adds value to a transportation entity, and those legal doctrines such as sovereign immunity and the rules of discovery and evidence can operate to protect the transportation entity from liability. Furthermore, the public interest of improving road safety outweighs the plaintiff's interests in a potential lawsuit.

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CHAPTER ONE – INTRODUCTION

Let us discern for ourselves what is right; let us learn together what is good.
Job 34:4

Long in our history has the safety of what we build been mandated and our failure to build safely a source of liability. The "Road Safety Audit" Program has been developed to proactively improve the safety of the road and street network by identifying and reporting on the safety status of the network. This report argues for the use of the Road Safety Audit Program by showing that it adds value to a transportation entity and by showing that it is legally defensible.

Overview of the Problem

The Road Safety Audit Program is a useful device for identifying potential safety improvements in streets, roads, and other vehicular thoroughfares. The potential safety improvements are aimed at reducing risks to people traveling in vehicles on the roadway and to pedestrians and other people on and adjacent to those roadways. The potential safety improvements may be identified at any time in the project's lifespan – in the planning, design, construction, or as-built stage.

However, other road safety programs already exist, which appear to accomplish this same goal of improving road safety. Accordingly, the Road Safety Audit may be rejected by a transportation entity based on the belief that the Road Safety Audit Program adds nothing to the entity's existing safety management program.

Furthermore, if a Road Safety Audit is undertaken, and potential safety improvements are in fact identified, then if those improvements are not fully and promptly implemented, there is the possibility that the people injured in the area of the potential safety improvement may attempt to use the Road Safety Audit to show that the entity responsible for the design, construction, and maintenance of the roadway—being aware of the dangers—failed to perform its duty and correct the roadway to eliminate those dangers. In other words, the existence of the Road Safety Audit potentially poses an increased liability risk for the entity that authorized it.

It follows then that if the Road Safety Audit Program adds nothing to a transportation entity or if the danger of increased risk of liability is significant, the result will be that the Road Safety Audit Program will be discouraged or simply not undertaken. In short, the program will be used only if it adds value to a transportation entity and if it does not create an undue risk of liability for the entity. This report shows that the Road Safety Audit Program adds value to the transportation entity and that it is legally defensible.

Objectives of the Report

Primary Objective

This report strives to thoroughly examine questions of whether the Road Safety Audit Program adds value to a transportation entity and whether the program is legally defensible. Particular attention is paid to the transportation entity responsible for local roads.

Secondary Objectives

This report has four secondary objectives. First, an explanation of how to conduct a Road Safety Audit is presented. Second, the differences between the Road Safety Audit Program and existing safety programs will be explained. Third, the legal issues implicated from a transportation entity's use of the Road Safety Audit Program are identified. Finally, a framework for analyzing these legal issues is provided.

Organization of the Report

The environment in which the transportation entity operates is provided for background purposes in Chapter Two. In Chapter Three, the Road Safety Audit Program is introduced and in Chapter Four it is distinguished from existing road safety programs. In Chapter Five, the legal issues associated with the use of a Road Safety Audit Program are introduced and a method for analyzing them is derived. In Chapter Six, the legal issues are analyzed. Finally, in Chapter Seven, findings, conclusions, and recommendations from the research are presented.

CHAPTER TWO – THE ENVIRONMENT OF THE TRANSPORTATION ENTITY

When you build a new house, make a parapet around your roof so that you may not bring the guilt of bloodshed on your house if someone falls from the roof.
Deuteronomy 22:8

To best appreciate the role and significance of the Road Safety Audit Program, it is necessary to understand the environment in which the transportation entity operates. First and foremost, of course, is the entity's obligation to provide safe roads, but the entity also has other obligations. The wane of governmental immunity and the rise of strict product liability indicate that the transportation entity has some responsibility to know the condition of its road network. In addition, as stewards of public coffers, the entity has an obligation to manage its risk. These obligations of the transportation entity form an environment in which the entity must identify and correct road safety deficiencies.

The Overarching Policy of Public Safety

It probably comes as no surprise to find that "[s]afety considerations are center-stage in highway and traffic engineering."[1] Indeed, transportation professor Ezra Hauer goes so far as to describe the goals of "'safe and efficient'" travel as "[h]abit and rote."[2] Though occasionally at odds with efficiency, the public policy of transportation safety is inherent in the administration of transportation systems and often is mandated by legislation.

Safety as an Inherent Public Policy

Historically Inherent

Transportation engineering has had the twin goals of safety and efficiency since its beginning.[3] According to transportation engineer Stanley Polanis, when Burton Marsh became America's first full-time traffic engineer in 1924, "his responsibilities included the development of ways to move traffic safely and expeditiously through Pittsburgh."[4]

Initially the two goals nearly were synonymous, as almost any traffic engineering at that time "brought order to chaos," but eventually the two goals began to conflict.[5] One need not strain too far to realize that increased efficiency via increased speed probably does little to improve safety.[6] The extent to which the two goals conflict is of some debate in the transportation engineering profession,[a] but is not as important here as is the fact that the goal of transportation safety is—and always has been—a goal of the transportation engineering industry.

Morally Inherent

In addition to the historical evidence of the goal of traffic safety in the traffic engineering profession, this goal is part of the moral nature of engineers. The Preamble to the State of Wyoming's Code of Ethics for Engineers requires that "the services provided by engineers...must be dedicated to the protection of the public health, safety, and welfare."[7] This statement

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[a] For conflicting views, see Stanley F. Polanis, Some Thoughts about Traffic Accidents, Traffic Safety, and the Safety Management System 32 (Institute of Transportation Engineers Journal, October 1995), and Martin A. Wallen, What Makes a Good Safety Management System 26 (Institute of Transportation Engineers Journal, January 1993).

verbalizes the moral obligation of engineers to provide safe projects. And reversing the purported moral obligation provides further illumination: it would be immoral for traffic engineers not to strive to provide safe roads.

The moral obligation of engineers to provide safe roads may be grounded socially, religiously, or philosophically, but it seems to be uniform. Civil engineering professor Ezra Hauer: "We genuinely feel that what we do, matters to safety."[8] According to transportation researcher Martin Wallen, "[t]o suggest that traffic engineers or highway departments might forget to consider safety in their day-to-day activities can be considered heresy."[9]

Safety as Legislatively Mandated

State legislatures may expressly require their transportation entities to provide a safe transportation system. For example, Michigan and New Jersey statutes allow a transportation entity in their states to be found liable for failure to keep the highway safe.[10] And, in enacting the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress empowered the secretary of the U.S. Department of Transportation (USDOT) to withhold up to 10 percent of a state's funding if the state failed to develop a safety management system in accordance with federal guidelines.[11]

That transportation safety can be required by federal and state legislatures — ostensibly as the representation of the public sentiment — indicates that the public expects the entity to provide a safe transportation environment. This overarching public policy is addressed further in Chapter Six.

So, not only is improving road safety inherent in the transportation engineering profession and in the transportation engineer, it is demanded of them. But public policies other than safety also contribute to the environment in which the entity operates as addressed in the following section.

The Implied "Duty to Know"

Along with the obligation of the transportation entity to provide a safe road system is another obligation: the duty to know the condition of the entity's roads. This obligation is not explicit as are other duties of the entity, but instead is implied from trends in society and in the law. Trends such as the decline of sovereign immunity and strict product liability illustrate the obligation.

The Erosion of Sovereign Immunity

Up until the latter half of the twentieth century, governments enjoyed immunity from suit. This notion — called "sovereign immunity" — was based on the principle that people could not sue themselves. But in the 1960s and 1970s several state legislatures and state supreme courts reversed the doctrine, effectively allowing governments to be sued in much the same way as a private person.[12]

One result of the erosion of the doctrine of sovereign immunity is that transportation entities can no longer expect to be protected from lawsuits when there is a defect in their road system. Instead, they are expected to monitor and maintain their roads so as to mitigate any

potential harm from the defects. In other words, they are becoming evermore expected to know the condition of their roads.[b]

Strict Product Liability Implications

Another trend in society and the law that has implications for the transportation entity is that of strict product liability. In strict product liability, manufacturers or sellers of defective products are subject to liability for harm caused by a product, which was defective when it left control of the manufacturer or seller.[13]

The implication for the transportation entity from this trend in the law is clear. The public — as the user of services and the consumer of goods — is becoming less tolerant for defects in those services and goods and is holding manufacturers and sellers liable for the defects. This translates into a duty on the manufacturer or seller to know the condition of their product and to improve its safety. Accordingly, this trend can implicate the transportation entity as the provider of transportation services and infrastructure.

Risk Management

A third aspect of the environment in which the transportation entity operates is that of risk management. Risk management is the administrative framework with which an entity —public or private, large or small — can objectively handle risks such as liability and loss. For the public entity, risk management is a necessary component of proper stewardship of the public's money.

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[b] The concept of sovereign immunity is discussed in great detail later in this report.

Transportation researcher Erskine Walther defines risk management as "a process of identifying and evaluating all pure risk exposures faced by the [transportation] system and selecting the appropriate method or methods for eliminating, reducing, or otherwise handling the risk."[14] Walther goes on to identify five elements of a risk management program: risk identification, risk evaluation, risk handling, implementing the method(s) selected, and continuous monitoring and review of the program.[15] Research by Gary Gittings and Donald Jacobs identifies five steps similar to Walther's.[16]

What is of interest here is not so much the *process* of risk management, but the *impetus* for it, and its *role*. The impetus for risk management is the need for a "logical, necessary, and effective approach for departments of transportation to use in dealing with their emerging tort liability problems." Its role is as one "component of comprehensive highway safety programs."[17] In other words, in addition to improving road safety, a comprehensive highway safety program should incorporate risk management processes to address tort liability problems facing the transportation entity.

Summary

These three aspects of the environment in which the transportation entity operates show the necessity of the entity's undertaking of a safety program. First, transportation entities have the overarching obligation to provide safe roads to the public. While the respective legislative bodies often require this obligation, it is inherent in the profession of transportation engineering. Second, two recent shifts in public policy — the erosion of sovereign immunity and the increase of strict product liability — indicate that transportation entities likely are becoming subject to a "duty

to know" the safety condition of their roads. Third, a comprehensive safety program will enable the transportation entity to manage its risk from tort liability in addition to improving road safety.

CHAPTER THREE – THE ROAD SAFETY AUDIT PROGRAM DEFINED

…the ransom for a life is costly, no payment is ever enough…
Psalm 49:8

By understanding the environment in which the transportation entity operates — in particular the overarching public policy of road safety, the impending "duty to know," and the need to manage its risk — the entity's need for a safety program emerges. The Road Safety Audit Program (RSAP) is introduced as one such safety program. It is distinguished from other road safety programs in the next chapter.

Overview of the Road Safety Audit Program

Australia was one of the first countries to implement Road Safety Audits. The Austroads handbook defines the Road Safety Audit as "a formal examination of an existing or future road or traffic project, or any project which interacts with road users, in which an independent, qualified examiner reports on the project's accident potential and safety performance."[18]

The Road Safety Audit Program encompasses the Road Safety Audit (RSA) and the Road Safety Audit Review (RSAR). The RSA is the road safety examination on a road in the *conceptual* stage — i.e., in the planning and design stages. The RSAR is the road safety examination on an *existing* road. In other words, the RSA and the RSAR are the actual audits themselves, while the RSAP is the comprehensive program in which both types of audits are performed.

History

The RSAP originated in the United Kingdom in the 1980s and has been further developed by Austroads, the Australian transportation authority.[19] In 1994, Austroads published a comprehensive handbook entitled "Road Safety Audit," which combined road safety auditing practices from Australia and from other nations to create guidelines for the then-fledgling RSAP.[20]

The Austroads handbook reports that the RSAP originated "in the United Kingdom in the 1980s," with aims of helping "highway authorities to take steps to reduce the possibility of accidents on their roads."[21] Interestingly, according to the U.S. Federal Highway Administration (FHWA), the concept of using an independent auditor was introduced during the Victorian Period to preview new rail lines.[22] By April 1991, both the Scottish Development Department and their British counterpart mandated safety audits for certain roads above specified costs. New Zealand also adopted the safety audit concept, conducting pilot studies as early as 1992 and developing related policies and procedures by 1993.[23]

In October of 1996, a nine-member, Federal Highway Administration-sponsored scanning team of U.S. personnel — from both government and academe — visited Australia and New Zealand to observe the two countries' "applications of the [RSAP] process, the framework in which audits are applied, and the policy context in which audits are conducted."[24] The report from this 1996 scanning expedition is the progenitor of recent safety audit research and applications in the United States, including this report.

Elements

Recall the Austroads handbook's definition of the Road Safety Audit: "a formal examination of an existing or future road or traffic project, or any project which interacts with road users, in which an independent, qualified examiner reports on the project's accident potential and safety performance."[25] The elements of this definition, which are also applicable to Road Safety Audit Reviews, follow.

Formal Examination

The RSAP utilizes a formal examination of the road. Austroads describes a three-stage process for this examination. First, the "designer or client selects an auditor, provides all the [project] documents, and holds a commencement meeting with the auditor."[26] The auditor[c] then "reviews all the documents and audits the drawings, inspects the site (including night time), repeats these two steps (as required), writes the audit report, and holds a completion meeting with the designer or client."[27] Third, the "designer or client decides on the action required in response to the audit report and its recommendations...and documents these decisions."[28]

The auditor may use checklists or other safety issue lists to ensure that all relevant safety factors in the site visit or plan review are considered.[29] However, the "auditor should use his/her own judgment [sic] about the safety of any feature."[30] Indeed, "the checklists are not a substitute for knowledge and experience: they are an aid for the application of that knowledge and experience."[31]

Existing or Future Projects

Though the emphasis of the safety items audited will vary depending on the project's size and stage, project aspects such as the road's alignment, intersections, uses and users, signs, signals, lighting, barriers, maintenance, and operation typically are examined.[32]

The Applicable Projects.

Audits are project specific,[33] and can be conducted on a wide range of road projects, such as "new freeways, major divided roads, reconstruction and realignment projects, intersection projects, pedestrian and bicycle routes, [detoured] local roads near major projects, local area traffic management schemes and their component parts, signal upgradings, subdivision proposals, and accident reconstruction schemes."[34]

Furthermore, a Road Safety Audit Program also can provide for audits that are conducted on projects that are off-road — those "which affect nearby roads or create off-road areas, which effectively operate like roads."[35] For instance, consider a shopping mall development that creates potential safety impacts as "vehicle/pedestrian conflicts in the new carpark, increased numbers of pedestrians crossing the adjacent road, [and] a spillover of parking onto an adjacent busy road."[36] These potential safety impacts can be identified in an RSA and a RSAR.

Transportation professors Eugene Wilson and Martin Lipinski found some RSAP applications in the U.S. They note that "the Pennsylvania DOT has had quite a successful pilot program to implement Road Safety Audits in the design phase," that "the New York DOT has a

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[c] Note that though the term "auditor" here is in the singular form, the audit may be done by a team of auditors. This is further explained later in this report.

program to integrate RSAs in their pavement overlay program," and that "[a]nother 10 or more DOT's are involved in initiating RSA practices."[37]

The Road Safety Audit / Road Safety Audit Review Distinction.

The Austroads handbook states that audits can be conducted at five stages,[d] "regardless of the size or nature of [the road] project: the feasibility stage, the draft design stage, the detailed design stage, the pre-opening stage, and an audit of an existing road."[38] Wilson and Lipinski divide these five stages into two categories: audits in the first three stages retain the name Road Safety Audit, while an audit in the fourth or fifth stage — on an existing road — is termed a Road Safety Audit Review.[39] This distinction between pre-construction and post-construction audits has some implication in the law. It is addressed further in Chapter Six.

Not surprisingly, the earlier the audit, the less costly it is to address potential safety improvements. Once "an inappropriate concept or treatment (i.e., one with inherent safety problems in the particular context) is chosen at the feasibility stage, it is very difficult, and often impossible to remove the safety problems at later design stages or once traffic is using it."[40]

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[d] Austroads provides examples of safety items that an audit might target in each of the five stages:

1. Stage 1: The Feasibility Stage - Route options, layout options, or treatment options (e.g., a roundabout vs. signals).
2. Stage 2: The Draft Design Stage - Intersection or interchange layout, chosen design standards.
3. Stage 3: The Detailed Design Stage - Geometric design, traffic signing scheme, linemarking plans, lighting plans, and landscaping plans.
4. Stage 4: The Pre-Opening Stage - Hazardous conditions which were not apparent at the feasibility or design stages, including day and night conditions.
5. Stage 5: Existing Roads - Hazardous conditions resulting from a change in the use of the road over time.

Austroads, Road Safety Audit 16 (Austl. 1994). Wilson and Lipinski suggest two other specific RSAP stages: audits during traffic control planning and audits during construction. Eugene M. Wilson & Martin

Safety of All Road Users

The Austroads handbook explains that audits "assess the operation of the road," and "focus on road safety as it affects the users of the road."[41] In addition to motorists, such users might include motorcyclists, truck and bus drivers, public transportation users, and pedestrians.[42]

The RSAP can affect the safety of other, less obvious road "users" as well. For instance, the owner of land that abuts the road can be at risk of loss from either personal or property damage caused by the unsafe condition on the adjacent road section. Recall also the "off-road" audit above in which the effects of a large development adjacent to the road spill over into the road. The safety of the pedestrians and of those who are forced to park on the street — while not using the road for transportation, but instead as a crosswalk or a parking area — is also certainly of concern.

Independent and Qualified Examiner

The RSAP utilizes an independent and qualified auditor to identify and report on the safety aspects of existing or future transportation projects.[43] The two tests, independence and qualified, are explained next.

Independence.

"Independence" of the auditor requires (1) the auditor to view the project from a safety-driven perspective and (2) that he or she not be familiar with the project. First, the auditor should focus only on road safety — he or she should not be biased by competing interests, such as

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E. Lipinski, Tailoring Road Safety Audits For Local US Applications, 2 (presented at the "Tenth

financial or personnel constraints. Second, the "road safety auditor must be independent of the designer;" he or she should not be biased by prior project decisions.[44] The Austroads handbook uses the phrase "'fresh eyes'" to describe what the auditor should bring to the audit.[45]

Qualifications.

The qualifications of road safety auditors include having "sufficient experience and expertise in the areas of road safety engineering, accident investigation and prevention, traffic engineering, and road design."[46] At a minimum, auditors should be familiar with traffic engineering operations and geometrics.[47] But skills also may be needed in the areas of pavement performance, road construction, human factors, and other areas, depending on the audit stage and the complexity of the audit.[48] Also important is the ability of auditors "to use their skills to see the road project from the point of view of the different types of 'customer' or road user—those able to think and perceive like each user."[49, e]

The RSA / RSAR split affects qualifications needed for the audit. In RSAs (when the road is in its conceptual stage), key auditor skills include the ability to envision the proposed road and its potential safety improvements. In RSARs (when the road is being constructed or already exists), auditor skills include the ability to assess the existing road and its potential safety improvements. In other words, the auditor's ability to envision the road is needed in RSAs, while

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International Conference: Traffic Safety on Two Continents," Malmo, Sweden, Sept. 1999).

[e] As an example of a unique road "customer," consider a bicyclist. The bicyclist has unique interests as a road user (especially in the road shoulder features), so the successful auditor will envision the road's safety from both a bicyclist's and a vehicle operator's point of view.

in RSARs, the ability to assess an existing road is needed. And again, in both RSAs and RSARs, the ability to analyze the road from the perspective of all road users is critical.

Austroads recommends that audits be performed by an audit team, rather than a single auditor, (1) to take advantage of "the diverse backgrounds and different approaches of different people," (2) to enable "the cross-fertilisation [sic] of ideas which can result from discussions," and (3) because of the advantage of "simply having more pairs of eyes."[50]

A team of auditors with the type of experience recommended by Austroads may not be available or affordable, yet Austroads states that even "an audit by one person has the potential for significant accident savings."[51] For example, according to transportation professor Eugene Wilson, as quoted in a National Safety Council publication, "[l]ocal governments won't hire a team of experts to tell them what's wrong with their roads — that formalized process is more applicable to the [State] Department of Transportation level."[52] But, Wilson adds, the local government may "relax the audit format, yet still use audits as a structured tool to solve local problems."[53]

Austroads stopped short of establishing an auditor accreditation requirement. Instead, Austroads suggests (1) that auditors "be experienced and skilled (as described above)," (2) that they undertake "a 1 - 3 day road safety audit training program," and (3) that they "should have worked on at least one road safety audit with an experienced auditor."[54]

A recent study from the University of Wyoming analyzed the level of expertise required to perform a Road Safety Audit Review by comparing the audits of four groups of varying qualifications with a control group. The four groups were a team of independent engineers, a visiting engineer, a resident engineer, and a team of superintendents. In the control group were a

transportation professor, a FHWA traffic safety engineer, and a Wyoming DOT traffic engineer.[55]

All five groups conducted Road Safety Audit Reviews of rural local roads in two counties in Wyoming. In the first county, the groups reviewed roads in four classifications (Rural Primary, Rural Secondary, Rural Local, and Rural Low-Volume Local). In the second county, the groups reviewed roads in five classifications (Major High Speed, Major Medium Speed, Minor, Rural Local, and Rural Low-Volume Local).[56]

The study had four conclusions. First, all levels of expertise found "valuable safety improvements."[57] Second, "[a]ll levels of expertise demonstrated consistency in their assessment of the issue of [safety] urgency, especially in the intermediate to higher urgency levels."[58] Third, the independent engineers identified "mainly the high priority safety needs," and fourth, the superintendents "were less likely to identify low priority issues."[59] The study recommended that further research is needed to better define the requisite level of expertise needed for a competent RSA or RSAR.

Report on Safety

The purpose of the Road Safety Audit Program — of the Road Safety Audit and of the Road Safety Audit Review — is to generate safety information that can assist the transportation entity in decision-making. Results from the RSA or the RSAR generally are in the form of reports on safety issues of the audited road.

Purpose of the Road Safety Audit Program

The Road Safety Audit Program has two purposes. First, the RSAP is "to identify potential safety problems for road users and others affected by a road project."[60] Second, the RSAP is "to ensure that measures to eliminate or reduce the problems are considered fully."[61]

Focus on Safety

Safety is paramount in the Road Safety Audit Program. Recall that the auditor is to be concerned only with safety aspects of the road and is not to be concerned with the financial or manpower aspects of the project.

