

**Potluck in the Court of Claims -
Proving liability in pothole cases against the State of Illinois
by Charles T. Newland**

Anybody that has ever driven on the roads in Illinois knows the shock from hitting an unseen pothole in the road. Fortunately, for most of us it doesn't result in a personal injury or significant property damage. For some, especially motorcyclists, hitting a defect in the road can be quite dangerous and even life threatening. If the incident occurs on a state owned road an injured party will have no remedy available to him in the circuit courts. However, there is a forum to hear the claim.

Preliminary Considerations & Notice

To recover for personal injury or property damage against the State of Illinois or any of its agencies, including Illinois Department of Transportation, (IDOT) a party must proceed as a claimant in the Illinois Court of Claims. The Illinois Court of Claims has exclusive jurisdiction for all damage claims against the State or any of its agencies. *705 ILCS 505/1*. The Court of Claims is made up of 7 judges that are licensed attorneys in the State of Illinois and appointed by the Governor. *705 ILCS 505/1*. Unfortunately, the most a claimant can recover for personal injury is \$100,000.00. *705 ILCS 505/8*. Proceeding in the Court of Claims is governed by the Court of Claims' regulations *74 Ill. Adm. Code 790 et seq.* Except as otherwise stated in the regulations