Moreover, while the RSAP involves a formal examination of the road with an eye toward identifying safety defects, it does not constitute a fault-finding mission aimed at embarrassing or even implicating the transportation entity or the designer, builder, or maintainer of the road whose decisions or actions may have led to the defect. Instead, "[t]he primary aim of a Road Safety Audit is to identify potential safety problems so that decisions can be made about eliminating or reducing the problems."[62]

Use of the Audit

The Road Safety Audit Program is a flexible and useful safety device. It allows for audits at the entire road system level and also at a specific location. It can provide a hierarchy of ratings of road safety deficiencies. At a minimum, it provides a tool for decision-makers at the transportation entity.

Incorporates Both System-Wide and Spot Approaches

Writing for the Transportation Research Board, Benjamin Chatfield explains that two approaches to road safety improvements are used by transportation organizations: the Spot Improvement Approach and the System-Wide Safety Improvement Approach.[63] Chatfield says that both approaches are necessary for "a balanced system."[64]

According to transportation professor Eugene Wilson, the "spot improvement approach focuses on hazardous locations or segments of a highway system on which crash frequency or severity is unusually high."[65] Spot improvement projects usually result in "crash prevention measures" that may include "revising grade and alignment, widening pavement, [and] installing signs or signals."[66] On the other hand, the System-Wide Approach targets "roadways in a substantial portion of an agency's jurisdiction," such as when it is desired "to install cross-bucks at all unmarked rail-highway crossings."[67] Thus, the Spot Approach can lead to actions unique to the *location* of the safety analysis, whereas the System-Wide Approach may lead to treating a *specific* safety issue by providing improvements for that issue *throughout the entire network*. An example of the latter approach would be to apply state-of-the-art guardrail end treatments at all guardrail locations in the network.

The Road Safety Audit Program can be used under either approach. The RSAP could be used as a Spot Approach in auditing a "new school crossing or set of road humps,"[68] and it could be used in a System-Wide Approach in the audit of the system's traffic signals.[69] The flexibility of the RSAP advances toward Chatfield's proposition of the necessity of both the Spot Approach and the System-Wide Safety Improvement Approach for "a balanced system."[70]

Provides a Hierarchy of Ratings

Perhaps the primary use of the RSA and RSAR is to prioritize findings from the audit. According to Austroads, "[a]ny safety issue which is considered to be of sufficient hazard to warrant immediate attention for removal, protection or warning should be so identified."[71]

However, though the purpose of this use "is not to rate the design, but rather to address any road safety concerns,"[72] a hierarchy of ratings of findings from the audited road likely will emerge. This hierarchy should be based on the severity of safety ratings, but should be listed "in an order which is logical for those considering the corrective actions."[73] Professor Wilson provides an insightful example: "'[I]f there is a cliff next to a rural local roadway, the local government can recognize that deficiency, then put it into their own priority scheme, based on road usage.'"[74] So this hierarchy of safety ratings contains judgments regarding the severity of the defect and is to be organized with the decision-maker in mind.

Serves as a Tool for Decision-Making

Another use of the audit is as a tool for the decision-maker in the transportation entity that performed the audit. Several levels of responses by the entity to the audit's findings are possible. The responses could be based on the defect, recommendation, or urgency of the recommendation.

The entity could agree entirely with every defect and immediately adopt each and every recommendation from the audit or it could reject it all. One can see that there are manifold variations within these two extremes that could vary as to the assessment of the defect, timing of the adoption, and extent of the adoption. For example, the entity could agree as to the defect, but disagree about the recommendation or urgency of the recommendation. Or the agency may agree

about the defect, recommendation, and urgency of the recommendation, but decide to postpone the recommendation out of funding or programmatic concerns.

Legal issues associated with these decisions are addressed later in this report. Of importance here, is use of the audit findings as an information tool for the entity to utilize in deciding between courses of action.

Results of the Road Safety Audit Program

Transitioning from the purposes of the Road Safety Audit Program to the results of the RSAP, the benefits, costs, outcomes, and output of the RSAP are presented here.

Benefits and Costs of the Road Safety Audit Program

With the focus on safety and the inclusion of a safety audit at all stages in a road project, which is targeted to all road users, benefits of the Road Safety Audit Program are obvious and substantial. The costs may be equally obvious yet are not nearly as substantial.

Benefits

Austroads identifies five benefits of the RSAP. The RSAP can (1) reduce the likelihood of accidents, (2) reduce the severity of accidents, (3) elevate road safety "in the minds of road designers and traffic engineers," (4) reduce the need for "costly remedial work," and (5) reduce the "total cost of a project to the community, including accidents, disruption, and trauma."[75] Writing for the Institute of Transportation Engineers, Robert Morgan adds also that the RSAP can foster "more explicit consideration of the safety needs of vulnerable road users," and may result in the "eventual safety improvements to standards."[76]

Costs

The costs of the RSAP include personnel, material, and time costs to conduct the RSAP. Morgan suggests that these costs "may be equivalent to less than 4 percent of the road design costs" which themselves are in the range of 5 to 6 percent of the overall project cost.[77] Thus, these direct costs appear to be significantly less than 1 percent of the overall project cost. In fact, the Pennsylvania DOT recently conducted a pilot project on Road Safety Audits. According to Pennsylvania DOT engineer Tim Pieples, "[o]ur audits have resulted in significant design improvements that have been well worth that small cost."[78]

Outcomes of the Road Safety Audit Program

Recall the two objectives of the Road Safety Audit Program. It is aimed at identifying the "accident potential and safety performance" of existing or future transportation projects[79] and ensuring the full consideration of solutions for mitigating any deficiencies.[80] Presumably, all audits will seek to satisfy these two objectives and should therefore result in general outcomes consistent with these two objectives. But other outcomes also may result from an audit that are more specific to the particular project. These two levels of outcomes, general and specific, are described here.

General Outcomes

According to the Austroads handbook, after the auditor assesses the relevant project documents and inspects the site, he or she should write a report. The main task of this report "is to succinctly report on aspects of the project which involve hazards and to make recommendations

about corrective actions."[81] Key components of the report, then, are that it should be succinct and that it should contain recommendations.

Austroads notes that the "recommendations will usually indicate the nature or direction of a solution, rather than specifying the details of how to solve the problem....that will rest with the designer."[82] Transportation professor Eugene Wilson proposes, though, that the auditor should record his or her concern and should assign an urgency and potential improvement to that concern.[83]

Professor Wilson also provides five categories on which the auditor should report: (1) roadside features, (2) road surface/pavement markings, (3) signing and delineation, (4) intersections and approaches, and (5) special road users, railroad crossings, and consistency.[84] Each of these of course has several sub-categories, but these categories provide general guidelines.

In sum, then, the RSAP report generally will be a succinct report, following categories similar to those proposed by Professor Wilson, with a description and recommendation of any safety deficiencies found in the project in those categories. Recommendations of the auditor might come with a priority and a suggested improvement strategy attached. A brief description of the audit process also may be included.[85]

Specific Outcomes

Research in the United States has led to the development of Road Safety Audit Programs tailored to bicycles, local agencies, small cities, and interstate reconstruction. Each of these specific audits yielded checklists that were tailored specially to the unique audit application.

In the bicycle safety audit, a unique checklist was developed that targeted "general facility design, visibility, alignments, travel surface, signing, marking, issues associated with the multi-use path, and other types of bicycle areas."[86] This project also demonstrated the Road Safety Audit Program's versatility in that it focused on a specific road user—the bicyclist.

In 1998, transportation researchers Tate and Wilson developed a Road Safety Audit Program "for use by local agencies," first creating a rural road classification system "to help structure road safety audits" and then developing a RSAP tailored specifically to the rural local roads.[87] The checklist developed in this research included a section for "general issues," which used categories similar to the five proposed by Wilson, above, but had two additional sections: one for "paved road issues" and another for "unpaved road issues."[88] In the "paved road issues" section, the checklist targeted pavement markings and pavement conditions, and in the "unpaved road issues" section, the checklist focused on roadway surface considerations.[89]

Research by Haiar and Wilson developed a safety audit program for use in small cities, creating "a systematic process for examining [the] safety needs" of small cities.[90] Two special checklists were developed in this study: one for traffic signs and another for intersections.[91]

In 1998, research by Bowler and Wilson led to the development of checklists for a Road Safety Audit of interstate reconstruction, focusing on evaluating "traffic control plans, devices, and strategies before the interstate work begins," to "ensure that major safety considerations have not been overlooked."[92] Four special checklists were developed in this study, each targeting a specific type of interstate reconstruction work: (1) slab replacements on a rural interstate, (2)

milling / resurfacing on a rural interstate, (3) two-lane, two-way operations on a rural interstate, and (4) entrance and exit ramps on a rural interstate.[93]

Most recently, in 2000, research by Wilson led to a refining of the local rural road classification initially developed by Tate and Wilson in 1998 and developed five categories discussed above (roadside features; road surface/pavement markings; signing and delineation; intersections and approaches; and special road users, railroad crossings, and consistency).[94]

The Output of the Road Safety Audit Program

Recall that after the audit, the auditor should "succinctly report on aspects of the project which involve hazards and...make recommendations about corrective actions."[95] This report will most likely address the general safety issues explained above and may contain specific issues related to the particular type of audit. The report also should contain the auditor's recommendations and suggestions for action with respect to each issue and may assign an urgency or ranking to the safety items.[96] Austroads suggests the use of photographs or videotapes to supplement the audit report.[97]

CHAPTER FOUR – THE ROAD SAFETY AUDIT PROGRAM DISTINGUISHED

The first to present his case seems right, till another comes forward and questions him.
Proverbs 18:17

An examination of existing road safety programs reveals some background into implementing a Road Safety Audit Program, and examining other infrastructure management programs revealed their common characteristics. The Road Safety Audit Program is contrasted with these programs.

Other Infrastructure Management Systems

In 1991, when Congress enacted ISTEA, it required states to implement a Safety Management System (SMS). In fact, Congress required five other infrastructure management systems in ISTEA: Pavement Management System (PMS), Bridge Management System (BMS), Traffic Congestion (CMS), Public Transportation Facilities and Equipment (PTMS), and intermodal transportation facilities and systems IMS.[98] Like the SMS, these programs no longer are mandatory, but instead are guidelines.[99] Research in Pavement Management Systems and Bridge Management Systems offers some assistance in analyzing the Road Safety Audit Program.

Both the PMS and BMS rely heavily on a computer database for storing data on the transportation entity's pavement and bridges, respectively. According to the FHWA, "[a] pavement management system is built around a database."[100] The PMS database may include data regarding the pavement's "identification, inventory, condition, construction, maintenance,

rehabilitation, [and] cost information."[101] The BMS centers around a bridge management database called "Pontis."[102] The database includes cost data and data on the condition of bridge components, which "is analyzed to arrive at least cost (optimal) long term preservation and improvement policies for a network of bridges."[103]

The FHWA issues some warnings about implementing a PMS. The FHWA warns that in some transportation entities, barriers to implementing the PMS may arise out of fear of exposure, turf protection, and perceived complexity of the new system.[104] Admitting that "[t]here are no magic solutions to overcome, remove, or bypass all barriers," the FHWA goes on to say that some of the barriers can be "overcome by improved communications and education."[105]

Two lessons learned from these two infrastructure management programs are relevant here. First, the PMS and BMS systems provide some examples for using computers to store and analyze infrastructure information. Second, the PMS system provides insight into barriers that might impede implementation of an infrastructure management program such as the Road Safety Audit Program.

Existing Road Safety Programs

Road safety programs that have been used to varying degrees by transportation entities are explained here. The Road Safety Audit Program is contrasted with these programs.

The Highway Safety Improvement Program (HSIP)

The Highway Safety Improvement Program (HSIP) was created by the Federal Highway Administration (FHWA) in 1979 "to establish the policy for the development and implementation

of a comprehensive highway safety program in each state."[106] The LHSIP, or Local Highway Safety Improvement Program, created in 1986, was provided for local transportation entities.[107] Both the HSIP and LHSIP use the Spot Improvement Approach — they use crash data that reveal high accident locations such as an intersection or bridge.

These programs[f] have three broad components: planning, implementation, and evaluation.[108] Each component has several specific processes, subprocesses, and procedures.[109] For example, the planning component has four processes (collect and maintain data, identify hazardous locations and elements, conduct engineering studies, and establish project priorities), which in turn consist of seven subprocesses and 68 procedures.[110]

The Safety Management System (SMS)

When Congress passed the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), it required that states have a Safety Management System (SMS) by October of 1994.[111] Though initially this was mandatory, Congress relaxed the requirement in 1995 and allowed states the option of enacting a SMS.[112]

The SMS utilizes five steps: (1) coordinating with other safety programs, (2) developing systems "to ensure that the major safety problems are identified and addressed," (3) "ensuring early consideration" of road safety, (4) "identifying [the] safety needs of special user groups," and (5) performing routine maintenance and upgrades on road safety hardware.[113] Congress also

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[f] The acronym "HSIP," when used hereafter in this paper, will refer to both the HSIP and the LHSIP unless indicated otherwise.

suggests additional elements that include establishing goals and accountabilities, coordinating among multiple agencies, utilizing databases, and implementing public information campaigns.[114]

Other Road Safety Programs

The American Association of State and Highway and Transportation Officials is developing a safety information management system called Transportation Safety Information Management Systems (TSIMS).[115] This system is not so much a comprehensive program as it is a computer database that can manage road safety information.[116] Other programs have been proposed that also emphasize computer inventories of crashes and defects.[117] Because the AASHTO TSIMS program still is in the design stage and because the other proposed programs have not been used extensively, the analysis in this report focuses on the HSIP and the SMS.

Common Characteristics

Notwithstanding their common goals of improving road safety, two characteristics of the existing road safety programs become apparent ? their reactive approach to improving road safety and their detailed structure, and are explained here.

Reactive Approach

Both the HSIP and the SMS systems are "reactive" in the sense that their safety analyses are triggered largely by crash data. The core of these programs is a safety system that "reacts" to crash data by undertaking a safety evaluation.

For example in the HSIP, the first of six processes[g] is to "collect and maintain data," and the second process is to "identify hazardous locations and elements."[118] The remaining four processes concern the safety analyses and safety project implementation to be performed once the hazardous locations and elements are identified.[119] The HSIP alludes to the need for identifying potential high accident-locations, but provides little guidance as to how to do so.[120] Instead, the HSIP describes a robust system for managing crash data management and identifying hazardous locations based on the data.[121]

Similarly, the SMS suggests the consideration of "identifying and investigating hazardous or potentially hazardous highway safety problems" in an entity's road safety program.[122] But, like the HSIP, the SMS focuses on a reactive approach in which crash data is collected, maintained, disseminated, and analyzed, "to assess highway safety needs, select countermeasures, and set priorities."[123]

Other road safety programs, such as that being developed by AASHTO,[124] also use this reactive approach. They use computer databases to manage road safety information and emphasize computer inventories of crashes and defects.[125]

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[g] The six processes of the HSIP are (1) Collect and Maintain Data, (2) Identify Hazardous Locations and Elements, (3) Conduct Engineering Studies, (4) Establish Project Priorities, (5) Schedule and Implement Safety Improvement Projects, and (6) Determine the Effect of Highway Safety Improvements. Federal Highway Administration, U.S. Department of Transportation, Highway Safety Improvement Program (HSIP) 11 (1981).

Cumbersome Structure

Another defining feature of the existing road safety programs is their detailed and cumbersome procedures. For example, in the HSIP, 68 procedures are provided in a methodical, detailed approach.[126] Computer databases and statistical analyses abound in the HSIP.[127]

The SMS has fewer procedures than the HSIP, but is no less burdensome. Being a set of overall safety program guidelines, the SMS recommends program elements aimed at coordination with other agencies, developing public education programs, and carrying out safety training.[128] Carrying out these additional elements of implementing coordination, education, and training programs are noble and worthwhile, but only are indirectly related to improving the safety of a particular road.

Whether it is through several detailed steps as in the HSIP or through fewer but large tasks as in the SMS, improving the safety of a particular road is achieved only after expending significant time and resources. Moreover, the circuitous routes involved in each create a cumbersome program structure for the entity aimed at improving road safety.

Distinguishing the Road Safety Audit Program

The Road Safety Audit Program differs from existing road safety programs in three ways. First, the RSAP is not solely a reactive program. It can be used as a reaction to a high accident location as indicated by crash data, but it is not as dependent on crash data as the HSIP and SMS are. Second, the RSAP is simple and not cumbersome. Third, the RSP is flexible and not rigid.

Proactive and Reactive

The Road Safety Audit Program is proactive — its use does not depend on a triggering event from crash data. It certainly can be implemented as a reaction to a high accident location in the crash data, but it does not have to be. For example, if crash data indicate that an intersection has a large amount of crashes, this may trigger a safety evaluation of that intersection in the form of a Road Safety Audit Review. But a Road Safety Audit can be conducted of the same intersection even while it is in the design stage — while it is still conceptual.

This is one of the powers of the Road Safety Audit Program. It can be proactive and reactive. A Road Safety Audit can be conducted on a road in its design stage, a Road Safety Audit Review can be conducted on the same road after the road is built, and RSAR's can continue on the road over time.

But the advantages to a proactive approach to identifying road safety are not limited to identifying safety defects of a road in the design stage. It can identify safety issues in a road from adjacent land uses, such as the potential spillover effects from a planned commercial development. Neither the road nor the development need exist. Reactive approaches that rely on crash data would not identify any such safety deficiencies until both the road and the development are built and several accidents have occurred in the area of concern.

A second advantage of a proactive approach to safety is that it can identify safety problems that do not show up in crash data. For example, if a new road has been built and little crash data exist for the road, the reactive approach would not be triggered. But a Road Safety

Audit Review of that road could identify safety defects. Or, if a safety defect results in several "near misses" or minor "fender-benders" that do not register in crash data, the reactive approach would not be triggered, but a Road Safety Audit Review could identify the safety defect.

Simple, Not Cumbersome

In contrast with the HSIP's manifold procedures including database utilization and statistical analyses of crash data, the RSAP appears quite simple. The RSAP consists of three primary stages (auditor selection, audit, and report)[129] which consist of steps themselves, but no computer usage or statistical analyses — steps which require significant time, money, and expertise — are required.

Furthermore, the RSAP has a sharper focus on road safety than the SMS program.[130] The SMS has elements that have the transportation agency engaging in public education programs, coordinating with other agencies, and carrying out safety training.[131] While these additional elements are aimed at improving road safety, they do not go directly to one particular road's safety. The RSAP does.

Flexible, Not Rigid

The HSIP uses only the Spot Improvement Approach in that it targets a particular high crash location as indicated by the crash data. But the Road Safety Audit Program can be used as a Spot Improvement Approach and a System-Wide Improvement Approach. For example, a Road Safety Audit Review can be used to examine a notorious bridge in a Spot Approach, or can be used to review the safety of all of the bridges in a particular corridor.

This flexibility is another powerful asset of the Road Safety Audit Program. It is not confined to safety evaluations on only those spots with high crash rates.

Compatibility

When compared to existing road safety systems, the proactivity, simplicity, and flexibility of the Road Safety Audit Program emerges. But the Road Safety Audit Program and the existing road safety programs can coexist — they are compatible.

By itself the Road Safety Audit Program is sufficient for improving road safety, but it can interface with the HSIP and the SMS if desired. In the HSIP, a Road Safety Audit Review can be performed once the crash data indicate that a particular area in the road system warrants a safety evaluation. In the SMS, the Road Safety Audit Program can fit into the first step of the overarching safety management system as one safety program that the safety manager must coordinate.

Summary

The value of the Road Safety Audit Program lies not only in its proactivity, simplicity, and flexibility, but also in its compatibility with existing road safety programs. Lessons from the Bridge and Pavement Management Systems include how computer databases may be used to store infrastructure data and how an entity may need to overcome some barriers in implementing the RSAP. So an entity can improve road safety through using the Road Safety Audit Program alone or it can dovetail its existing HSIP and SMS programs with the Road Safety Audit Program.

CHAPTER FIVE – ADDRESSING THE LEGAL ISSUES

It is a trap for a man to dedicate something rashly and only later to consider his vows.
Proverbs 20:25

Even assuming a transportation entity accepts the Road Safety Audit Program as adding value to its organization, the entity may yet pause at fully adopting the RSAP for fear that it will expose the entity to liability. Transportation researchers Turner and Blaschke observe that the fear of a lawsuit has caused many transportation engineers to use "an excessive amount of caution" and to "hide behind their (archaic) standard drawings instead of diligently searching for the best design for every roadway site and every traffic condition."[132]

The fear of liability that paralyzes some designers also has paralyzed the adoption of the Road Safety Audit Program. Indeed, "[t]he biggest obstacle to road safety audit success in this country can be summed up in one word: liability."[133] So this paper now turns from the question of whether the Road Safety Audit Program adds value to a transportation entity to the question of whether the Road Safety Audit Program can be used to establish liability of the entity that uses it.

The Situation

The Parties: The Alleged Victim and the Local Rural Transportation Entity

A setting in which the RSAP might be attempted to be used against the transportation entity is a lawsuit between a person allegedly harmed on the entity's road and the entity. In such a lawsuit, the plaintiff is the alleged victim and the defendant is the transportation entity.

Literature was reviewed to identify both parties. The transportation entity responsible for local and rural roads was specifically described as a defendant.

The Plaintiff: The Alleged Victim

The plaintiff in our hypothetical is the road user who, alleging to have been "injured on the portion of the highway which was included in the audit,"[134] sues the transportation entity responsible for the road. "Road users" include motorists, passengers, bicyclists, pedestrians, and adjacent property owners. The plaintiff's alleged injury may be based on bodily harm or property loss.

The Defendant: The Local Rural Transportation Entity

The transportation entity may be found at all levels of government, in all corners of the Nation. This entity is responsible for the public administration of designing, constructing, maintaining, and operating the roadway, roadside, and their appurtenances. It is this responsibility that leads to the transportation entity being the defendant in our hypothetical.

Transportation entities exist at all levels of our nation's government. The Federal Highway Administration of the U.S. Department of Transportation is the primary[h] transportation entity of the Federal government. At the state level, it is the state's Department of Transportation (DOT) or equivalent agency. Beyond the state level, transportation entities may be found at the county and municipality levels or in districts crossing other political boundaries.

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[h] The USDOT/FHWA is primary in the sense that other Federal agencies may have "transportation" branches that provide satellite support to the agency. For example, the U.S. Department of Agriculture has

The Local Rural Transportation Entity Explained.

Transportation researchers Walzer and Chicoine show that while states and counties are free to allocate responsibilities for their road systems as they see fit, three common approaches for allocating responsibilities over their local rural roads exist.[135] The first approach is where "the State administers virtually all rural local roads," the second "makes counties primarily responsible," and the third blends the two, having "a dual system of local governments."[136] As of 1989, the second approach was the most common.[137]

The legal analysis of this report concentrates on the local rural transportation entity. The term "local rural transportation entity" is a label used to describe the local governmental organ — whether a town, city, or county government entity[138] — responsible for primarily rural (as opposed to urban) roads. According to the U.S. Department of Transportation, the "vast majority (75.2 percent) of the Nation's roadways are under the jurisdiction of local governments (town, city, county)," with the remaining 24.8 percent under the jurisdiction of the federal and state governments.[139] The local rural road mileage of 2,238,308 accounts for 56.9 percent of the nation's 3,933,985 total mileage.[140] The local rural transportation entity indeed plays a significant role — as the primary road owner — in the nation's road ownership.

At the Fifth International Conference on Low Volume Roads (1991), transportation researchers Walzer and McWilliams emphasized the significance of rural roads. The authors explained that rural roads provide the farm-to-market connection, the rural-to-urban employment commute, and are used by emergency and other public services.[141]

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the "Office of Transportation." See generally, Norman Walzer & David L. Chicoine, U.S. Department of

Vulnerability of the Local Rural Transportation Entity.

Unfortunately, the local rural transportation entity is hindered with manifold challenges. While more than half the roads in the United States are under control of local rural transportation entities, these entities have access to only limited federal funding[142] and rely primarily on local and state sources of revenue. Federal funding problems stem from a number of sources, including the "poor performance of the farm economy in the early 1980s," rural population declines, and the elimination of federal general revenue sharing.[143] Faced with the responsibility of managing many miles of low volume roads with inadequate funding "local transportation systems across the United States are financially strapped," with the result that "[s]afe and efficient travel is now threatened in rural areas."[144]

Transportation professors Wilson and Lipinski identify other challenges facing local rural transportation entities: violations of "roadway consistency or driver expectation," a "lack of trained professional engineers," and an "increase in tort liability claims."[145]

The challenges faced by the local rural transportation entity ultimately may result in increased risk of liability to the local rural transportation entity. Researchers Tate and Wilson found that "[m]anpower and funding are the major factors limiting counties' abilities to develop and maintain [safety improvement programs]."[146] Forgone safety improvement programs may lead to missed roadway defects, and as our litigious society searches for a "deep pocket," roadway defects spawn tort suits.[147] Thus it appears that the local rural transportation entity—the transportation entity responsible for more than one-half of our nation's roads — is faced with

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Agriculture, Rural Roads and Bridges: A Dilemma for Local Officials (1989).

financial constraints, defective roads, a lack of expertise, and rising liability. The vulnerability and importance of the local rural transportation entity warrant special consideration in this report's examination of the legal effects of a transportation entity's use of the Road Safety Audit Program.

The Protection: Sovereign Immunity

The first step in deciding whether the Road Safety Audit Program can be used to establish a local rural transportation entity's liability is to determine whether — in any event — the entity can be found liable for harms arising out of the roads it manages and operates. This determination may be dispositive: if the entity is immune from suit, the entity cannot be found liable. If the entity can be found liable, then further inquiry into the effects that the laws of evidence might have on using the RSAP report against the transportation entity is required. The doctrine of sovereign immunity is concerned with the first step; later inquiries are discussed in later chapters.[i]

Sovereign immunity provides governments at all levels with a protection from lawsuits. According to transportation research by Turner et al., the "concept came to have two meanings: (1) the government could not be sued unless it gave its express permission, and (2) even where the government allowed itself to be [sued], it was not responsible for the acts of its employees."[148] The immunity of municipalities for their torts has been a subject of debate for decades, with those who wish to defend governments saying "sovereignty" and those who wish to hold governments responsible saying "fairness." Researchers Fuller and Casner frame the two sides of the debate

in their 1941 *Harvard Law Review* article. The authors explain that defenders of municipal sovereignty "fear that fraud and excessive litigation would result in unbearable cost to the public in the event municipal corporations were treated as ordinary persons for purposes of tort liability."[149] Proponents of holding municipalities liable point to the "unfairness to the innocent victim" and to "the social desirability of spreading the loss"[150] in advocating against sovereignty.

The early rule regarding sovereignty of municipalities is summarized in "[t]he maxim, 'The King can do no wrong.'"[151] This simple doctrine, which gives full liability protection to municipalities, according to Dray,[152] was used in the 1788 English case of Russell v. The Men of Devon.[153] Dray further explains that this English doctrine of providing tort immunity to municipalities eventually became American doctrine.[154] Then, as Dray notes, the 1842 case of Bailey v. New York[155] limited this liability enjoyed by governments to only those torts arising out of governmental functions; the government could be held liable for torts arising out of its proprietary functions,[156] discussed below.

The Erosion of Sovereign Immunity

The protection that transportation entities once enjoyed from the doctrine of sovereign immunity has eroded via common law and the lawmakers — Congress and the state legislatures. Unsatisfied with results which were patently unfair to injured parties, state Supreme Courts began restricting the defense of sovereign immunity.[157] Turner et al. go on to explain that though this

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[i] This report is concerned only with the immunity of sovereigns in their own state court system. The question of whether a state transportation entity is immune from suit in a federal court (i.e., the effect of the Eleventh Amendment) is not addressed here.

abrogation of the defense initially was regarded by some "as a legal fluke," it caught on, and through the 1960s and 1970s, "a series of states lost their immunity…through court rulings."[158]

Not to be outdone, legislatures began enacting statutes that eviscerated the defense. In 1946 Congress passed the Federal Tort Claims Act,[159] which expressly authorizes suits against the United States government. Section 2674 of the Act says, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."[160] Although Congress went on to limit the cause of action with respect to allowable damages[161] and the statute of limitations,[162] the Act marked the death knell of absolute United States governmental immunity.

State legislatures also began to modify their sovereign immunity doctrines.[j] In 1996 Glennon reported that "[i]n the last thirty years, the doctrine of sovereign immunity has either been completely waived or modified in most of the States."[163]

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[j] Wyoming's sovereign immunity history exemplifies the wrangling and complexity commonly involved in eroding a state's sovereign immunity. In 1978, in the case of Oroz v. Board of County Commissioners of the Board of County of Carbon, 575 P.2d 1155 (1978), the Wyoming Supreme Court abrogated immunity for Wyoming's counties, municipalities, school districts, and other subdivisions of the government, making it effective on July 1, 1979. But in 1979, the Wyoming Legislature enacted the "Wyoming Governmental Claims Act" (W.S. §§ 1-39-101 et seq.) including W.S. § 1-39-111, which contained the phrase "public facilities" as a source of liability. This phrase was interpreted by the Wyoming Supreme Court in State v. Stovall, 648 P.2d 543 (1982), to include "highways," finding the Wyoming DOT liable. Dissatisfied with that result, the Legislature repealed W.S. § 1-39-111 in 1986, and enacted W.S. § 1-39-120, which said the state was immune for defects in plans, for failing to construct or reconstruct, or for the maintenance of bridges, culverts, highways, roadways, streets, alleys, sidewalks, or parking areas. But in the 1993 case of Romero v. Hoppal, 855 P.2d 366 (1993), the Wyoming Supreme Court interpreted the word "maintenance" in W.S. § 1-39-120 as holding the state liable for negligent maintenance, saying "maintenance" is a noun, not a verb. Accordingly, the government may be liable for negligent acts made while maintaining, but is immune from liability arising in the results of the maintenance acts.

A Continuum of Immunities

In a comprehensive 1992 survey of the status of state acts, AASHTO[k] determined that of the 42 states that responded to the question of whether their state has "sovereign immunity as to highway tort claims," seven said they had immunity, five said they did not, and 30 said that their immunity was limited.[164] A similar compilation is found in section 895B of the 1982 Second Restatement of Torts.[165] This earlier compilation adds two considerations regarding the transportation entity's tort liability. First, whether a transportation entity has sovereign immunity as to its tort claims may depend on whether the entity is the state entity or a local entity.[166] Second, some of the more common features in those states with limited immunity were identified, including the requirement of legislative consent to suit, liability limited by dollar limits or insurance coverage limits, liability dependent on whether the alleged harmful act was of a general or proprietary nature, or limits and procedures enacted by a claims board.[167]

A continuum of immunities emerges. On one extreme are the states that have sovereign immunity and on the other extreme are those that have no sovereign immunity. In the middle of the continuum are those states with limited immunity. An additional consideration in each of the three positions is the state-local immunity distinction: whether the state and the local entities are treated the same. Again, in this report, the concern is the immunity of the local transportation entity.

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[k]The American Association of State Highway and Transportation Officials.

Summary

People who are injured in the area of the potential safety improvement identified in the audit may attempt to use the RSAP report to show that the entity responsible for the design, construction, and maintenance of the roadway—being aware of the dangers—failed to perform its duty and correct the roadway to eliminate those dangers. The local rural transportation entity, though disadvantaged by inadequate funding and expertise, is responsible for more than one-half of the nation's roads. As such, the local rural transportation entity is particularly susceptible to a risk of liability. If this danger of increased risk of liability is significant, then the result will be that Road Safety Audit Programs will be discouraged or simply not undertaken by the local rural transportation entity.

However, the doctrine of sovereign immunity may protect some governmental entities from liability. Though some states have completely abolished the doctrine so as to subject their transportation entities to the risk of liability typical of any person, other states have kept the defense. Still others have crafted various limitations into their doctrines such that their governmental agencies can be found liable only under certain circumstances.

If a plaintiff injured on the entity's roads sues the local rural transportation entity, the relevant legal question then is whether the Road Safety Audit Program can be used to establish a transportation entity's liability. The method for addressing this question is now explained.

Methodology

To analyze the legal question of whether the RSAP report can be used to establish liability of the local rural transportation entity in a lawsuit arising out of injuries on the entity's roads, three legal inquiries arise:

- First, can the transportation entity be found liable in any event in a lawsuit arising out of injuries that occurred on the entity's roads?
- Second, if the entity can be found liable, can the RSAP report be used as evidence to show the entity's negligence?
- Third, if the entity can be found liable and if the RSAP report can be used as evidence against the entity, does the public interest in improving road safety through the RSAP outweigh holding the entity liable?

This report will address these three inquiries.

Because each of the 50 states has jurisdiction over such laws and because each state is free to determine the laws within their borders, subject of course to the United States Constitution, no simple answers to the three inquiries are available. In theory it is possible that there could be 50 different approaches (one for each of the states) to answering each of the three inquiries that comprise the overarching legal question. To avoid such complexity, it will suffice to obtain a framework of guidelines for use in answering the three inquiries. This framework will be based on the outcome from legal analysis of the three inquiries in a sample of states. Note that while the ensuing legal analysis focuses on the local rural transportation entity, this three-step framework is

applicable for addressing the legal question at any level of transportation entity — whether federal, state, or local.

Six states were chosen for this sample. In each of these states, laws are researched with respect to a RSAP report[l] and assumed parties (the plaintiff: the alleged road user victim; the defendant: the local rural transportation entity). Although this is not a statistically valid sample, because only a mere framework of relevant approaches to the legal question is desired, a sample of six states adequately provides this framework.

The Six States: Arizona, Louisiana, Michigan, New Jersey, North Carolina, & Wyoming

Section 895B of the 1982 Second Restatement of Torts (Restatement) compiles the 1982 sovereign immunity positions of the 50 states and the District of Columbia.[168] For each of the 50 states, the compilation summarizes the judicial and legislative activity that led to the immunity position, and includes state and local entity immunities.[169] The table in Appendix II shows the Restatement's breakdown of the state and local immunities of the fifty states in 1982.[m]

As discussed above, a continuum of immunities emerges from the Restatement's compilation. The state and the local entity could have absolute immunity, no immunity, or limited immunity, yet the immunities of the two entities are independent: the immunity status of the state entity itself does not necessarily control the immunity status of the state's local entities. An entity's absolute immunity "prevent[s] any recovery against the [entity] for tortious conduct."[170]

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[l] From Chapter Three: a "report on the conclusions drawn [and] recommendations regarding aspects which involve unnecessary or unreasonable hazards." Austroads, Road Safety Audit 43 (Austl. 1994).
[m] Though the Restatement included status of the District of Columbia, (D.C.), D.C. is abandoned in this study. This is done because D.C. is not a state.

"No immunity" indicates that the entity is "subject to liability in tort."[171] Finally, "the tort immunity of the State and its agencies can be…severely limited[n] by either legislative or judicial action."[172] Table 1 shows the quantities of states with the various combinations of state and local immunity positions.

Table 1. Number of State Positions regarding State Entity and Local Entity Sovereign Immunity.[o]

	Local Immunity			
State Immunity	Absolute	Limited	None	Total
Absolute	0	3	1	4
Limited	0	40	4	44
None	0	1	1	2
Total	0	44	6	50

Table 1 shows that absolute local immunity was non-existent in 1982. All local entities somehow could be found liable for their torts. Six states provide no immunity to their local entities while 44 allow their local entities limited immunity. Four states provide absolute immunity to their state entities, two give no immunity to their state entities, and forty-four states allowed their state entities limited immunity.

This study examines the law in six states to determine the answer to the legal question at the heart of this report (to what extent the RSAP report might be used to establish the local rural transportation entity's liability). Relevant to this study then — again, in dealing with the local rural

[n] Examples of such limitations include distinctions between discretionary and ministerial acts, governmental and proprietary acts, insurance effects, and statutory tort claims procedures. These are discussed below.
[o] After Section 895B of the 1982 Second Restatement of Torts. See Appendix II for more detail on this Restatement.

transportation entity — is the Restatement's finding of the split between states with limited local immunity and no local liability (44 and six, respectively).[p]

The six states sampled are Arizona, Louisiana, Michigan, New Jersey, North Carolina, and Wyoming. Arizona, Michigan, New Jersey,[q] North Carolina, and Wyoming are five of the 44 states that were reported as having limited local immunity in the Restatement; Louisiana is the one state selected out of the six reported by the Restatement as having no local immunity.

MINITAB for Windows (Release 11.21, 1996) is the statistical software used to select the six states. The random sampling tool of MINITAB was used for selecting the states, notwithstanding the fact that statistical validity of the sample was not the goal.[r] Initially, three states with no local immunity and three with limited local immunity were selected, but preliminary research into the local immunity of those states revealed that their local immunity position had changed from that reported in the 1982 Restatement. Indeed, Louisiana is the only state out of those reported in 1982 as having no local immunity that still appears to have no local immunity. Therefore, the names of the remaining 49 states (i.e., without Louisiana) were entered into MINITAB and five states were selected from those 49: Arizona, Michigan, New Jersey, North Carolina, and Wyoming. These are the five sample states with limited local immunity. Louisiana,

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[p] Even if the Restatement had identified states with absolute local immunity, the law of those states would not be explored because it would add nothing to the analysis. Those immune entities, by definition, cannot be found liable for their torts.

[q] Arguably, New Jersey may not be considered a "rural" state. However, New Jersey's laws concerning local immunity still will assist in developing the desired legal framework. In fact, the law draws a much clearer distinction between local and state transportation entity than it does between the urban and rural transportation entity. Thus, for our purposes here—attempting to develop a legal framework for analyzing the three legal inquiries—New Jersey's treatment of the local entity will be sufficient.

the sixth sample state, has no local immunity. As shown below, further research verified the local immunity positions of these six sample states. Table 2 lists the six states that were researched in this study.

Table 2. The six states selected for legal research in this study.

Limited Local Immunity	No Local Immunity
Arizona	Louisiana
Michigan	
New Jersey	
North Carolina	
Wyoming	

The Process: Legal Research

Having selected the six states, the next step was to research the law in each of the states to determine how each state would handle the question of whether the RSAP report could be used against the local rural transportation entity to establish the entity's liability. Again, this question can be broken into three legal issues, each of which is discussed in turn:

- First, can the transportation entity be found liable in any event in a lawsuit arising out of injuries that occurred on the entity's roads?
- Second, if the entity can be found liable, can the RSAP report be used as evidence to show the entity's negligence?

[r] Using MINITAB's random sampling tool was the method used to effectively draw the six states "from a hat." Perhaps it was overkill, but at a minimum it helped psychologically to have the six states' selection process preserved in a MINITAB output file.

- Third, if the entity can be found liable and if the RSAP report can be used as evidence against the entity, does the public interest in improving road safety through the RSAP outweigh holding the entity liable?

Statutes and cases were reviewed in the three inquiries. From these and any treatises or articles, the common principles and rules were culled and any eccentricities or exceptions thereto were identified, explained, and summarized.

To understand the law with regard to the first issue, the law of each of the six states was researched to determine boundaries of the local rural transportation entity's sovereign immunity in that state. Statutes, court opinions, and legal commentaries and articles were examined to verify the status of the entity's local entity immunity and to ascertain what limitations (if any) exist on the entity's immunity.

The second issue breaks down further into two inquiries. The first inquiry is whether the plaintiff can gain access to the RSAP report through the state's "Freedom of Information Act" or through the rules of discovery. The second inquiry is whether the plaintiff can admit the report into evidence even if the plaintiff gains access to the report. Again, statutes, court opinions, and legal commentaries and articles were reviewed to understand these issues in each of the six states studied.

The third issue breaks down further into three inquiries. The first inquiry is whether the Road Safety Audit Program is merely a tool used by the local rural transportation entity in accomplishing the entity's legal duties. The second inquiry is whether decisions arising out of the

RSA report are part of the entity's governmental actions. The third inquiry is into the effect that using the RSAP report against the entity might have on the public policy of improving road safety.

A framework was developed that explores inquiries in each of the three legal issues and how the law of each of the six sample states treats those issues. This framework directly answers the legal question at the heart of this report for the six states studied and provides guidelines for answering the question when the question is asked with respect to a state that was not specifically studied.

The legal research was performed with an assumed plaintiff, defendant, and RSAP report. The assumed plaintiff is the person allegedly harmed on the local rural transportation entity's road and the assumed defendant is the local rural transportation entity. For the hypothetical report, the Austroads definition is used: a "report on the conclusions drawn [and] recommendations regarding aspects which involve unnecessary or unreasonable hazards."[173] We now turn to analysis of the legal issues.

CHAPTER SIX – ANALYZING THE LEGAL ISSUES

Do not withhold good from those who deserve it, when it is in your power to act.
Proverbs 3:27

In a lawsuit, the rules of "discovery" govern the parties' access to each other's information prior to the courtroom proceedings and the rules of "evidence" govern the use of information during the trial. Both of these sets of rules are relevant here.

If a plaintiff alleges he or she was harmed on a local rural transportation entity's road and then commences to sue the entity, but the local rural transportation entity is immune, the entity can avoid liability altogether. On the other hand, if the entity is not immune and has a RSAP report concerning the area of the road where the plaintiff alleges he or she was harmed, the plaintiff will probably want access to the RSAP report to help his or her case against the entity. If the RSAP report is discoverable by the plaintiff and admissible as evidence, the entity will attempt to show that it does not establish the entity's liability. This defense approach of the entity is one that is "defensive": the entity is trying to keep the report out of the plaintiff's hands and out of evidence.

This situation raises two legal issues. First, a determination as to whether the entity is immune from liability must be made, and second, if the entity is subject to liability, an assessment of the possibilities that the report might be discovered by the plaintiff and admitted into evidence must be made. The potential countering effects that confidentiality and privileges might have on the discoverability and admissibility of the report also must be considered during the second inquiry.

Notwithstanding results of the "defensive defense" strategy, an alternative litigation defense strategy for the local rural transportation entity being sued is an "offensive defense." In that approach, the entity proudly will proffer the RSAP report and will attempt to use the report as evidence of the entity's proactive efforts toward improving the safety of its roads—proactive efforts that must not be chilled through fear of liability.

The law implied in these two litigation defense strategies is examined here with regard to the six states sampled in this study.

Issue One: Can the Entity Be Found Liable?

Local governments are creatures of the state and therefore typically have only those duties and responsibilities expressly given by the state constitution or state government. The doctrine of sovereign immunity of the local entity is no exception. Most states provide that their local governments are subject to liability only as provided by state tort claims acts or other state statutes, or by judicial activity.[174]

Local Government Immunities

One general principle in the law is that "where there is a tortious injury there is liability."[175] But sovereign immunity, itself an exception to the general principle, is the rule for local governments: local immunity is allowed unless the state legislature or courts have specifically restricted it. The six sample states have dealt with the question of local immunity, and have restricted its use through either judicial activity or legislation.

History

In Arizona, the Arizona Supreme Court abolished sovereign immunity in 1963 in the case of Stone v. Arizona Highway Commission.[176] The court made it clear in 1967 that local immunity was abolished as well in Veach v. City of Phoenix.[177] Arizona's tort claims act, enacted in 1984, codified the limits of Arizona's state and local immunities and liabilities.

Louisiana's Supreme Court abolished the defense in 1973 in Board of Commissioners of Port of New Orleans v. Splendour Shipping and Enterprises, Inc.[178] In 1974, Louisiana adopted a new constitution which provided that "[n]either the state, a state agency, nor a political subdivision shall be immune from suit and liability,"[179] but has yet to enact a comprehensive tort claims act.[180]

Michigan enacted a tort liability act (Mich. Comp. Laws Ann. §§ 691.1401 *et seq.*) in 1964. In Michonski v. City of Detroit,[181] (1987), the Michigan Supreme Court construed Mich. Comp. Laws Ann. §§ 250.61 and 691.1401 as meaning that neither the state of Michigan nor its counties or cities are immune for torts arising out of their defective highways.

In 1970, the New Jersey legislature enacted the New Jersey Tort Claims Act (N.J. Stat. Ann. 59:1-1, *et seq.*) in response to the New Jersey Supreme Court's decisions in P., T. & L. Const. Co. v. Commissioner, Dept. of Transp.[182] and Willis v. Department of Conservation and Economic Development,[183] where the court abolished the state's immunity in contract claims and tort claims, respectively.[184]

North Carolina has a tort claims act that it is applicable only to North Carolina's state government.[185] However, the North Carolina Supreme Court repeatedly has held that North Carolina municipalities retain immunity unless the state legislature abolishes it.[186]

In 1978, the Wyoming Supreme Court abolished the defense for local governments in Oroz v. Board of County Commissioners of the Board of the County of Carbon.[187] In response to Oroz, in 1979 the Wyoming legislature enacted the Wyoming Governmental Claims Act (Wyo. Stat. Ann. §§ 1-39-101 *et seq.*).

Table 3 summarizes the source of the local government immunities in the six sample states.

Table 3. Sources of local government immunities in the sample states.

Tort Claims Act	Judicial
Arizona	Louisiana
Michigan	North Carolina
New Jersey	
Wyoming	

The acts and judicial history of the six states provide the extent of the governments' liability and immunity. Whatever their impetus, the following principles regarding local rural transportation entity immunity emerge from the judicial opinions, tort claims acts, and statutes of the six sample states.

Common Themes

Of the six sample states, four (Arizona, Michigan, New Jersey, and Wyoming) have a tort claims act (TCA) that deals specifically with immunity of the local government. Louisiana has no tort claims act, but has statutes with provisions similar to the TCAs of the other states. North Carolina has a TCA, but it is only applicable to North Carolina's state government.[188]

Aside from North Carolina's state-only TCA, generally the TCA and statutory requirements apply to the local government and the state government.[189] The general rule is that the local government retains immunity but will be subject to liability pursuant only to expressly codified activities.[190] Exceptions to this general rule of immunity include distinctions based on the character of the entity's activity at issue and limitations to the entity's liability. These exceptions are discussed in the sections that follow.

Modifying the Extent of Immunity

Some of the sample states modify extent of the local rural transportation entity's immunity based on whether the entity carries liability insurance or based on a dollar amount. The general rule in the question of the effect of a local government's procurement of liability or indemnity insurance is that the procurement "has no effect upon its immunity from tort liability."[191] But other states hold "that where a governmental unit procures insurance, its immunity from tort liability is removed to the extent of the coverage of the insurance."[192]

New Jersey endorses the majority view. In Hughes v. Burlington County, a county that was sued for injuries arising out of a traffic accident was held not to have waived its immunity solely because it had procured liability insurance.[193]

Michigan,[194] North Carolina, and Wyoming fall into the minority rule so that in their states, a local government's procurement of liability insurance waives the entity's immunity to the extent of the liability coverage. North Carolina and Wyoming have statutes in their tort claims acts that authorize local government to waive its immunity by procuring insurance.

North Carolina statute § 160A-485 provides that a "city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance," and that "[i]mmunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability."[195] For instance, in Davis v. Town of Southern Pines, the town was found not to be immune from liability for the torts of its police officers.[196]

In Wyoming, a government's procurement of "liability insurance coverage shall extend the governmental entity's liability" to liabilities not under Wyoming's tort claims act or under a federal law.[197] In Helm v. Board of County Commissioners, Teton County, Wyo., the Teton Board of County Commissioners avoided liability because the plaintiff's claim that the county performed a negligent home inspection failed to fall within the scope of the county's insurance coverage, which would have operated to waive the county's immunity.[198] Wyoming's statute also limits extent of the local government's liability to certain dollar amounts. Wyoming statute § 1-39-118(a) says that except as modified by the entity's liability insurance, the entity's liability shall not exceed $250,000 per person for claims arising from a single transaction or occurrence or $500,000 for all persons for claims arising out of a single transaction or occurrence.[199]

Table 4 summarizes the sampled states' views on the effect on sovereign immunity that the local rural transportation entity's procurement of liability insurance has on the entity's immunity.

Table 4. Effect of procurement of liability insurance on immunity in the sample states.

No Effect on Immunity	Immunity Waived
New Jersey	Michigan
	North Carolina
	Wyoming

Sources of Liability

To establish the entity's liability, the plaintiff must show that the entity was negligent. Negligence is the defendant's breach of a duty of care to the plaintiff which caused harm to the plaintiff. Simply put, negligence "is the failure to exercise the reasonable care that a prudent person would use under similar circumstances."[200] The plaintiff will try to establish the local rural transportation entity's liability by showing the entity breached a duty it owed to the plaintiff.

Duties

As stewards of the Nation's highway systems, transportation entities are entrusted with the responsibility or duty to the public to provide a medium for the safe transportation of goods and people. This type of duty entails things such as care and notice.

Researcher Derrick describes two levels of duties of care: the "general-duty special-duty doctrine which provides in essence that a governmental entity is not liable for torts committed against a citizen unless a special or particular duty is owed to the injured citizen." Under this doctrine, the agency "is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general, as in the case of police or fire protection," but "when a citizen becomes singled out from the general population and a special duty is owed him by the governmental entity.…the breach of that duty may result in liability for the damages suffered by the citizen."[201]

Standard of Care.

Transportation researcher Glennon provides a description of the duty owed by transportation entities: "[t]he basic standard of care for roadway agencies is reasonable safety for all motorists."[202] Research by Pearson adds that the transportation entity has a "duty to exercise reasonable diligence to maintain its streets and highways in a reasonably safe condition for the uses for which they were established."[203] Exactly what "reasonable safety" is, though, is not easily defined. "Reasonable" means different things to different people and many factors "limit one's ability to act."[204] The definition of "reasonable" can thus vary state to state.

Research by Lewis provides several factors that courts have considered in determining the reasonableness of a transportation entity's action "[w]hen a potentially hazardous condition exists…[and] resources are not available to correct all such conditions."[205] Lewis' factors: (1) the "gravity of harm posed by the condition," (2) the "likelihood of harm," (3) the "availability of a method to correct the situation," (4) the "usefulness of the condition for other purposes," and (5) the "burden of removing the condition."[206]

Arizona's standard of care is found in Arizona Statute § 12-820.03: "Neither a public entity or a public employee is liable for an injury arising out of a plan or design...if the plan or design is prepared in conformance with generally accepted engineering or design standards."[207]

The State of Louisiana "is bound to exercise due, ordinary, or reasonable care under the circumstances."[208] Because the "Parish is not the guarantor of safety on its roads, the simple fact that an accident occurred does not mean that condition presents an unreasonable risk of harm or is

unreasonably dangerous….not every minor imperfection, irregularity, or bump in the road constitutes an unreasonably dangerous condition."[209]

A governmental entity in Michigan has a duty to "maintain the highway in reasonable repair."[210] Furthermore, a Michigan "county shall keep in reasonable repair...all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel,"[211] but this duty "extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel."[212] According to the Michigan Supreme Court in Nawrocki v. Macomb County Road Commission, the duty of the state and county transportation entities is limited by "the *location* of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach."[213]

A North Carolina statute prescribes that North Carolina cities have "[t]he duty to keep the public streets, sidewalks, alleys, and bridges in proper repair [and] free from unnecessary obstructions."[214]

In 1992, the Wyoming Supreme Court rejected an argument that the board of commissioners owed to the plaintiffs a duty of care in supervising a weed and pest control board that allegedly sprayed herbicide in a way that polluted the plaintiffs' water supply.[215] Whether this is an appropriate analogy in Wyoming has yet to be seen as no Wyoming case law on duty of care was found.

Table 5 summarizes the various tests for the standard of care to which the local rural transportation entity is held in the sample states.

Table 5. Standards of care for the local rural transportation entity in the sample states.

State	Description of Standard of Care
Arizona	Design or plan prepared in conformance with generally accepted engineering or design standards.
Louisiana	Exercise due, ordinary, or reasonable care under the circumstances.
Michigan	Maintain the highway in reasonable repair.
North Carolina	Duty to keep the public streets, sidewalks, alleys, and bridges in proper repair and free from unnecessary obstructions.

Duty to Warn.

Transportation entities have a duty to the road user to provide notice of adverse road conditions. To be sure, "it is the duty of the responsible public authority to maintain warning signs when reasonably necessary to enable travelers exercising ordinary care and prudence to avoid injury."[216] For instance, the familiar "Slippery When Wet" sign, when combined "with an advisory speed [limit sign] could be used to alert motorists of the [potentially wet] condition."[217] And "a governmental authority has a duty to provide warnings or markings at particular highway curves where the government knew of the dangerous condition of the curve."[218] Although a transportation entity can be found liable solely for "failing to properly warn motorists of the dangerous situation,"[219] an entity's failure to warn of an otherwise inactionable situation also may create liability for the transportation entity.[220]

An Arizona governmental entity has a duty to provide a "reasonably adequate warning...as to any unreasonably dangerous hazards which would allow the public to take suitable precautions."[221]

Louisiana Statute § 32:235 provides that Louisiana "municipal and parish authorities…shall place and maintain…traffic control devices upon highways under their jurisdiction as they may deem necessary."[222] This statute has been interpreted to impose upon Louisiana parishes a duty to warn motorists of hazardous conditions.[223]

In Michigan, the statutory duty of the local rural transportation entity is to "maintain the highway in reasonable repair."[224] The Michigan Supreme Court extended this duty so that once a traffic sign is erected, it "becomes an integral part of the physical structure of the highway, and thus the duty to maintain a highway in reasonable repair encompasses the maintenance of traffic signs."[225] Although in Michigan "a claim of a duty to warn is a separate and distinct theory of liability from a statutory duty to maintain and repair under the highway exception to governmental immunity,"[226] in Salvati v. Department of State Highways the Michigan Supreme Court nevertheless noted that a governmental entity "may incur liability under the broad concept of 'traffic sign maintenance'...for failing to erect any sign or warning device at a point of hazard."[227]

In New Jersey, governmental entities have a duty to warn for emergency situations,[228] but not for ordinary conditions[229] or weather conditions.[230] In deciding question of the difference between "emergency" and "ordinary," the New Jersey court looked at the legislature's intent and Webster's Third New International Dictionary to say that "a public entity would be liable for its failure to respond to an emergent situation that held a high degree of risk for the public."[231] Thus

in Aebi v. Monmouth County Highway Department, the New Jersey Supreme Court held that the county was immune from liability where the plaintiff alleged the county had a duty to warn of a narrow bridge that was not held to impose a high degree of risk.[232]

Duty to Maintain.

In Isbell v. Maricopa County, the Arizona Supreme Court upheld a jury's finding that the county had breached "its duty to maintain safe roadways" where the county failed "to follow up on its request for improvements or…to reduce the speed limit when the improvements were not completed."[233]

In Michigan, the local rural transportation entity "shall maintain the highway in reasonable repair."[234] "Once a signal or sign is installed, it must be maintained in a functional condition."[235] But this statutory duty has been construed to apply to maintenance of only those conditions that affect the safety of motorists using the improved portion of the highway designed for vehicular travel.[236] Also, the duty to maintain imparts no duty to "improve or enhance existing highways."[237] Furthermore, in Bernier v. Board of County Road Commissioners for Ionia County, the court said that the county "should be permitted to introduce evidence that it lacked sufficient funds" to maintain and repair an intersection and was therefore forced to use its discretion in applying funds.[238]

In New Jersey, the local rural transportation entity generally has immunity for discretionary decisions.[239] However, in Costa v. Josey, the New Jersey Supreme Court said that while the decision to maintain might be discretionary and therefore protected, "[o]nce the decision to maintain was made, however, the tort immunity would seem to have ended."[240] In that

particular case, pavement resurfacing under the state's resurfacing program reduced the height of the barrier dividing the traffic, and the court refused to allow the New Jersey Department of Transportation to have immunity from liability for the death of two motorists killed by a vehicle that crossed the center barrier.[241]

The North Carolina Supreme Court held that North Carolina's statute "relating to streets and bridges imposes on municipalities the positive duty to maintain the streets in a reasonably safe condition for travel."[242]

Wyoming cases decided before the 1979 Wyoming Governmental Claims Act held that the city[243] and county[244] had a duty to maintain the road. But the tort claims act provides Wyoming local rural transportation entities with immunity from liability for "maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area."[245] Again, in 1993, the Wyoming Supreme Court drew a distinction similar to that of the New Jersey court. In Romero v. Hoppal the Wyoming court said that immunity would not lie for *maintaining* the road, but only for the result of maintaining.[246] This distinction is similar to that drawn by the New Jersey court in Costa, above.[247]

Duty to Comply With Standards.

Local rural transportation entities may be held to have a duty to comply with external and internal standards in control of their roads. To establish the standard of care, courts will consider several types of information. "One of the strongest types of information" that courts will consider is the "agency's own guidelines and policies…[which] may define in detail the minimum requirements."[248] The reason behind this is clear: a "reasonable person would follow such rules

and orders."[249] Further, courts also consider "the commonly accepted good practices promulgated by authoritative national bodies in their standards, policies, or guidelines."[250]

For example, the Manual of Uniform Traffic Control Devices[251] is "a widely recognized authority and is the official standard in many states."[252] Beyond the agency's own guidelines and national guidelines, courts also will look at (1) "guidelines and policies of other agencies (to determine the state of the art)," (2) "guides developed by national and professional organizations (such as, American Association of State Highway and Transportation Officials, Institute of Transportation Engineers, and National Association of County Engineers)," (3) "engineering texts and manuals," (4) "professional journals," (5) "research publications," and (5) "opinions of expert witnesses."[253]

An Arizona corporation also may be held to the standard of its internal standards. For example, in a case involving a train crash in which the defendant railroad company requested access to the investigative report and safety standards of the employer whose plaintiff employees were injured in the crash, the Arizona Supreme Court recognized the relevance that such documents have in litigation.[254] Although the court protected employees' individual safety records, the court did allow the railroad access to the employer's internal safety standards.[255]

Arizona Statute § 28-642(A) requires the state director to "place and maintain traffic control devices that conform to [Arizona's] manual and specifications…on all state highways as the director deems necessary."[256] This duty is imputed to the local authority when the local authority is placing or maintaining "traffic control device under the jurisdiction of the director."[257] Louisiana has similar provisions.[258]

The Michigan Supreme Court held in Salvati v. Department of State Highways that a local rural transportation entity "may incur liability for positioning an improper system of signs on the roadway...or for placing a sign which inadequately informs approaching motorists of a hazard."[259] The court stated that "compliance with standard manual specifications" will not "absolve the highway authority from liability," but rather "compliance with traffic manual standards is a factor to consider in determining the reasonableness of the state's actions at the time of the accident."[260] In a 1995 case in which the city of Dearborn Heights was alleged to have failed to comply with the Manual on Uniform Traffic Control Devices (MUTCD) — which the city had apparently adopted — the court noted that under Salvati, evidence of the city's lack of compliance with the MUTCD would likely be admissible.[261] However, the court did not have to consider the city's apparent lack of compliance because the plaintiff "failed to submit evidence of such a lack of compliance."[262]

New Jersey statute § 59:4-6 provides that a local rural transportation entity is not liable "for an injury caused by the plan or design of public property...where such plan or design is prepared in conformity with standards previously [approved by the Legislature, other governing body, or some other body or public employee exercising discretionary authority]."[263] In the 1984 case of Kolitch v. Lindedahl, the New Jersey Supreme Court was faced with the question of whether to extend immunity to the state DOT for a wrongful death action that arose from a 1978 head-on collision in a vertical sag curve with a design speed of 30 miles per hour, but which was posted at 50 miles per hour.[264] The court held that the DOT was immune "for the condition of the roadway even though dangerous at 50 miles per hour" because the design was approved in 1925,

but remanded back to the trial court for a determination of whether the DOT would be found liable under § 59:4-2(b) for having failed to "protect against the dangerous condition"[265] of posting a 50 miles per hour speed limit sign 200 feet before the curve.[266]

In 1990, the North Carolina Supreme Court held that the MUTCD is not "a national standard which cities must follow with respect to installation of protected left turn signals."[267] Nevertheless, the court held that a city, which had complied with all requirements of the state's MUTCD, was not liable for failing to install a protected left turn signal.[268]

Wyoming Statute § 31-5-112 requires that the most recent edition of the MUTCD is the standard for highways in the State of Wyoming.[269] In Fanning v. The City of Laramie, the Wyoming Supreme Court held against the city where the deceased died at an intersection with a stop sign that the city had erected, but which had become obscured by foliage.[270] The court reasoned that "[t]he city having elected to establish the through street and having erected the required stop sign was obligated [through the MUTCD] to maintain its visibility and to exercise special care that shrubbery, i.e., trees, was not allowed to obscure the sign."[271] But in the 1985 case of Randolph v. Gilpatrick Construction Company, Inc., the Court said that in a construction zone, where "the signs and the detour were in substantial compliance with the [MUTCD]," neither the state nor the contractor who had installed the signs was liable for a death in the detour.[272] The court relied on the language of § 31-5-112 which "only requires compliance with the manual 'so far as possible'; strict compliance is not mandated."[273]

Table 6 summarizes views of the sample states regarding various duties imposed on the local rural transportation entity.

Table 6. Local rural transportation entity duties in the sample states.

Duty to Warn	Duty to Maintain	Duty to Meet Standards
Arizona	Arizona	Arizona
Louisiana	Michigan	Michigan
Michigan	New Jersey	New Jersey
New Jersey	North Carolina	North Carolina
	Wyoming	

Notice

Fairness would dictate and indeed "[m]ost courts hold that the roadway agency must have sufficient advance notice of the defect to have had reasonable opportunity to either correct the roadway defect or to warn of its hazard."[274] Lewis explains: "[r]easonable people would not act until they knew that there was a problem," but once so informed, "there may be an obligation to respond."[275]

The requisite advance notice period afforded a transportation entity to road defects appears on its face to be straightforward. But this notice period does have a vast gray area, and a continuum of levels of notice is helpful for understanding the notice requirement. At one end of the continuum is the situation in which the agency has "actual" notice of a defect. For example, when an agency has a written report by one of its employees that a bridge is washed out, the agency has "actual" notice of the missing bridge and is responsible for taking appropriate action. At the other end of the continuum is, of course, the situation in which the agency has no notice of a road defect. For example, when a traffic signal began malfunctioning just moments ago while no one, including agency employees, has witnessed the malfunctioning, the agency has no notice of the defective signal and therefore no responsibilities. But if the signal has a remote feed to an

agency computer, had been defective for weeks, or was overlooked in a prior routine maintenance check, the agency may have notice imputed to it. In other words, when the agency should have noticed the defect, the agency has "constructive notice" of the defect that in turn may give rise to the agency's "duty to act."[276]

It appears that although constructive notice considers time and severity factors, if an agency has constructive notice of a condition, the agency still has a duty to handle the condition appropriately and may be held liable for breaching that duty. According to research by Lewis, once an agency is informed, "there may be an obligation to respond," and if "the defect is extreme, however, such as the collapse of a bridge, the reasonable action would be to close the roadway as quickly as possible."[277] Transportation researcher Glennon adds that "constructive notice may arise when a roadway defect has existed for such a time and is of such a nature, that the roadway agency should have discovered the defect by reasonable diligence."[278] And according to Pearson, if a transportation entity breaches its duty "to put and keep [its roads] in a reasonably safe condition for the uses for which they were established….it will be held liable…if it had either actual or constructive notice of the unsafe condition in time to have remedied it or otherwise guarded against it."[279]

The agency's notice of a defect is critical. Because the agency's "knowledge of the existence of the defect is a matter frequently at issue in actions for injury resulting from the defec[t]," the agency "will be liable for allowing it to continue only where [the agency] has actual or constructive knowledge of its existence."[280] For example, in the 1958 New Jersey case of Schwartau v. Miesmer, in which the plaintiff allegedly fell through a wood catch basin cover into

the town's storm sewer, the court allowed a witness to testify that she had seen a town vehicle and work crew "at the site of the catch basin" to help establish the town's control of the catch basin.[281] But this type of evidence cuts both ways. An agency may be able to rely on mitigating evidence such as "that although the property in question was used by others under conditions substantially similar to those prevailing when the plaintiff was injured, there had been no previous accident at the place in question."[282]

To hold an Arizona local rural transportation entity "liable for damages caused by improper maintenance," the plaintiff "must show that an unreasonably dangerous condition existed and that the [entity] had actual or constructive notice of this condition."[283] In Galati v. Lake Havasu City, a plaintiff's mere allegation "that the City had actual or constructive notice of any dirt or debris in the roadway," was not enough to overcome the city's photographs of the accident location and the evidence of the investigating police officer's affidavit.[284] In other words, the plaintiff failed the burden of proof. To show that the entity knew of dirt or debris on the road required more than a mere allegation by the plaintiff to overcome the City's evidence to the contrary.

Louisiana's statute § 9:2800(B) provides that unless addressed specifically elsewhere, "no person shall have a cause of action...against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect."[285] Section § 9:2800(C) explains that "[c]onstructive notice shall mean the existence of facts which infer actual knowledge."[286]

Actual notice in Louisiana can be imputed to the city through its employees. The City of New Orleans was held to have actual notice when a police officer who was employed by the city learned of a road defect prior to an accident.[287] In a case where evidence showed that "city employees were periodically in the area" of an intersection at which a crash later occurred, the city was held to have had actual knowledge of the condition of the intersection.[288]

Constructive notice in Louisiana largely depends on the amount of time the condition existed prior to the accident. For instance, where cracked, sloped, and misaligned sidewalks had developed "over a lengthy period of time," the City of Tallulah was held to have had constructive notice of the condition,[289] and where it "was aware five and one-half months" prior to the plaintiff's accident of a pothole, the City of Bogalusa was held to have had constructive notice of the existence of the pothole.[290] But the City of New Orleans was not liable for injuries a pedestrian sustained when a cracked sidewalk on which she was walking collapsed beneath her; "the defective condition did not manifest itself until she walked across the cracked area and the sidewalk crumbled," so the city did not have actual or constructive notice of the defect in time to remedy the situation.[291]

Michigan statute § 691.1403 provides that a local rural transportation entity will be immune from liability arising from a road defect unless the entity "knew, or in the exercise of reasonable diligence should have known, of the existence of the defect."[292] As with Louisiana, the local rural transportation entity's actual notice could be inferred when the entity's employees are aware of the defect. In Schroeder v. Department of Transportation, for example, the Michigan DOT was held not to have actual notice of a parked car into which the plaintiff

crashed.[293] The court held that while the city's police had actual notice of the parked vehicle, the Michigan DOT did not because the "police department was neither the agency which had jurisdiction over the highway nor an agency which had contracted to maintain that highway."[294]

As in Louisiana, in determining whether a Michigan local rural transportation entity had constructive notice of a road defect, the duration of the condition is paramount. Indeed, to establish the township's constructive notice, a plaintiff was allowed to show that the condition of the township's highway existed "for several months before the accident."[295] Also, in an action against a township for death from an alleged defective highway, the Michigan Supreme Court held that evidence concerning other accidents occurring on the same highway prior to the accident at issue was admissible.[296]

In Meta v. Cherry Hill Township., the New Jersey Supreme Court held that the local rural transportation entity may not "ignore hazardous conditions, when actually notified of same."[297] In that case, the court held that where the local rural transportation entity was notified several times about dangerous ice conditions, yet failed to mitigate them, they should have taken "immediate action when notified of [the] emergent condition."[298] Elsewhere, the court adds that "prior accidents can be used to prove the existence of a dangerous condition on public property if...(1) [there is the] same or substantial similarity of circumstances between the prior accident and the one involved in the case on trial, and (2) [there is an] absence of other causes of the accident."[299]

North Carolina's statute prescribing the duties of North Carolina cities to "keep the public streets, sidewalks, alleys, and bridges in proper repair [and] free from unnecessary obstructions"[300] has been found to imply a notice requirement. For example, in Mosseller v. City

of Asheville, the city was held to have "knowledge of a defect which inspection" resulting from its "reasonable and continuing supervision over its streets" would have disclosed.[301] Furthermore, actual notice in North Carolina is not required — constructive notice is sufficient. "Notice of a dangreous [*sic*] condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it."[302]

In Fanning v. City of Laramie, where a stop sign was obstructed by foliage, the Wyoming Supreme Court implied notice to the City of Laramie.[303] The court opined that "the question of duration seems unimportant because obstruction by shrubbery does not take place overnight but occurs gradually, [eventually bringing] the claimed obstruction to the City's knowledge sufficiently in advance of the accident to have enabled it to cure the defect."[304]

Table 7 summarizes the various notice requirements imposed on the local rural transportation entity in the sample states.

Table 7. Notice requirements for the local rural transportation entity in the sample states.

State	Description of Notice Requirement
Arizona	Actual or constructive notice of dangerous condition is enough.
Louisiana	Actual or constructive notice of dangerous condition is enough.
Michigan	Immune unless entity knew or should have known of the defect.
New Jersey	Entity cannot ignore hazardous situations if actually notified of them.
North Carolina	Actual or constructive notice of dangerous condition is enough.
Wyoming	Actual or constructive notice of dangerous condition is enough.

If the local rural transportation entity can be found liable for breaching a duty to the plaintiff-road user, and if the entity has an RSAP report concerning location on the road where the

plaintiff was injured, the next issue is whether the RSAP report can be used against the entity that conducted the RSAP, discussed here.

Issue Two: Can the Road Safety Audit Program Report Be Used Against the Entity?

This nation clings tightly to the notions of honest communication and open government. But the nation also recognizes that certain information is protected, being too private or dangerous for public exposure. Procedural rules govern the parties' sharing of information before trial (in the discovery phase) and govern how evidence may be admitted during trial. These competing goals of accessible information and protected information are juggled by courts and legislatures when interpreting or promulgating rules of law in discovery and evidence.

Freedom of Information Acts

The admissibility of public records into evidence is subject to the tension between protecting confidentiality of certain governmental information and the democratic ideology of open government. For example, at common law, a principle evolved in which "writings and information constituting military or diplomatic secrets" were excluded from public scrutiny for the obvious reason of national security.[305] In 1966 Congress codified this common law principle as one exception to the broad rule of making federal government information available in its enactment of the Freedom of Information Act.[306] Another exception is the "privilege [that] protects communications made between governmental personnel, or between governmental personnel and outside consultants, which consist of advisory opinions and recommendations preliminary to the formulation of agency policy."[307] Under this exception, reports to or among government officials

will not be accessible if they were "communicated prior to finalization of the policy and…constituted opinion or evaluation as opposed to the mere reporting of objective facts."[308] States also have enacted their versions of the Freedom of Information Act.

The general rule favoring information accessibility is significant in that it "clear[s] the way for discovery [of the information] in litigation."[309] Further, if the government is a party to the litigation, the accessibility of information is often essential to the parties involved. If the government initiates either a criminal or civil action, but refuses to allow the defendant access to significant governmental information, courts do not hesitate to dismiss the government's case.[310] But the opposite situation in favor of the government may arise when the government is the defendant. For example, even given the Federal Government's Freedom of Information Act "an adverse finding cannot be rendered against [the government] as the price of asserting an evidentiary privilege."[311] Therefore, if "the plaintiff's action cannot be proved without disclosure of the privileged matter, the plaintiff will remain remediless," although some courts will labor to prevent this harsh result.[312]

The Plaintiff in our situation may be able to gain access to an RSAP report under the state's "freedom of information act" (FOIA) if the local rural transportation entity's RSAP report is viewed as an accessible public record. All six of the states sampled in this study have some form of "freedom of information act," which purports to allow private citizens access to public records.[313] Wyoming's § 16-4-202 provides a statement typifying the underlying policy: "All public records shall be open for inspection by any person."[314] Each of the six acts applies to the state government and its branches and local governments and their branches.[315]

The general rule of the FOIAs in the six sample states is that all public records are accessible. For example, in Louisiana, "[t]he fact that a person who requests a public record volunteers [the purpose behind the request] does not permit a detailed inquiry by the [entity or a court] into the applicant's motive behind the request."[316] All of the acts, however, provide definite limitations on that rule for reasons such as confidentiality and public safety. In Arizona, the test for accessibility is not whether the "record is technically a public record, [but whether] release of the information would have an important and harmful effect on the official duties of the official or agency."[317] In Loigman v. Kimmelman, the New Jersey Supreme Court said that in considering the citizen's right to a public record, a court must examine "the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure."[318]

Furthermore, while a lawsuit against the entity is pending, the requirement that an entity comply with the acts may be lessened. In Arizona and Michigan, the fact that a civil lawsuit against the entity was pending did not affect the entity's obligations to comply with the FOIA as to the plaintiff's requests for records.[319] But in Michigan, using the FOIA as a pretrial discovery procedure is not allowed,[320] and in North Carolina, attorney-client communications "concerning any claim against or on behalf of the government body" are not accessible under the FOIA.[321] In Wyoming, "interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency" may be withheld from the citizen.[322]

Table 8 summarizes the various nuances of FOIAs that may limit a citizen's right to public information.

Table 8. Limitations to full access in the FOIAs of the sample states.

Negative Effect on Official Duties	Plaintiff in Lawsuit Against the Entity
Arizona	Michigan
New Jersey	North Carolina
	Wyoming

If limitations on the freedom of information prohibit our plaintiff from accessing the RSAP report, he or she may be able to access the report in litigation through discovery procedures.

Discovery of the Road Safety Audit Program Report

Once litigation has commenced, our plaintiff may have access to the RSAP report through "discovery." Discovery is the pretrial stage of litigation in which facts are revealed and issues identified.[323] The discovery philosophy of most states is full disclosure; "a party may seek any information that is relevant to the subject matter of the action, as long as it is not privileged."[324] Rule 26 of the Federal Rules of Civil Procedure[325] is the model upon which all six of the sample states base general provisions for discovery.[326]

The standard for discoverable information is much lower than that for admitting evidence during trial; the information "only must be reasonably calculated to lead to admissible evidence."[327] But this laxity in no way licenses the party seeking discovery to engage in a "fishing expedition" in hopes of finding a lawsuit. For example, in Williams v. State Farm Mutual Auto. Ins. Co., the North Carolina court denied the plaintiff's discovery request because it was "very broad," and the plaintiff did not show "that the materials sought were relevant or necessary."[328] Other state courts in the sample states have held similarly.[329]

Rule 34 allows the requesting party to access any documents discoverable under Rule 26.[s] All six of the states in this study have equivalents to Rule 34.[330] A common requirement of Rule 34 — which allows discovery without court approval — is that the request addresses the requested item with "reasonable peculiarity."[331]

The litigation philosophy favoring broad discovery and the minimal requirements for the seeking party would seem to imply that discovery of the RSAP report is easily attainable. This is not the case. Privileged information is not discoverable. Three privileges related to the RSAP report are explored next.

Privileges

It is possible that the RSAP report would be protected from discovery or from being introduced into evidence under a theory that it is privileged.[t] Three theories bear this potential: the work-product privilege, the self-critical analysis privilege, and the Federal-Aid Highway Program privilege.

Table 9 identifies the privileges that the local rural transportation entity may be afforded in the sample states.

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[s] In this paper, Rule 26 of the Federal Rules of Civil Procedure and its state equivalents will be referred to as "Rule 26."

[t] The term "privilege" is used in this paper to connote an entitlement to protection from disclosure that may not yet have been fully incorporated into the body of the law. This use of the term is looser than the narrow use of the word in more common privileges such as the "attorney-client privilege" and "doctor-patient privilege." In this paper, the term does not mean the narrow class of "privileges" that are well ensconced in the laws of evidence, but is instead a looser term used to generally describe protection from disclosure.

Table 9. Local rural transportation entity privileges in the sample states.

Work-Product	Self-Critical Analysis	Federal-Aid Highway
Arizona	Arizona	Arizona
Louisiana	Louisiana	Louisiana
Michigan	Michigan	Michigan
New Jersey	New Jersey	North Carolina
North Carolina		
Wyoming		

These three privileges are now discussed in greater detail.

The Work-Product Privilege

The work-product privilege "prevents access to material prepared for or in anticipation of litigation."[332] All six of the states studied recognize the work-product privilege.[333] The policy behind the privilege is to protect such things as the strategies, thoughts, and opinions of the attorney or others involved in the case. While the general rule is that such material is protected from discovery or evidence, there are some limitations to this rule that operate to allow discovery or admissibility.

The first two limitations are found in Rule 26 itself: the party seeking discovery of the document must show a "substantial need" for the document and that the party cannot obtain the document elsewhere without "undue hardship."[334] A third limitation is that only the opinions in the report are protected; facts are unprotected. For example, an attorney's video tape of a field condition — even though prepared for trial — is considered a fact and is unprotected.[335] Along those lines, the documents or statements about which the attorney forms an opinion and writes in a

report will not be privileged as the attorney's work product, though the opinions in the report would be.[336]

Rule 26 also provides that the attorney does not have to be personally involved in the preparation of the report. The work of the party's representative (i.e., consultant, agent, insurer, etc.) can be covered as well, so long as it meets the criteria described above.[337]

So if the RSAP report is deemed to have been prepared in anticipation of litigation and the plaintiff cannot show a substantial need for the report, the report would probably be privileged as a work-product. But the entity will have difficulty in showing that the report was prepared in anticipation of litigation. Indeed, the purpose of the Road Safety Audit Program is not to prepare for litigation, but to aid the transportation entity in identifying and mitigating road safety deficiencies.

The Self-Critical Analysis Privilege

In the wake of increasing federal and state regulations, private corporations have stepped up their efforts in initiating internal evaluations to better comply with the law, identify problems in hopes of mitigating them, and avoid any unwanted sanctions from regulatory agencies. Even though such "self-evaluations" often are required by the regulatory agency, in some jurisdictions the "privilege of self-critical analysis has developed to shield certain institutional self-analyses from discovery."[338] In other words, reports from an organization's internal reviews may not be discoverable or admissible under this "self-critical analysis privilege." The policy behind such a privilege is to encourage candid investigations and analyses to better organizations' performance and compliance, while "the public's need for all available evidence" counters the privilege.[339]

These two competing policy interests have indeed resulted in inconsistent views of the self-critical analysis privilege.[340] Heller suggests a continuum along which various views lie: at one extreme are those jurisdictions who refuse to allow the privilege; at the other extreme are those jurisdictions who protect the underlying self-critical facts and the self-critical material; in the middle are those who protect the self-critical material, but admit or allow discovery of the underlying facts.[341] The privilege has been used successfully in cases involving, among other things, environmental regulation compliance[342] and hospital records.[343] But in the 1990 U.S. Supreme Court case of University of Pennsylvania v. Equal Employment Opportunity Commission, the Court refused to extend the privilege to academic peer review materials in a Title VII civil rights claim.[344]

The domain of allowing the self-critical analysis privilege is not left to the courts; in addition to case law, "the privilege of self-critical analysis, unlike many other privileges, has been the subject of state legislation."[345] Although some state legislatures have codified the privilege, the U.S. Congress refused to do so.[u] Regardless of the source — whether judicially or legislatively — some jurisdictions may view the privilege as necessary to protect certain documents or reports from discovery or admissibility while others may view "the public need for all available evidence"[346] as paramount.

Four of the six states studied have recognized the self-critical analysis privilege to varying extents and in varying contexts, with only New Jersey allowing it — in certain situations — in a

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[u] Congress did not enact Proposed Federal Rule of Evidence 502 that would have extended the privilege "if the law requiring [the return or report] so provides." Fed. R. Evid. 502 (not enacted).

transportation setting. Perhaps the policy that led to these uses of the privilege will support a local rural transportation entity's use of the privilege.

In 1975, the Arizona Supreme Court refused to recognize the privilege where an employer sought to protect its own internal safety program evaluations,[347] but recognized the privilege in 1983 in the case of State ex rel. Corbin v. Weaver.[348] In that case, the court observed three factors that "emerge as guideposts" for the privilege:[v] (1) "materials protected have generally been those prepared for mandatory governmental reports," (2) "only subjective, evaluative materials have been protected," and (3) there is a "policy favoring exclusion of the materials [that] clearly outweighed plaintiff's need."[349] An article by Arizona attorney Gary Cohen observes that "Arizona lawyers should be aware of the self-critical analysis privilege when advising clients about the creation or discovery of such information," but cautions: "Lawyers cannot, however, be confident self-critical analysis materials, as such, will be protected from discovery."[350] He thus recommends that lawyers "focus on keeping self-critical analysis materials within the attorney-client privilege and work-product doctrine by 1) directly participating in their preparation; and 2) indicating that the materials are "prepared in anticipation of litigation."[351]

Louisiana does not recognize the privilege as applied to the local rural transportation entity, but does recognize it in the context of hospitals, where internal hospital records[352] and peer review committee reports[353] are privileged. For instance, the court recognized the privilege "in order to

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[v] A 1999 article by Arizona attorney Gary Cohen observes that "Arizona lawyers should be aware of the self-critical analysis privilege when advising clients about the creation or discovery of such information," but cautions: "Lawyers cannot, however, be confident self-critical analysis materials, as such, will be protected from discovery." He thus recommends that lawyers "focus on keeping self-critical analysis materials within the attorney-client privilege and work-product doctrine by 1) directly participating in their preparation; and

foster the ability of hospitals to regulate themselves unhindered by outside scrutiny and unconcerned about the possible liability ramifications their discussions might bring about."[354] The court will still subject a request for the privilege to an *in camera*[w] inspection.

Michigan upheld the privilege in the context of an internal investigation into police affairs. There the court also required an *in camera* inspection.[355]

In Wylie v. Mills,[356] (1984), the New Jersey Supreme Court created the privilege in a transportation context, but narrowed its application in 1997. In the latter case, Payton v. New Jersey Turnpike Authority, the court refused to "adopt the privilege of self-critical analysis as a full privilege," but instead will balance "a party's need to know against another party's need for confidentiality."[357]

The self-critical analysis privilege does not appear to be as applicable to protecting the RSAP report as does the Federal-Aid Highway Program privilege. The latter privilege is discussed next.

The Federal-Aid Highway Program Privilege

The Federal-Aid Highway Program (FAHP) "is a federally assisted, state-administered program which distributes Federal funds to the States for the construction and improvement of urban and rural highway systems" and "is financed from the proceeds of motor-fuel and other highway-related excise taxes deposited in the Federal Highway Trust Fund."[358] Such "highway-

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2) indicating that the materials are 'prepared in anticipation of litigation.'" Gary J. Cohen, A Guide Through the Morass of the Self-Critical Analysis Privilege, 35-Jul AZATT 34, 38 (1999).

[w] An *in camera* inspection is performed by the judge in his or her "chambers before ruling on its admissibility or its use." Black's Law Dictionary 522 (Abridged 6th Ed. 1991).

user" fees as gasoline taxes, tire taxes, and tolls make up the Federal Highway Trust Fund that is distributed among states that, in turn, internally distribute funds to local governments. In 1996, of the $101.5 billion "[t]otal highway funding by all units of government," $63.8 billion (or 62.9 percent) was contributed by highway-user fees through the FAHP.[359]

Section 409 of Title 23 of the United States Code (initially passed by Congress in 1987) provides that an internal safety evaluation generated by a transportation entity may be privileged and not discoverable nor admissible when the evaluation is to be implemented in a FAHP project.[x] This is a watershed. From the combination of the reach of a 62.9 percent funding share and Congress' policy goal of increasing road safety,[y] it appears that this Congressional grace imparts sweeping protection to transportation entities with respect to their liability in knowing of road defects.

Four of the states studied recognize the Federal-Aid Highway Program privilege (FAHP privilege) to varying degrees. Arizona takes a strict view, narrowly viewing the defense. In Southern Transp. Co. v. Yarnell In and For County of Maricopa, the Arizona Supreme Court says

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[x] "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130 [Railway-highway crossings], 144 [Highway bridge replacement and rehabilitation program], and 152 [Hazard elimination program] of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." 23 U.S.C. § 409 (2000).

[y] Road safety certainly appears to be a policy goal of Congress. For instance, 23 U.S.C. § 152 promulgates the "Hazard elimination program" which mandates that "[e]ach State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements…assign priorities…, and establish and implement a schedule of projects for their improvement." 23 U.S.C. § 152(a)(1).

that the only documents privileged by the FAHP privilege are those "described and prepared under the authority of §§ 130, 144, and 152, and no others."[360]

Louisiana initially balked at allowing the privilege,[361] but after reviewing the history of the Act, endorsed the privilege in 1993. In that case, Wiedeman v. Dixie Elec. Membership Corp., the court held that the following are not privileged: "(1) accident reports; (2) traffic counts; and (3) other raw data collected by the [DOT]," and held that the following are privileged: "(1) surveys to identify hazardous railroad crossings and improve them (§ 130); (2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144); (3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and (4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409)."[362]

Michigan takes a broad view and liberally allows the privilege. In Mackie v. Grand Trunk Western R. Co., the court reversed a trial court's refusal to protect a railroad grade crossing report.[363] The appellate court held that the report should have been privileged under the FAHP privilege on two grounds: first, the privilege applies "to projects 'which *may* be implemented utilizing Federal-aid highway funds...'" and second, the privilege is not only for those projects deemed "comprehensive."[364]

North Carolina acknowledged the privilege in a recent case, but did not interpret the privilege; it instead returned the case to the lower court for deciding applicability of the privilege.[365]

The FAHP privilege seems likely to protect the RSAP report from disclosure in discovery and as evidence, provided the project stands the chance of being implemented using FAHP funds.

The importance of this particular privilege is significant. As discussed above, federal-aid monies fund nearly 63 percent of the nation's transportation projects. If the other criteria of § 409 are met, an RSAP report that covers a project that may be implemented with FAHP funds is likely to be privileged from discovery and from evidence.

Public Records and Reports

If the local rural transportation entity is not immune and if the plaintiff obtains the RSAP report through discovery (i.e., the report was not privileged), the plaintiff still must offer the report into evidence before it can be used to establish the entity's liability. Records made by the governmental agency as part of its ordinary course of business may be admissible during the course of litigation. Before exploring that question, a brief discussion of the rule against hearsay is warranted.

One general rule of evidence is that "hearsay" evidence is inadmissible.[366] According to the Federal Rules of Evidence, "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted."[367] In other words, "[w]hen a witness testifies that someone said something out of court, the out-of-court statement is hearsay if its relevance depends on the truth of what the out-of-court speaker meant to communicate."[368] The primary concern behind excluding hearsay evidence is that if admitted, the out-of-court speaker's words would not be tested by cross-examination. In short, the jury would not be able to evaluate truthfulness of the out-of-court speaker.

An exception to the general rule against hearsay is the rule admitting regularly kept records into evidence.[369] The policy behind this exception that allows what would otherwise be

inadmissible hearsay is "that regularly kept records typically have a high degree of accuracy," in that the "records are calculated to train the recordkeeper in habits of precision…[and] the entire business of the nation and many other activities function in reliance upon records of this kind."[370] In other words, if businesses and government can rely on the truthfulness of such records, courts should be able to rely on their truthfulness as well.

Because the RSAP report is produced by a government agency, the plaintiff may try to introduce the report — assuming the plaintiff was successful in obtaining the report — as a public record. All six of the states sampled have a public records exception[371] that is modeled after Rule 803(8) of the Federal Rules of Evidence.[372]

Arizona, Louisiana, North Carolina, and Wyoming will allow into evidence only those portions of records that contain "factual findings," such that those records of portions of records that contain opinions or conclusions will not be admitted.[373] For example, in Davis v. Cessna, the Arizona court properly refused those portions of a National Transportation Safety Board (NTSB) report, which offered *conclusions* as to the cause of a plane crash, but properly admitted the portions of the report providing the *facts* of the crash.[374] Further, Louisiana courts hold that although "factual findings from a *general* investigation may be admissible, factual findings from a *specific or particular* investigation are inadmissible."[375]

Table 10 summarizes the position of the sample states with respect to the public records exception and its limitation.

Table 10. Admissibility of Public Records in the sample states.

Public Records Admissible in General	Only Factual Findings Admissible
Arizona	Arizona
Louisiana	Louisiana
Michigan	North Carolina
New Jersey	Wyoming
North Carolina	
Wyoming	

If the local rural transportation entity can be found liable and if the plaintiff gains access to the RSAP report and can introduce it into evidence, the issue becomes whether the public interest in improving highway safety can overcome a finding of the entity's negligence. In other words, if the entity's "defensive defense" strategy failed — or if the entity chooses not to employ the strategy in the first place — will the entity's "offensive defense" strategy prevail? That is the subject of the next discussion.

Issue Three: Does Improving Public Safety Outweigh The Entity's Negligence?

Trying to keep the RSAP report from the plaintiff or from being admitted into evidence is one litigation defense approach that entity being sued may take. Certainly the entity's immunity from liability is desirable. And if the plaintiff has no "smoking gun" with which to show that the entity had notice of the road deficiency at issue or that the entity breached a duty owed to her, the plaintiff's case becomes difficult. But what does this "defensive defense" strategy say of the entity's confidence in the RSAP?

In contrast, an "offensive defense" strategy is one in which the local rural transportation entity being sued does not use the inadmissibility of the report as a *shield* from liability but instead

uses the report as an evidentiary *sword* of a good faith attempt to improve road safety. This strategy leads to three further inquiries.

The first of these inquiries is whether the Road Safety Audit Program is simply a tool used by the local rural transportation entity to accomplish the entity's legal duties. The second inquiry is whether decisions arising out of the RSA report are part of the entity's governmental actions. The third inquiry is into the effect that using the RSAP report against the entity might have on the public policy of improving road safety. These inquiries will be discussed in turn.

The RSAP: Assisting the Transportation Entity in Performing its Duties

The local rural transportation entity has specific duties that it must perform as controller of the local government's roads. The entity generally has to keep the roads reasonably safe for all road users. Thus the entity has the duty to warn of hazardous situations, the duty to maintain the roads, and the duty to comply with standards. Of the local rural transportation entities in the six states sampled, four have the duty to warn, five have the duty to maintain, and four have the duty to meet standards.[z]

These duties were discussed previously as sources of the entity's liability in that the entity's failure to meet these duties could be grounds for liability. But these duties are not imposed on the local rural transportation entity for the purpose of providing fodder for a negligence charge; they are imposed on the entity for the purpose of keeping the roads safe.

The Road Safety Audit Program is a device that the entity can use to comply with these duties for keeping the roads safe for all road users. The RSAP report would identify and prioritize

the needed road safety improvements, and the entity's management could utilize the report in its decisions about which roads need warnings or maintenance. It would indeed be a strange result if the legislature or the courts were to saddle the entity with the duty to keep its roads safe for all road users, yet allow the report that the entity uses to meet that duty to become the basis of the entity's liability.

The RSAP: Protected Governmental Action

Employees of the local rural transportation entity necessarily make several decisions in carrying out the role of the local rural transportation entity as the steward of the local government's roads. Decisions abound in selecting between design, construction, and maintenance alternatives. The Road Safety Audit Program will present the local rural transportation entity with a panoply of alternatives for improving road safety deficiencies, requiring the entity's managers to decide between several courses of action.

Generally speaking, the law distinguishes between those actions of the government that are considered to be government actions and those which are not, extending immunity to those that are and subjecting the entity to liability for the latter. The law recognizes that some decisions have wide parameters while others have narrow parameters or even no parameters at all. Therefore, it becomes necessary to determine the effect of various decisions, which the entity makes in deciding between alternatives presented in the RSAP report will have on the entity's immunity.

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[z] See Table 6.

Various legal distinctions that limit the local rural transportation entity's sovereign immunity are presented. A continuum of the various decision approaches arising from a Road Safety Audit Program is presented and is analyzed in the light of various sovereign immunity limitations.

A Continuum of Road Safety Audit Program Decisions

The entity's decision-makers may decide to implement some of the Road Safety Audit Program's improvement alternatives immediately, to reject some alternatives outright, and to partially implement others.[aa] These opportunities for decisions presented by the RSAP can occur at any time in the road's "life": at any time before it is built or at any time after it is built.

But the decisions made before the road is built may have a different character than those made after the road is built. Decisions made before the road is built include planning and engineering decisions, such as those related to road alignment and cross sectional features. Those made during or after construction include maintenance, operation, and redesign decisions, such as whether to chip seal a road, install a stop sign, or realign a horizontal curve. The concern in distinguishing between pre- and post-construction decisions is in the severity of the impact of the decision.[bb] For example, in the planning stage, a rejection of an alignment with multiple safer features may have more severity than a decision to reject a decision to improve one safety deficiency on an existing road.

[aa] "Partial improvements" include, for example, the similar improvement, an improvement completed only to a preliminary stage, and the decision to implement the improvement at a later date.
[bb] The term "post-construction" as used in this Report also includes the construction stage itself.

Whether a weightier decision subjects the local rural transportation entity to more liability is the issue here. To analyze this, various distinctions between certain governmental activities found in the law are used.

Sovereign Immunity Distinctions

Three distinctions that refined sovereign immunity in our six sample states emerged: the negligence-gross negligence distinction, the governmental-proprietary distinction, and the discretionary-ministerial distinction. These distinctions are aimed at allowing governments immunity from suit for activities done in the scope of government, but hold them responsible for activities not in the scope of government.

Table 11 summarizes views of the six states as to the governmental-proprietary distinction. Of the six states studied, five states use the negligence-gross negligence distinction (Arizona, Louisiana, Michigan, New Jersey, and Wyoming), two states use the governmental-proprietary distinction (Michigan and North Carolina), and three use the discretionary-ministerial distinction (Arizona, Louisiana, and New Jersey). Wyoming statute §1-39-102(b) reads, "In the case of the state, this act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions and 'discretionary' or 'ministerial' acts previously used by the courts to determine immunity or liability."[376]

Table 11. Local entity sovereign immunity distinctions recognized in the sample states.

Negligence-Gross Negligence	Governmental-Proprietary	Discretionary-Ministerial
Arizona	Michigan	Arizona
Louisiana	North Carolina	Louisiana
Michigan		New Jersey
New Jersey		
Wyoming		

The Negligence – Gross Negligence Distinction.

Louisiana and Michigan have statutes that remove immunity from the local entity if the damage was caused by the entity's gross negligence. Louisiana says that no one "shall have a cause of action against a public entity…for damage to property…unless such damage was caused by willful or wanton misconduct or gross negligence."[377] Michigan's statute provides local immunity only so long as the government "officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage."[378]

Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[379] In 1929, the New Jersey Supreme Court held that a police officer was grossly negligent in a driving "at high speed and without warning."[380] But the other states sampled are more deferential to the local entity. In Arizona, the Supreme Court refused to hold the City of Flagstaff liable for gross negligence where a child was injured while sledding in a city park, saying that the city was not "grossly negligent in creating a dangerous situation" nor in maintaining it, and that the city in fact "discourage[d] sledding on the hill by posting warning signs."[381] The Louisiana Supreme Court refused to hold the City of Morgan City liable for gross negligence in its alleged failure to fill a deep spot in a natural swimming lake owned by the city.[382]

Michigan's Supreme Court refused to find a city grossly negligent where one of its employees injured the plaintiff with a forklift having known brake problems.[383] In Wyoming, the Supreme Court held that "a municipality is not liable for injuries resulting from a negligent plan of construction unless the court can say that the plan is so manifestly dangerous that it is negligent as a matter of law."[384]

Applying this distinction to questions of liability in Road Safety Audit Program decisions made pre- or post-construction indicates that the pre- or post-construction split would probably not make a difference. The negligence-gross negligence distinction depends not so much on the *stage* of the decision, but on the *conduct* of the governmental decision-maker. For a RSAP decision to be drawn out from beneath the entity's immunity, the decision — whether pre- or post-construction — would have to have been reckless or manifestly dangerous. Sending a road over a cliff is probably reckless or manifestly dangerous, but deciding between similar alternatives in fulfilling a need for a road would probably not be construed as reckless.

The Governmental – Proprietary Distinction.

In some states, a distinction is drawn between not holding a government liable for its "governmental" functions such as fire prevention, police protection, and education while holding a government liable for its "proprietary" functions such as airports, gas, lights, and playgrounds. According to engineering researcher Glennon, "government functions are those that can only be performed adequately by a government unit such as police, fire protection, or courts," whereas "[p]roprietary functions are those that could be supplied by private concerns."[385] Glennon

maintains the distinction as lying simply in "proprietary functions are those services that derive revenue, such as water, gas, and electric supplies."[386]

However, according to researchers Fuller and Casner, the distinction has resulted in "an enormous amount of litigation" as governments argue that the function in question is governmental while the injured party argues that the function is proprietary.[387] Furthermore, there is little agreement between what facts constitute proprietary liability, resulting in the distinction's determination depending on a case-by-case basis, varying among the states.[388] Fuller and Casner add that "activities involving streets, sidewalks, playgrounds, bridges, viaducts, and sewers are governmental in some jurisdictions and proprietary in others."[389] Thus, functions performed by transportation departments have traditionally fallen into the "gray area" between governmental and proprietary, the first category affording immunity to governments, the latter, liability.

Because of this apparent gray area, there is no "bright-line" rule; each state's view of this distinction is its own, although some similarities do exist among the states. According to author Minge, "[a]lthough the maintenance of public ways 'would seem to be a governmental or public function,…most of the courts of this country…have held cities liable for negligence in failing to keep their streets in a safe condition for travel.'"[390] Transportation researcher Lewis echoes this view: "the construction and maintenance of public streets, highways, and sewers have generally been regarded to be proprietary functions in most states."[391] Further, this judge-made law (or "common law") basis for liability may also be either supplemented or reversed in a statute.

Applying the governmental-proprietary distinction to the question of a local rural transportation entity's immunity in pre- and post-construction decisions arising out of a Road

Safety Audit Program is not as clear cut as applying the negligence-gross negligence distinction. Nevertheless, the distinction probably does not operate to remove the coverage of the entity's immunity in these decisions. The governmental-proprietary distinction aims at the *type* of decision being made rather than the *stage* of the project at which the decision is made. The purpose of the governmental-proprietary distinction is to protect those decisions that are of a governmental nature. Therefore, if the local rural transportation entity's decision (in a state that recognizes the distinction) is classified as a governmental decision, it makes no difference as to whether that decision was made before or after construction of the road.

Two of the six states sampled in this study — Michigan and North Carolina — use the governmental-proprietary distinction in determining immunity of their local governments. Arizona, Louisiana, New Jersey, and Wyoming do not. Arizona and Louisiana rely on the discretionary-ministerial distinction as discussed below, and New Jersey and Wyoming specifically rejected the distinction. In 1980 the New Jersey Supreme Court specifically rejected the distinction in Tower Marine, Inc. v. City of New Brunswick,[392] recognizing the language in New Jersey's Tort Claims Act that instead contains the discretionary-ministerial distinction. Wyoming Statute 1-39-102(b) reads, "In the case of the state, this act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions and 'discretionary' or 'ministerial' acts previously used by the courts to determine immunity or liability."[393] It is unclear whether the abolition of these distinctions also applies to Wyoming's local governments.

In Michigan, the governmental-proprietary distinction is found in the language of statute § 691.1407(1) which provides that "a governmental agency is immune from tort liability if the

governmental agency is engaged in the exercise or discharge of a governmental function."[394] That statute goes on to say that "the discretional or ministerial nature of the conduct in question" is not to be considered.[395] In Adam v. Sylvan Glynn Golf Course, the Michigan court defined the (non-immune) proprietary function as "an activity [that is] conducted primarily for the purpose of producing a pecuniary profit and not normally...supported by taxes or fees."[396] Yet while public entities in Michigan generally enjoy immunity for governmental functions, the "highway exception"[397] prevents road entities from so doing. For example, the Michigan court refused to allow the state to be immune from liability involving a fatality when a car crossed over median,[398] and refused to allow a county immunity from a suit involving an injury from stepping onto cracked pavement,[399] both cases involving what arguably would have been governmental functions otherwise.

Unlike that of Michigan, the North Carolina governmental-proprietary distinction is not found in a statute. In Guthrie v. North Carolina State Ports Authority, the North Carolina Supreme Court explained: "[I]n determining the liability of a municipality for tort, one of the primary questions usually presented is whether the incident causing the plaintiffs injury or damage arose out of a governmental or proprietary function of the municipality."[400] The court added, "the general rule being that liability may be found if the function was proprietary but not if it was governmental."[401] Examples of North Carolina municipalities' governmental functions in which the municipalities were held to be immune from liability include the operation of a public street lighting system[402] and operating traffic signals.[403]

Table 12 summarizes the views of the six states as to the governmental-proprietary distinction.

Table 12. Views of the governmental-proprietary distinction in the sample states.

Adopted	Specifically Rejected	Uses Alternative
Michigan	New Jersey	Arizona
North Carolina	Wyoming	Louisiana

The Discretionary – Ministerial Distinction.

Alongside the Governmental-Proprietary distinction is the Discretionary-Ministerial distinction. Ministerial acts are those that "usually involve clearly-defined tasks performed with minimum leeway on personal judgment and do not require any comparison of alternatives before undertaking the duty to be performed," such as "[r]outine roadway maintenance."[404] These acts "may create liability,"[405] in that "persons involved in ministerial functions are generally open to tort liability suits."[406]

On the other hand, discretionary functions "are those requiring the exercise of independent judgment in arriving at a decision or choosing a course of action."[407] Liability in discretionary functions is less clear than that in ministerial functions, as "courts are reluctant to second-guess discretionary decisions made by executive bodies" and because of the belief "that a jury of untrained laymen is not competent to evaluate the appropriateness of discretionary decisions."[408] When deciding liability questions relating to discretionary functions, courts often have ruled in favor of transportation entities when the "agencies have carried out a reasonable plan of roadway improvements."[409] Courts often also hold out as legitimate discretionary

functions the "adoption of improvement plans, the designation of funds, and the setting of priorities for improvement."[410]

Courts may extend protection to an entity's "discretionary" decision after analyzing whether the entity complied with the entity's manuals, codes, and other such documents, paying particular attention to the level of discretion allowed by the document. Courts will probably view non-compliance with mandatory provisions less favorably than non-compliance with optional provisions.[cc] Again, if the relevant "code, manual, standard, or guideline permits the exercise of discretion, not directing conformance to a mandatory standard, the alleged deviation may be considered to be some evidence of negligence, but not negligence per se."[411,dd]

In determining the effect of the distinction on the pre- and post-construction decisions of the Road Safety Audit Program, the level at which the decision is made plays a significant role. Immunity under the distinction turns on the amount of discretion of the person making the decision. Decisions made in the pre-construction stage of a project are typically made by professionals; the decision-makers are afforded wide discretion and routinely decide policy matters. For example, a pre-construction decision might be whether to locate a new county road on the west slope of a mountain as opposed to the east slope. In contrast, several decisions made in the post-construction stage of a project are made by employees that are not afforded much discretion.

[cc] Mandatory provisions may include words such as "shall" and "must." Optional provisions may include such words as "may" or "ought."

[dd] When a defendant (e.g., the transportation entity) is found to have been negligent *per se*, the plaintiff is presumed to have met its burden of proof and the defendant must then convince the jury otherwise. On the other hand, a finding of *evidence* of the defendant's negligence is not nearly as detrimental to the defendant; there is no presumption that the defendant was negligent and the burden of proof is still with the plaintiff.

It follows then that the pre- or post-construction Road Safety Audit Program split is of more relevance in this distinction than it is in the prior two because decisions made regarding an existing road are more likely to include routine decisions that do not tolerate much variance. Thus, in states that recognize discretionary-ministerial distinction, those decisions that are made regarding a road that has not yet been constructed stand more of a chance of being afforded discretionary protection.

Arizona statute § 12-820.01 provides that an Arizona "public entity shall not be liable for acts and omissions of its employees constituting...[t]he exercise of an administrative function involving the determination of fundamental governmental policy [which] involves the exercise of discretion."[412] The distinction lies in the difference between administrative and operational level acts, where "[o]perational level acts concern routine, everyday matters," and are not entitled to immunity, whereas administrative acts — which "require evaluation of broad policy powers" — are entitled to immunity."[413] An example of an act that was not immune because it was not making fundamental governmental policy was the county flood control district's negligent exercise of its regulatory authority over a drainage ditch in which a pedestrian was injured.[414]

Louisiana statute § 9:2798.1 provides immunity for Louisiana public entities "based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts."[415] In Rick v. State, Dept. of Transp. and Development, the Louisiana Supreme Court provided a two-part test for determining whether the discretionary exception applies: (1) "First, a court must determine whether the action is a matter of choice," and (2) "[I]f no options are involved, the exception does not apply. If the action involves selection among

alternatives, the court must determine whether the choice was policy based."[416] The court adds that even those "[d]ecisions at an operational level can be discretionary if based on policy."[417] The court held that a Parish's decision to not provide a sidewalk involved a discretionary act for which the state legislature had provided the Parish immunity.[418]

New Jersey rejected the governmental-proprietary distinction in Tower Marine, Inc. v. City of New Brunswick.[419] Instead, New Jersey statute § 59:4-6 provides that a local rural transportation entity is not liable "for an injury caused by the plan or design of public property...where such plan or design is prepared in conformity with standards previously [approved by the Legislature, other governing body, or some other body or public employee exercising discretionary authority]."[420] Statute § 59:2-3 provides that such immune activities include discretion in providing resources, services, and facilities, and says that the "entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources."[421] Examples of immune discretionary functions include the county's control over traffic signs and warning devices[422] and the decision to implement the state's maintenance program.[423] But, as found in Costa v. Josey, the decisions at the operational level within a maintenance program are not immune.[424]

Table 13 summarizes the views of the six states as to the discretionary-ministerial distinction.

Table 13. Views of the discretionary-ministerial distinction in the sample states.

Adopted	Specifically Rejected	Uses Alternative
Arizona	New Jersey	Michigan
Louisiana	Wyoming	North Carolina

Table 14 summarizes how methods of sovereign immunity distinctions affect the Road Safety Audit Program's pre- and post-construction split — the Road Safety Audit and the Road Safety Audit Review, respectively.

Table 14. Sovereign immunity distinctions coupled with the pre- and post-construction decision split.

Distinction	Emphasis	Unprotected Activity	Effect of Split
Negligence-Gross Negligence	Conduct of decision-maker	Decisions which are reckless or manifestly dangerous	Probably no effect
Governmental-Proprietary	Type of operation	Decisions that are not of a governmental nature	Probably no effect
Discretionary-Ministerial	Level of decision-maker	Decisions in which little or no discretion is allowed	Probably affects decisions made post-construction

Implications of the Sovereign Immunity Distinctions.

The distinctions in sovereign immunity are helpful in analyzing questions that may arise from various options that the transportation entity's decision-maker has in deciding what to do with the RSAP report, whether from a Road Safety Audit or a Road Safety Audit Review. If the decision is based on policy grounds or is made at a high level, the decision stands a good chance of being protected by sovereign immunity. But if a decision is based on non-policy grounds or is made at a lower level, the decision is less likely to be protected by sovereign immunity. Such a decision probably will be tested as any other negligence issue would be tested (i.e., whether the decision-maker breached a duty of care to the plaintiff).

Therefore, decisions not to implement a Road Safety Audit Program or not to implement recommendations from a RSA or a RSAR likely will first be tested with these sovereign immunity distinctions. If the decision does not garner immunity protection, the decision is subject to other negligence analyses such as the reasonableness test.

The RSAP: Furthering the Public Interest of Improving Road Safety

In addition to the RSAP's value of being a tool to carry out the entity's duties and its likelihood of falling under an immunity distinction, the RSAP has another virtue: it furthers substantial policy interests. As discussed in Chapter Two, the public policy of road safety is an overarching public policy. The policy is inherent in the transportation engineering profession and is reflected in transportation-specific statutes and analogous legal doctrines.

Transportation Entity-Specific Road Safety Provisions

Several states have statutory provisions that deal specifically with the local rural transportation entity. These provisions manifest the legislature's interest in road safety. This thrust of the statutory scheme may indicate that the Road Safety Audit Program would be viewed with favor in the courts.

Arizona's Tort Claims Act (TCA) provides immunity for the local rural transportation entity with respect to "an injury arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights of way" if prepared according to generally accepted engineering principles and if adequate warning for unreasonably dangerous hazards is given.[425]

In Michigan, §§ 691.1402 through 691.1404 of Michigan's TCA combine to allow local rural transportation entity liability for failing "to keep a highway in condition reasonably safe and fit for travel."[426] This is known as Michigan's "highway exception" to the state's general rule of immunity,[427] and it is construed broadly in favor of plaintiffs. In Nawrocki v. Macomb County Road Commission, the Michigan Supreme Court relied on § 691.1402's language requiring the local rural transportation entity to keep the highway "reasonably safe and convenient for public travel"[428] to allow a pedestrian (a member of the *public*) whose ankle was injured when she stepped on broken pavement of the road to sustain an action against the county.[429]

New Jersey's Tort Claims Act provides a general rule of local government immunity,[430] but the entity may be found liable if the entity had notice of a dangerous condition that caused an accident.[431] The Act provides that the local rural transportation entity will be liable for its negligence in failing "to provide emergency signals, signs, markings or other devices if such devices were necessary to warn of a dangerous condition,"[432] but will not be found liable "for an injury caused by the failure to provide ordinary traffic signs, signals, markings or other similar devices."[433] The emphasis in these two provisions is on emergency devices as opposed to ordinary devices. New Jersey's Act also provides immunity for the local rural transportation entity for injuries caused by weather conditions.[434] In a broad grant of immunity to the local rural transportation entity, the Act grants "complete immunity for injuries resulting from a plan or design of public property when it has been officially approved by an authorized body."[435]

Section 1-39-120 of Wyoming's Governmental Claims Act provides sweeping immunity for the local rural transportation entity. It provides immunity for defects "in the plan or design," or

"failure to construct or reconstruct," or "maintenance" of "any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area."[436] But in 1993, in Romero v. Hoppal, the Wyoming Supreme Court held that the word "maintenance" in the statute is "a noun and not a verb," meaning "that the maintenance [that is immune] is not the act of maintaining, but rather the result of any said act."[437] In that case, the plaintiffs upheld the right of the plaintiffs to sue the Wyoming State Highway Department for the death of Jean Hoppal that occurred when the Hoppals' van collided with a snowplow that was operated in maintaining the road.

Table 15 summarizes the provisions of those sample states with transportation-entity specific statutes.

Table 15. Transportation-entity-specific provisions in the sample states.

State	Description of Transportation-Entity-Specific Provisions
Arizona	Plan or design immunity if prepared according to generally accepted engineering principles and if adequate warning given.
Michigan	Liability for failure to keep highway reasonably safe and fit for travel.
New Jersey	Liability if entity had notice of condition that caused an accident and for failure to provide emergency—but not ordinary—traffic control devices.
Wyoming	Immunity for defects in design, construction, and maintenance of highway.

An examination of the statutory provisions covering the transportation entity in Arizona, Michigan, and New Jersey indicates the legislature's interest in road safety. Arizona's statute offers immunity if the plan or design is acceptable and adequate warning is provided. Michigan and New Jersey allow transportation entity liability for unsafe roads. An examination of Wyoming's statute — which generously extends immunity to the transportation entity — indicates the legislature's favoritism of the transportation entity.

In sum, these statutes indicate the legislatures' interest either in road safety or in protecting the transportation entity. It follows, then, that a transportation entity program that furthers road safety (such as the Road Safety Audit Program) would probably be viewed with favor by these legislatures. And if the legislatures reflect the will of the people, the public interest in improving road safety may convince a jury.

Public Policy Arguments

Significant public policy arguments exist in favor of the judicial support of the use of the Road Safety Audit Program by local rural transportation entity. Though some of these public policies are not directly related to the transportation industry, they are relevant by analogy.

First of all, the public interest in increasing road safety is paramount. Chapter Two discussed in detail the fact that road safety is an overarching policy in transportation engineering. Furthermore, echoes of the policy sound among the judicial opinions in all six of the sample states and the policy underlies the statutory schemes that provide both immunity and liability to the transportation entity. Moreover, the United States Supreme Court has recognized the significance of highway safety. In Bibb v. Navajo Freight Lines, Inc., the court stated that "[t]he power of the State to regulate the use of its highways is broad and persuasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce."[438]

Second, the law already recognizes that certain public interests outweigh certain private interests. For example, in the field of product liability, evidence of a manufacturer's subsequent

safety improvements to a product alleged to have injured the plaintiff are inadmissible as evidence to show the manufacturer's liability. The policy behind this rule is that allowing such evidence to be used against the manufacturer would chill the manufacturer's improvement of the product's safety. Though an injured plaintiff's inability to gain access to the report is not an insignificant drawback, the public policy of improving product safety outweighs the injustice to the plaintiff. This underlying policy is directly on point with the desirability of improving road safety through the use of such devices as the Road Safety Audit Program — albeit at the expense of the injured plaintiff who cannot use the report against the entity.

Third, the law already recognizes the value in being protected from having one's own words being used against oneself. This is seen in the criminal context in the privilege against self-incrimination found in the Fifth Amendment of the United States Constitution.[439] In a sense, the local rural transportation entity's RSAP report being used against the entity is a form of self-incrimination in that the entity's acknowledgment of a deficiency in a road is used to establish the entity's liability. More directly on point, the Federal-Aid Highway Program Privilege also protects against such incrimination by protecting the data and findings from safety evaluations of Federal-Aid funded roads from being discovered or admitted into evidence.

These public policy arguments are relevant in that the concept of using the RSAP report as an "offensive defense" to show the entity's good faith in improving road safety is not an unprecedented stretch of the law. The law already recognizes that certain interests for the greater good outweigh certain private interests, and also recognizes that the admission into evidence of defendant's admissions of fault are not always in society's best interest. Thus, the

"offensive defense" approach should be implemented by the defendant entity. Not only does it have significant legal and public policy support, it radiates the fact that the entity is taking a proactive role in addressing road safety.

Summary

Because there are 50 states with 50 different legislatures and 50 different judicial systems, there is no simple, straightforward answer to the question of whether the report from a Road Safety Audit Program can be used against the local rural transportation entity that conducted the audit. The outcome will depend on a great number of factors dealing with the rules and characteristics of the state, the entity conducting the audit, and the report produced. But what is evident now is that the laws of evidence and discovery are not hostile to the transportation entity, and public policy concerns also favor the entity's use of the Road Safety Audit Program.

CHAPTER SEVEN – FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

Now all has been heard; here is the conclusion of the matter…
Ecclesiastes 12:13

The Road Safety Audit Program improves road safety. It originated in the United Kingdom in the 1980s, has since been used successfully in Australia and New Zealand, and has made some inroads in the United States. But because other road safety programs exist and because the fear of liability may deter the use of the RSAP, the RSAP must add value to a transportation entity and must withstand legal scrutiny in order for the program to realize its safety improvement potential in the United States. What follows are the findings, conclusions, and recommendations from analyzing the two questions presented — whether the RSAP adds value to an entity and whether it is legally defensible.

Findings

The Road Safety Audit Program is a Useful Safety Program

The Road Safety Audit Program utilizes an independent and qualified examiner or team of examiners to conduct an audit of the road project, in either or both of the conceptual and existing stages, with the objective of improving road safety for all road users. Audits done on roads that are in the conceptual stage are called Road Safety Audits and those that are done on existing roads are called Road Safety Audit Reviews. The examiner or team typically issues a report from

the audit, which describes the safety status of the road and which can include recommendations and priorities for improving the road's safety.

The RSAP is focused on road safety and is not hindered by political or financial entanglements. It provides a tool for the decision-makers in the transportation entity that authorized it in that it can be used by the entity to improve the safety of the roads for which it is responsible.

A Legal Analysis Framework

A three-step analysis is pertinent in answering the question of whether the Road Safety Audit Program can be used to establish a transportation entity's liability. The analysis should proceed as follows.

Step One: Determine if the Entity Can Be Found Liable.

First, the local rural transportation entity may be afforded sovereign immunity. This means that the entity cannot be held liable for an injury to a road user arising from the entity's roads. Some states specifically define and limit the extent of this immunity through legislation known as tort claims acts while others limit the immunity through judicial action. Arizona, Michigan, New Jersey, and Wyoming have tort claims acts, while Louisiana and North Carolina follow the latter approach.

Some states modify the extent of the immunity based on the entity's insurance coverage. For instance, Michigan, and North Carolina withdraw the entity's immunity to the extent of the entity's insurance coverage.[ee]

In general, the local rural transportation entity is responsible for keeping its roads reasonably safe for the road user. Liability for a local rural transportation entity can arise for a breach of a duty to a road user such that the road user is harmed. But holding the entity liable for such breaches can be mitigated depending on the extent of the entity's advance notice of the defect. For instance, if the problem occurred without warning and immediately led to the plaintiff's harm, the entity will probably not be found liable. But if the entity knew or should have known about a defect yet failed to mitigate the defect, the entity will probably be held to have breached a duty to the plaintiff road user.

Three common duties of the local rural transportation entity exist. First, the entity typically has a duty to warn the road user of adverse road conditions such as emergencies or hazardous situations. Arizona, Louisiana, Michigan, and New Jersey entities have been held to have that duty. Second, the entity typically has a duty to maintain its roads. Arizona, Michigan, New Jersey, North Carolina, and Wyoming have this duty. Finally, the entity may have a duty to comply with its own internal standards as well as external guides such as the Manual of Uniform Traffic Control Devices. Arizona, Michigan, New Jersey, and North Carolina local rural transportation entities have been held to have this duty.

[ee] Other local non-transportation entities in Wyoming have similar limitations. Wyoming's local rural transportation entities are given broad immunity. Wyo. Stat. Ann. § 1-39-120 (West 2000).

If the local rural transportation entity is not immune from suit and if the entity appears to have breached a duty to the road user, the next inquiry is whether a RSAP report that identifies the problem at the source of the plaintiff's harm can be used against the entity.

Step Two: Determine if the Road Safety Audit Program Can Be Used Against the Entity.

One strategy for the local rural transportation entity is to keep the RSAP report from being used against the entity by keeping it out of the plaintiff's hands. But the plaintiff may be able to obtain the report through the state's freedom of information act (FOIA) or through discovery in a litigation context.

FOIAs operate in general to provide the private citizen with public records and reports. But two common limitations to this general rule of accessibility exist. First, in states like Arizona and New Jersey, the private citizen is precluded from accessing those reports that would have a negative effect on the government's official duties. Second, if the citizen is a plaintiff in a lawsuit against the entity, the FOIA cannot be used by the plaintiff to obtain an otherwise inaccessible document. Michigan, North Carolina, and Wyoming recognize this limitation.

In a litigation setting, the rules of discovery might be used by the plaintiff to access the RSAP report. Rule 26 and Rule 34 (or their equivalents) are the procedural mechanisms whereby the parties can seek information from their opponent. But this right to discover the report is limited to non-privileged information. Therefore, if the local rural transportation entity being sued can find a privilege through which to withhold the RSAP report, the entity can probably preclude the plaintiff from accessing the report. All six states sampled in this report have the equivalence of Rules 26 and 34.

Three privileges may operate to keep the report out of the plaintiff's hands. The Work-Product Privilege, which is inherent in Rule 26 itself, stops a party from accessing material that is prepared in anticipation of litigation unless the requesting party is in substantial need of the material and cannot obtain the material without undue hardship. This privilege will probably not be of much assistance to the entity in trying to keep the report away from the plaintiff because, by definition, the RSAP report is prepared to assist the entity in improving its road safety, not in anticipation of litigation. All six states sampled in this report recognize the Work-Product Privilege.

The Self-Critical Analysis Privilege protects from discovery or admissibility those reports from an organization's internal investigations that are conducted with the goal of bettering the organization's operations. The idea behind the privilege is to encourage such reports; to allow them to be used against the organization would, it is believed, chill the conducting of such analyses. Of the six states sampled, Arizona, Louisiana, Michigan, and New Jersey recognize the privilege, though only Michigan has applied it in a transportation setting. This privilege appears more likely than the Work-Product Privilege to keep the report out of the plaintiff's hands, yet it is by no means a panacea.

Finally, the Federal-Aid Highway Program Privilege is a privilege created by Congress to protect materials prepared for the purpose of enhancing road safety in projects that may be implemented using Federal-Aid Highway Program funds. This is a boon to the desire to privilege the RSAP report because these funds contribute nearly 63 percent of all highway funding in the nation. Thus, if the report meets these criteria, it will most likely be privileged from discoverability

and admissibility. Of the six states studied, Arizona, Louisiana, Michigan, and North Carolina had applied the privilege to keep such a report from the plaintiff.

Nevertheless, if a plaintiff obtains the report, the plaintiff must somehow offer the report into evidence. On its face, the report is inadmissible hearsay because it is being offered for the truth of what it says, without the ability of being cross-examined. An exception to this rule against hearsay is the public records exception. Under this exception, regularly kept public records can be offered into evidence because they are generally trustworthy. But these also may be subject to the various privileges and may only be admissible if they contain only facts — opinions detract from the report's presumed trustworthiness. All six of the sample states recognize the public records exception, yet Arizona, Louisiana, North Carolina, and Wyoming allow only factual findings to be admitted into evidence.

Step Three: Determine if Public Safety Outweighs the Entity's Negligence.

The first two steps are those that can be undertaken by a local rural transportation entity that has a litigation defense strategy, which is trying to keep the Road Safety Audit Program from disadvantaging the entity. But there is an alternative litigation defense approach that seeks instead to use the RSAP to the entity's advantage. In this "offensive defense" approach, the strengths of the RSAP are expounded.

First, the Road Safety Audit Program really is just one of many tools that the local rural transportation entity can use to fulfill the duties that it has under the law. It seems inconsistent for a state to impose on its transportation entities several duties in keeping the road safe, yet neuter

the entity's attempt to improve road safety by using the safety evaluation report to establish the entity's liability.

Second, the law recognizes that governmental functions should be protected. Whether the Road Safety Audit Program is conducted on a road project before the road is built or after the road is built may have a marginal impact on immunity of the local rural transportation entity.

The negligence-gross negligence distinction recognizes that a local rural transportation entity should not be afforded immunity if it exercises gross negligence in carrying out its duties. This type of conduct by a transportation entity is probably rare. Thus, the distinction means that the pre- and post-construction decision split (i.e., the RSA / RSAR distinction) will have little effect on the entity's liability. The governmental-proprietary distinction will operate to remove whatever immunity the entity may have if the entity's decision is not one that is of a governmental nature. Because RSAP decisions concern the safety management of a road — which is most likely a governmental function — whether the decision occurs before or after construction will have little effect. The discretionary-ministerial distinction operates to remove any immunity from the entity where the decision is one in which little discretion is allowed. Here, the pre- and post-construction decision split is of more significance in that several post-construction safety decisions may have little room for discretion.

Finally, various public policies reflected in the law bolster the entity's use of the RSAP. Some of these policies are related directly to the transportation entity, while others are related only by analogy.

For example, in Arizona, Michigan, New Jersey, and Wyoming, statutes that govern the transportation entity indicate those states' interest in furthering road safety. They create duties for the transportation entity to keep the road safe for the traveling public and penalize the entity for failing to keep the road safe.

In addition, the law includes policies that recognize furthering the interest of the harmed plaintiff is not necessarily the best thing for society; in some situations, favoring a defendant is better. For instance, in product liability litigation, the plaintiff cannot use evidence that a newer version of the allegedly harmful product has a safety feature. The reason for this rule is to encourage manufacturers to improve their products without fear of the improvement being used against them. The privilege against self-incrimination is another policy that favors the defendant's interest.

It follows then that the "offensive defense" approach by the defendant entity should be the primary approach. It has solid legal and policy underpinnings and proclaims the fact that the entity is taking a proactive role in addressing road safety.

Conclusions

The Road Safety Audit Program Adds Value to a Transportation Entity

The Road Safety Audit Program adds value to the transportation entity in four ways. First, the RSAP provides a significant step toward improving road safety: its focus is to identify road safety deficiencies with the objective of empowering the decision-maker with information to

mitigate the deficiencies. Thus, the RSAP can help the entity achieve the overarching public policy goal of improving road safety.

Second, the RSAP provides an objective tool for the transportation entity's decision-maker to use in managing the entity's transportation system. The objectivity lies in the program's focus on safety and independence of the project's examiner. The utility of the tool is found in the report that succinctly assesses the road's safety and which may provide recommendations and priorities for addressing any safety deficiencies.

Third, the RSAP differs from existing road safety programs. It can be used in a proactive and a reactive approach to addressing safety, whereas the existing road safety programs focus primarily on the reactive approach. The RSAP is a simple road safety tool; it has few steps and focuses only on safety. Other programs have manifold steps and are burdened by other concerns such funding, statistical analyses, and educational programs. Another difference is the RSAP's flexibility. In contrast with existing systems that emphasize the spot system, the RSAP can be used in a specific location or it can be used in a project that covers the entire road system.

Fourth, the RSAP is compatible with existing systems. Although the RSAP can improve road safety as a stand-alone program, it can be used in conjunction with (or as a tool within) existing road safety systems if the entity should so desire.

The Key Legal Strengths and Weaknesses of the Road Safety Audit Program

Legal Strengths

The rules of discovery and evidence favor the transportation entity in that they tend to operate to protect the report from being accessed, discovered, and admitted into evidence. In particular, the Federal-Aid Highway Program Privilege is a stronghold for the Road Safety Audit Program. The prevalence of Federal-Aid projects indicate that the privilege could be a significant deterrence to the plaintiff's accessing the RSAP report.

As a class, the legal distinctions which otherwise operate to remove a governmental entity from the protection of immunity, such as the negligence-gross negligence, governmental-proprietary, and discretionary-ministerial distinctions have little impact on the decisions arising out of a Road Safety Audit Program. They indicate that the decisions and actions evidenced in the RSAP report probably will be protected. Moreover, Federal or state legislation that mandates RSAP actions probably will further ensconce the RSAP as an immune activity.

Legal Weaknesses

Absent all policy and legal protections, a report, which recognizes a safety issue that contributed to a victim's harm is, on its face, a "smoking gun." By itself, the report shows that the transportation entity knew of a defect in the road that later was the location of an accident, which led to the plaintiff's harm.

The discretionary-ministerial distinction poses the greatest threat to the entity's immunity. If a decision arising out of a Road Safety Audit Program is made that rejects a safety fix when

the decision did not command that extent of discretion, the decision will probably be viewed as ministerial and therefore not protected.

Key Policy Strengths and Weaknesses of the Road Safety Audit Program

Policy Strengths

The strongest policy for the Road Safety Audit Program is that it furthers the overarching public interest in improving road safety. Echoes of this policy — which is inherent in transportation engineering — abound in the statutes and judicial opinions, including those of the United States Supreme Court.

In addition, in using the Road Safety Audit Program, the transportation entity is merely fulfilling its legal duties. A policy which allows the entity's use of the RSAP to be used to establish the entity's liability is not only inconsistent — it chills the use of a valuable safety device.

Policy Weaknesses

No public policies were found to have cut against the transportation entity's use of the Road Safety Audit Program.[ff] However, an entity's use of the "defensive" defense approach in litigation carries a negative public policy implication if the entity tries to hide the report by using an exception to the Freedom of Information Act. The public policy of allowing the private citizen to

[ff] While the mere use of the RSAP is coherent with public policy, allowing any governmental entity to escape from liability for sovereign immunity reasons contravenes the public policy that recognizes the plaintiff's right to be compensated for harm done by the defendant. This of course is the primary criticism of sovereign immunity.

have access to governmental information and records is important in a republic form of government. It should not be discarded lightly.

Recommendations

A Statute for the Wary

Though significant legislative and judicial postures favor the protection of the transportation entity in a dispute arising from a Road Safety Audit Program, a state may desire to further protect its transportation entities in litigation. In such a case, the following statute is recommended. It is modeled after the federal statute granting the Federal-Aid Highway Program Privilege.[440]

"Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings or for the purpose of developing any highway safety construction improvement project shall not be subject to discovery or admitted into evidence in any State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

Recommendations for Further Study

The question of whether the RSAP report can be used to establish a transportation entity's liability requires a complex answer dependent on variables such as the entity's immunity and the rules of discovery and evidence, among others. Also, because of the variations in what

the report might contain along with creativity of lawyers adjudicating a case in which the Road Safety Audit Program is at issue, several issues were left out of this study necessarily. Accordingly, further study into the following issues would be helpful in gathering a more robust answer to the questions of the efficacy of the Road Safety Audit Program and the legal questions it presents.

First, further research regarding the level of expertise required to perform a Road Safety Audit or Road Safety Audit Review would be helpful in analyzing credibility of the audit and would be useful in the entity's hiring and budgeting decisions. Related research might be performed to analyze whether a certification or licensing program for RSAP auditors would be appropriate.

Second, a study about whether the RSAP report could be used to establish the entity's admission that its road was dangerous through the doctrine of "subsequent remedial measures" would support this study. The doctrine of subsequent remedial measures deals with the admissibility of evidence of changes made to a product *after* an accident. The plaintiff's legal theory is that by making the changes the entity "admits" the danger in the prior version of the road. The scope of this report on the other hand is the admissibility of evidence (i.e., the RSAP Report) to show the road entity's awareness of a problem *before* an accident.

Third, a study of the extent of the liability of transportation entity employees or consultants who are responsible for an audit or are identified in an audit would be worthwhile. The liability of governmental employees often is specifically considered in the tort claims acts. Questions about the duty of care that the auditor would owe to the entity and about what effect, if any, the

auditor's disclaimer would have on his or her liability—or the entity's liability for that matter—would also be of interest.

Fourth, a study of the state or local entity being sued in federal court — as opposed to state court — would be worthy. Questions as to which law applies and to which court has jurisdiction would abound in that study. Likewise, whether the Road Safety Audit Program could be used against the Federal Highway Administration either in a state court or in a federal court would be an interesting study.

All Levels of Transportation Entities Can Benefit from the Road Safety Audit Program

The analysis and findings concerning the value of the RSAP were performed without discriminating between levels of transportation entities. Thus, the research showing the RSAP's value is applicable to all levels of transportation entity—federal, state, and local.

On the other hand, the legal analysis emphasized the local transportation agency. This was done partly because the law recognizes a distinction between federal, state, and local governments, but primarily because of the significance and vulnerabilities of the local rural transportation entity. The legal analysis only considered laws of six states, but the legal analysis framework is applicable to all levels of transportation entities, in all states. All levels of transportation entities, in all 50 states, when analyzing whether the RSAP can be used to establish the entity's liability, can approach the question using the three-step framework described above.

Simply put, transportation entities should use the RSAP because it is a useful road safety tool and because it is legally defensible. It can be used by itself to improve road safety or it can be used in conjunction with existing road safety systems. The risk that the report may be used to

establish the entity's liability also should not deter the entity from using the RSAP. Substantial legal doctrines operate to encourage use of the RSAP and public policy is on the side of the transportation entity that uses it.

Summary

Two questions must be addressed in an analysis of whether the Road Safety Audit Program should be implemented by a transportation entity — whether the RSAP adds value to the entity and whether the RSAP is legally defensible. This study answers both of these questions in the positive.

A deeper issue is whether the public policy of improving road safety for all road users outweighs the competing policy favoring the plaintiff's redress of his or her harm. Approaching the issue from a utilitarian perspective, the public policy of improving road safety for all road users — favoring the many over the individual — must reign supreme over the competing policy favoring the plaintiff's redress of his or her harm that favors the individual over the many.

It follows that a combination of the utility of the RSAP, the fact that it has solid legal grounds, and overwhelming public policy argument of improving road safety creates solid support for using the RSAP. Therefore, the Road Safety Audit Program should be implemented by the transportation entity. There no longer is an excuse.

APPENDIX A – LIST OF COMMON ACRONYMS

AASHTO	American Association of State Highway and Transportation Officials
BMS	Bridge Management System
DOT	Department of Transportation
FAHP	Federal-Aid Highway Program
FHWA	Federal Highway Administration
FOIA	Freedom of Information Act
HSIP	Highway Safety Improvement Program
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
LHSIP	Local Highway Safety Improvement Program
LRTE	Local Rural Transportation Entity
PMS	Pavement Management System
RSA	Road Safety Audit
RSAP	Road Safety Audit Program
RSAR	Road Safety Audit Review
SCAP	Self-Critical Analysis Privilege
SMS	Safety Management System
TCA	Tort Claims Act
TSIMS	Transportation Safety Information Management Systems
USDOT	United States Department of Transportation

APPENDIX B – STATE AND LOCAL SOVEREIGN IMMUNITIES IN 1982

State and Local Sovereign Immunities
(After the Restatement of Torts 2d, Appendix, Section 895B (1982)).

	State Immunity	Local Immunity
Alabama	**Absolute** Constitutional provision against suit. Ala. Const. art. I, s 14. Legislature cannot consent. Hutchinson v. Board of Trustees of University of Alabama, 288 Ala. 20, 256 So.2d 281 (1971). Includes agencies.	**None** Judicially abolished because court believed the judicially imposed governmental-proprietary distinction thwarted legislative intent. Jackson v. City of Florence, 294 Ala. 592, 320 So.2d 68 (1975). Statute remains unchanged and allows suit. Ala. Code, tit. 11, s 190
Alaska	**Limited** Constitutional provision allowing legislature to establish procedures for suits against state. Alaska Const. Art. 2, s 21. Requires legislative waiver. Alaska v. The O/S Lynn Kendall, 310 F.Supp. 433 (D. Alaska 1970). Statutory authorization with exceptions for discretionary functions and intentional torts. Atty.Gen. may settle claims. Alaska Stat. ss 09.50.250- 09.50.300.	**None** Judicially abolished. Scheele v. Anchorage, 385 P.2d 582 (Alaska 1963); Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962).
Arizona	**Limited** Judicially abolished. Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963). Statutory exception for discretionary functions. Ariz.Rev.Stat. s 26-314.	**Limited** Same. Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).
Arkansas	**Absolute** Constitutional provision against suit. Ark. Const. Art. 5, s 20. Applies to agencies, cannot be waived. Wilson v. Coston, 239 Ark. 515, 390 S.W.2d 445 (1965). Statutory establishment of State Claims Commission, with exclusive jurisdiction and no judicial review. Ark.Stat.Ann. ss 13-1401 to 13-1406.	**Limited** Statutory provision that political subdivisions are immune for torts, but procedure authorized for handling tort claims. Requires motor vehicle insurance coverage. Ark.Stat.Ann. ss 12-2901 to 12-2903 (Supp.1977).
California	**Limited** Judicially abolished. Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961); Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 11 Cal.Rptr. 97, 359 P.2d 465 (1961). Presently a detailed Tort Claims Act. West's Ann.Cal.Gov. Code ss 910.0-996.6.	**Limited** Same.
Colorado	**Limited** Judicially abolished. Proffit v. State, 174 Colo. 113, 482 P.2d 965 (1971). Colo. Gov't Immunity Act passed, restoring to large degree but making exceptions. Colo.Rev.Stat. 1973, ss 24-10-101 to 24-10-117. Insurance waives immunity to extent of coverage.	**Limited** Same.

	State Immunity	Local Immunity
Connecticut	**Limited** State Claims Commission hears claims; may approve claims under $5000. Makes recommendations to legislature for greater awards, and may waiv e state's immunity and authorize suits for greater awards. Conn.Gen.Stat.Ann. ss 4-141 to 4-165b. Judicial refusal to abolish sovereign immunity. Hirschfeld v. Comm'n on Claims, 172 Conn. 603, 376 A.2d 71 (1977); Fidelity Bank v. State, 166 Conn. 251, 348 A.2d 633 (1974).	**Limited** Suit against employee, with payment by municipality, subject to certain limitations. Conn.Gen.Stat.Ann. s 7-465 (Supp.1980). If not within statute liability only for ministerial acts. Tango v. City of New Haven, 173 Conn. 203, 377 A.2d 284 (1977).
Delaware	**Limited** Constitution authorizes suits against the state, subject to lawful regulation. Del. Const. Art. I, s 9. Held to require legislative authorization for a tort suit against the state. Blair v. Anderson, 325 A.2d 94 (Del.1974); Shellhorn & Hill, Inc. v. State, 55 Del. 298, 187 A.2d 71 (1962). Statutory authorization with usual exceptions. 10 Del. Code Ann. ss 4001-4005.	**Limited** Same.
Florida	**Limited** Constitution allows provision to be made for suit against State. Fla. Const. Art. 10, s 13 (1970). Statutory waiver of sovereign immunity in tort with exceptions. West's Fla.Stat.Ann. s 768.28. Maximum liability: $50,000 per claimant, $100,000 per incident, but legislature may authorize greater recovery. Insurance authorized. Id.	**Limited** Same.
Georgia	**Limited** Constitution authorizes legislature to create a Court of Claims for tort claims against the state, but does not waive immunity. Ga. Const. art. 6, sec. 5. This court has not been established, but the constitutional amendment authorizing it means that sovereign immunity has constitutional status and cannot now be judicially abrogated. Azizi v. Board of Regents of Univ. of Ga., 233 Ga. 487, 212 S.E.2d 627 (1975); Clark v. State, 240 Ga. 188, 240 S.E2d 5 (1977). Insurance for motor vehicles waives immunity. Ga. Code Ann. s 89-932.	**Limited** Traditional position for municipalities. Ga. Code Ann. s 69-301. Counties are not liable for suit unless made so by statute. Ga. Code Ann. s 23-1502. All political subdivisions may procure insurance for motor vehicles, which waives immunity to the extent of the coverage. Ga. Code Ann. s 89-932.
Hawaii	**Limited** State Tort Liability Act waives immunity with exceptions, like discretionary duties and intentional torts. Hawaii Rev.Stat. ss 662-1 to 662-16.	**Limited** Same.
Idaho	**Limited** Judicially abolished. Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970). Tort Claims Act abolishes the gov't/proprietary distinction, provides for indemnification of employee, and excepts intentional torts, discretionary functions, etc. Idaho Code Ann. ss 6-901 to 6-928.	**Limited** Same.

	State Immunity	Local Immunity
Illinois	**Limited** Constitution waives immunity. Ill. Const. Art. 13, s 4. State Court of Claims set up with maximum of $100,000 recovery. Ill.Ann.Stat., ch. 37, s 439.8 (Smith-Hurd).	**Limited** Judicially abolished. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968, 80 S.Ct. 955, 4 L.Ed.2d 900 (1960). Statutory restoration of exceptions, Ill.Ann.Stat. ch. 85, ss 1-101 to 10-101.
Indiana	**None** Judicially abolished. Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972).	**None** Same.
Iowa	**Limited** Tort Claims Act. Iowa Code Ann. ss 25A.1-25A.22. State Appeal Board, with suit in district court if no relief from Board. Exceptions include discretionary functions and intentional torts.	**Limited** Abolished by statute with limitations and exceptions. Iowa Code Ann. ss 613A.1 to 613A.11.
Kansas	**Limited** Proprietary immunity judicially abolished. Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969). Restored by statute. Kan.Stat.Ann. ss 46-901 to 46-916. Statute declared unconstitutional in Brown v. Wichita State Univ., 217 Kan. 279, 540 P.2d 66 (1973), that holding vac'd on motion for reh'g, 219 Kan. 2, 547 P.2d 1015 (1976), appeal dismissed, 429 U.S. 806, 97 S.Ct. 41, 50 L.Ed.2d 67 (1976). Insurance authorized, with waiver of immunity of extent of coverage. Kan.Stat.Ann. ss 74-4715, 74-4716.	**Limited** Insurance authorized. Id. See Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966).
Kentucky	**Limited** Immunity unless waived by legislature. Ky. Const. s 231. State Board of Claims. Maximum recovery, $50,000 Ky.Rev.Stat.Ann. 44.070-44.160.	**Limited** Judicially abolished. Haney v. City of Lexington, 386 S.W.2d 738 (Ky.1964). Usual exceptions.
Louisiana	**Limited** Constitution abolished tort immunity. La. Const. Art. 12, s 10A. Statutory procedure for suing State or political subdivisions. La.Rev.Stat. 24:152.	**None** Legislative authority to be sued apparently abolishes immunity. See Hamilton v. City of Shreveport, 247 La. 784, 174 So.2d 529 (1965), on remand, 180 So.2d 30 (1966), writ denied, 248 La. 700, 181 So.2d 399 (1966).
Maine	**Limited** Judicially abolished in Davies v. City of Bath, 364 A.2d 1269 (Me.1976). Tort Claims Act. 14 Me.Rev.Stat.Ann. ss 8101 to 8118. Immunity for all gov't entities unless expressly exempted by type of activity.	**Limited** Same.
Maryland	**Limited** Immunity retained; abrogation said to be up to the legislature. Weisner v. Bd. of Educ., 237 Md. 391, 206 A.2d 560 (1965); Duncan v. Koustenis, 260 Md. 98, 271 A.2d 547 (1970); Robinson v. Bd. of County Comm'rs, 262 Md. 342, 278 A.2d 71 (1971); Mayor and City Council of Baltimore v. Austin, 40 Md. App. 557, 392 A.2d 1140 (1978), aff'd, 286 Md. 51, 405 A.2d 255 (1979). A statutory exception allowed a university to procure insurance and waive immunity to extent of policy. Md.Educ. Code Ann. s 13-108.	**Limited** Insurance for counties authorized, with corresponding waiver. Md. Code Ann.1978, Art. 25A, s 5. Austin v. Mayor and City Council of Baltimore, 286 Md. 51, 405 A.2d 255 (1979) (retaining proprietory governmental distinction, suggesting that abrogation is a matter for the legislature).

	State Immunity	Local Immunity
Massachusetts	**Limited**	**Limited**
	Statutory provision for liability with exceptions for discretionary functions, intentional torts, etc. Mass.Gen. Laws Ann., c. 258, ss 1-8. This enactment followed Whitney v. City of Worcester, 373 Mass. 208, 366 N.E.2d 1210 (1977), where the court stated that if the 1978 session of the legislature failed to act on the doctrine, as the court had been awaiting since Morash & Sons v. Commonwealth, 363. 612, 296 N.E.2d 461 (1973), the court would abrogate the doctrine in the first appropriate case.	Same.
Michigan	**Limited**	**Limited**
	Judicially abolished. Pittman v. City of Taylor, 398 Mich. 41, 247 N.W.2d 512 (1976) (decided after statute, but based on prior law). Immunity retained for gov'tl functions; abolished for proprietary functions and motor vehicles. Mich.Stat.Ann. ss 3.996(101) to 3.996 (115) (1977, Supp.1979). See Thomas v. State Highway Dept., 398 Mich 1, 247 N.W.2d 530 (1976).	Judicially abolished. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961). Restored by statute as to gov'tl functions. Mich.Stat.Ann. s 3.996(107) (1977, Supp.1979), but held unconstitutional on procedural ground in Maki v. City of East Tawas, 385 Mich. 151, 188 N.W.2d 593 (1971). Subsequent enactment abolishing immunity for proprietary functions. Mich.Stat.Ann. s 3.996 (101-113) (1977, Supp.1979). Gov'tl functions are immune. Galli v. Kirkeby, 398 Mich. 527, 248 N.W.2d 149 (1976). There is no immunity for nuisance. Rosario v. City of Lansing, 403 Mich. 124, 268 N.W.2d 230 (1978). See also Dionne v. City of Trenton, 79 Mich.App. 234, 261 N.W.2d 273 (1977); and Beauchamp v. Saginaw Township, 74 Mich.App. 44, 253 N.W.2d 355 (1977) for characterization of gov'tl and proprietory functions.
Minnesota	**Limited**	**Limited**
	Statute abolished immunity with exceptions including discretionary functions. Limits recovery to maximum of $100,000 per claimant, $500,000 per occurrence. Insurance waives immunity to extent of policy. Minn.Stat.Ann. s 3.736.	Judicially abolished. Spanel v. Mounds View School Dist., No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962). Followed by statute subjecting municipalities to liability for their torts, whether for gov'tl or proprietary functions, with exceptions which include discretionary functions. Maximum recovery $100,000 per claimant, $300,000 per occurrence. Minn.Stat.Ann. ss 466.01 to 466.15 (1977, Supp.1978).
Mississippi	**Limited**	**Limited**
	Immunity retained, with some exceptions when there is insurance. See, e.g., Miss. Code Ann. 1972, ss 61-5-47 (airports), 41-13-11 (community hospitals), 41-13-37 (hospitals), 19-7-8 (county motor vehicles). Judicial refusal to abrogate immunity, saying it is up to the legislature. Berry v. Hinds County, 344 So.2d 146 (Miss.1977), cert. denied, 434 U.S. 831, 98 S.Ct. 114, 54 L.Ed.2d 91 (1977).	Same.
Missouri	**Limited**	**Limited**
	Judicially abolished. Jones v. State Hwy. Comm'n, 557 S.W.2d 225 (Mo.1977). Some insurance provisions. Vernon's Ann.Mo.Stat. s 226.092.	Same.

	State Immunity	Local Immunity
Montana	**Limited**	**Limited**
	Constitutionally abolished. Mont. Const. Art. 2, s 18, State Comprehensive Insurance Plan and Tort Claims Act. Mont.Rev. Codes Ann. 1977, ss 82-4301 and 82-4327. 120-day notice of claim requirement held unconstitutional. Noll v. City of Bozeman, 166 Mont. 504, 534 P.2d 880 (1975).	Same.
Nebraska	**Limited**	**Limited**
	Constitution held to abolish immunity but leave to legislature to provide for suit. Neb. Const. Art. 5, s 22. State Tort Claims Act. Neb.Rev .Stat. 1977 Supp. ss 81-8, 209 to 81-8, 239. File claim with State Claims Board. If no relief, suit. Exceptions for discretionary duties and intentional torts.	Judicially abolished. Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Johnson v. Municipal Univ. of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969), appeal after remand, 187 Neb. 24, 187 N.W.2d 102 (1971). Followed by Political Subdivisions Tort Claims Act, which retains immunity for discretionary functions, intentional torts, and the enforcement of invalid statutes using due care, but gives the governing body authority. Neb.Rev.Stat. ss 23-2401 to 23-2410 (1974, Supps.1976, 1977).
Nevada	**Limited**	**Limited**
	Statutorily abolished with exceptions for enforcement of an invalid statute using due care and discretionary duties. Maximum award $35,000. Nev.Rev.Stat. ss 41.031 to 41.039 (1979).	Judicially abolished. Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966). Followed by statute above.
New Hampshire	**Limited**	**Limited**
	Insurance authorized waives immunity to extent of coverage. N.H.Rev.Stat.Ann. s 412:3. Immunity retained otherwise, unless state has consented to suit. Sousa v. State, 115 N.H. 340, 341 A.2d 282 (1975).	Judicially abolished, with exceptions for legislative and judicial functions and executive policy decisions. Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974). Insurance authorized. N.H.Rev.Stat.Ann. s 412:3.
New Jersey	**Limited**	**Limited**
	Judicially abolished. Willis v. Dep't of Conservation, 55 N.J. 534, 264 A.2d 34 (1970). Followed by New Jersey Tort Claims Act, providing for immunity with exceptions. N.J.Stat.Ann. ss 59:1-1 to 59:12-1. No liability except as provided in the Act. McGowan v. Borough of Eatontown, 151 N.J.Super. 440, 376 A.2d 1327 (1977).	Same.
New Mexico	**Limited**	**Limited**
	Judicially abolished. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975). Followed by Tort Claims Act, which provides for immunity unless specifically excepted, like claims arising from motor vehicles, streets, facilities. Insurance required for excepted areas. N.M.Stat.Ann. 1978, ss 41-4-1 to 41-4-25. Maximum liability $100,000 per claim, $300,000 per person for any single occurrence, $500,000 per any single occurrence. Id.	Same.
New York	**Limited**	**Limited**
	Statutory waiver of immunity. N.Y.Ct.Cl. Act. s 8-12 (1963, Supp.1978). See Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).	Same.

	State Immunity	Local Immunity
North Carolina	**Limited** State Indus. Comm'n hears claims against state dep'ts and agencies. Appeal to State Court of Appeals. Maximum award $100,000. N.C.Gen.Stat. ss 143-291 to 143-300.6 (1978).	**Limited** Insurance authorized for cities, with waiver of immunity. N.C.Gen.Stat. s 160A-485. State Board of Education authorized to pay claims arising from school bus accident, maximum of $600 per pupil. Otherwise, immunity retained. Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).
North Dakota	**Limited** Insurance authorized for state agencies, with waiver of immunity to extent of policy. N.D.Cent. Code s 39-12.1-15. Insurance also authorized for motor vehicles. N.D.Cent. Code s 39-01-08.	**Limited** Judicially abolished. Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D.1974). Statutory waiver of immunity for negligence actions, with exceptions for discretionary actions and enforcement of invalid statute using due care. Maximum liability $250,000 per person, $500,000 per occurrence. Insurance authorized. N.D.Cent. Code ss 32-12.1 to 32-12.1-14.
Ohio	**Limited** Constitution held to abolish immunity, but to require legislative consent for suit. Ohio Const., Art. I, s 16. Krause v. State, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), appeal dismissed, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506 (1972), reh'g denied, 410 U.S. 918, 93 S.Ct. 959, 35 L.Ed.2d 280 (1973). Statutory waiver of immunity, suit in court of claims with right of appeal and limitations. Ohio Rev. Code ss 2743.01-2743.20.	**Limited** Waiver in Court of Claims Act held not to apply to political subdivisions. Haas v. Hayslip, 51 Ohio St.2d 135, 364 N.E.2d 1376 (1977). Scattered provisions waive immunity in certain situations. See, e.g., Ohio Rev. Code ss 701.02, 723.01 (1976), s 305.12 (1979).
Oklahoma	**Limited** Highway, Welfare, and Agriculture Dep'ts authorized to purchase vehicular insurance, with coverage not to exceed $10,000 per person, $20,000 per accident. 47 Okl.Stat. s 157.1. All other dep'ts may purchase coverage for $100,000 per person, $300,000 per accident. Immunity waived only to insurance coverage. 47 Okl.Stat. s 158.1. Dep't of Corrections may also purchase insurance and waive immunity to extent of coverage. 57 Okl.Stat. s 553.	**Limited** Political Subdivisions Tort Claims Act provides for liability with usual exceptions, limited to $25,000 per claim, $50,000 per claimant in single accident, $300,000 per accident. (Supp.1978).
Oregon	**Limited** Abolished by statute, with usual exceptions. Maximum recovery: $50,000 per claimant for property damage, $100,000 per claimant per accident, $300,000 per single occurrence. Insurance authorized, court approval required for any settlement over $5000. Or.Rev.Stat. ss 30.260-30.300.	**Limited** Same.
Pennsylvania	**None** Judicially abolished. Mayle v. Penn. Dep't of Hwys., 479 Pa. 384, 388 A.2d 709 (1978). Previously, Constitution construed as immunizing state unless clear legislative provision for suit. Sweigard v. Dep't of Transp., 454 Pa. 32, 309 A.2d 374 (1973); Freach v. Com., 471 Pa. 558, 370 A.2d 1163 (1977).	**Limited** Judicially abolished. Ayala v. Philadephia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973). Statutorily reinstated, with exceptions for certain negligent acts of employees. Maximum per incident: $500,000. Pa.Cons.Stat.Ann. s 53-5311.802.
Rhode Island	**Limited** Abolished by statute, but recovery limited to $50,000 though legislature can authorize more. R.I.Gen. Laws 1978, ss 9-31-1 to 9-31-7.	**None** Judicially abolished. Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970). Followed by statute, supra.

	State Immunity	Local Immunity
South Carolina	**Limited** Traditional immunity retained. Boyce v. Lancaster County Natural Gas Authority, 266 S.C. 398, 223 S.E.2d 769 (1976). Scattered statutes. See, e.g., S.C. Code Ann. s 44-7-50 (abolishing immunity for state hospitals, with $100,000 maximum recovery). State Budget and Control Board controls settlement and defense of claims.	**Limited** Permitted to procure insurance. S.C. Code Ann. s 1-11-140.
South Dakota	**Limited** Office of Commissioner of Claims makes advisory findings to legislature, which determines whether to award relief. S.D.Comp. Laws ss 21- 32-1 to 21-32-7.	**Limited** Insurance authorized. S.D.Comp. Laws s 9-12-7. Statute detailing procedure for actions against municipalities held not applicable to tort claims. Swanson v. City of Deadwood, 88 S.D. 320, 219 N.W.2d 477 (1974).
Tennessee	**Limited** Constitution requires legislative consent for suit against state. Tenn. Const. Art. I, s 17. Reinforced by statute depriving courts of jurisdiction over suits against state unless legislature has consented. Tenn. Code Ann. s 20-1702 (Supp.1978). Legislature set up State Board of Claims, authorized insurance. No appeal. Tenn. Code Ann. ss 9-801 to 9-882.	**Limited** Abolished by Governmental Tort Liability Act, applicable to all political subdivisions. Removes immunity in most situations, retaining usual exceptions. If gov'tl entity rejects claim or fails to act, suit in circuit courts. No claim shall exceed minimum amounts of required insurance ($20,000 per claimant, $40,000 per accident, but in motor vehicle cases, $50,000 per claimant, $300,000 per accident). Tenn. Code Ann. ss 23-3301 to 23-3331.
Texas	**Limited** Abolished by Texas Tort Claims Act, but many exceptions. Retains gov'tl/proprietary distinction. Recovery limited to $100,000 per person, $300,000 per occurrence. Vernon's Tex.Ann.Civ.Stat. art. 6252-19.	**Limited** Same.
Utah	**Limited** Governmental Immunity Act. Immunity retained for gov'tl functions subject to exceptions in act. Immune for discretionary functions and intentional torts. File first with entity then appeal. Utah Code Ann. 1978, ss 63-30-1 to 63-30-34.	**Limited** Same.
Vermont	**Limited** Abolished by statute, subject to usual exceptions. 12 Vt.Stat.Ann. ss 5601-5605. Insurance authorized and immunity waived. Attorney General may settle claims under $5000. 29 Vt.Stat.Ann. ss 1401, 1403.	**Limited** Insurance authorized and immunity waived for municipalities. 24 Vt.Stat.Ann. s 1092. Same for counties. 29 Vt.Stat.Ann. ss 1403, 1404.
Virginia	**Absolute** Retaining immunity. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973); Va. Elec. & Power Co. v. Hampton Redevelopment & Housing Auth., 217 Va. 30, 225 S.E.2d 364 (1976).	**Limited** Gov'tl/proprietary distinction. Tay lor v. City of Newport News, 214 Va. 9, 197 S.E.2d 209 (1973). Prior notice of claim to municipality required. Va. Code 1977, s 8.01-22.
Washington	**Limited** Abolished by statute for both gov'tl and proprietary functions. West's Wash.Rev. Code Ann. ss 4.92.090-4.92.170. See Kelso v. City of Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964).	**Limited** Statute construed in Kelso, supra, to abolish. Confirmed by later statute. West's Wash.Rev. Code Ann. ss 4.96.010-4.96.030.

	State Immunity	Local Immunity
West Virginia	**Absolute** Constitutional provision that state cannot be a defendant in a suit. W.Va. Const. Art. 6, s 35. Extends to instrumentalities of State, which includes local bodies when they are largely dependent on state funds or subject to extensive state control. Boggs v. Bd. of Educ. of Clay County, -- W.Va. ----, 244 S.E.2d 799 (1978).	**Limited** Judicially abolished for municipalities. Long v. City of Weirton, --- W.Va. ----, 214 S.E.2d 832 (1975). For counties, see Cunningham v. County Court, 148 W.Va. 303, 134 S.E.2d 725 (1964). Insurance authorized. W.Va. Code s 8-12-7.
Wisconsin	**Limited** Legislature to determine consent and method for suit. Wis.S.A. Const. Art. 4, s 27. Immunity judicially abolished. Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). Claims Board has authority to settle claims under $1000, make recommendations to legislature for larger awards. Wis.Stat.Ann. s 16.007.	**Limited** Judicially abolished. Holytz, supra. Usual statutory restrictions. Maximum recovery $25,000. Wis.Stat.Ann. s 895.43. Insurance authorized. Id. 66.18. Stanhope v. Brown County, 90 Wis.2d 823, 280 N.W.2d 711 (1979), upheld the constitutionality of the limitation of recovery and held that if the institution waives its immunity in the insurance policy it is liable beyond the statutory limit for the policy limits.
Wyoming	**Limited** Constitution allows legislature to provide for suits against the state. Wyo. Const. Art. 1, s 8. Legislature has provided for immunity, and courts will not judicially alter the doctrine. Davis v. Bd. of County Comm'rs, 495 P.2d 21 (Wyo.1972). Oroz, infra, reserved question of state immunity.	**None** Judicially abolished. Oroz v. Board of County Comm'rs of Carbon County, 575 P.2d 1155 (Wyo.1978). Earlier statute provided for waiver of immunity to extent of insurance. Wyo.Stat.Ann. s 1.618(1).

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[438] Bibb v. Navajo Freight Lines, Inc. 79 S.Ct. 962, 964 (1959).

[439] U.S. Const. amend. V.

[440] 23 U.S.C. § 409 (2000).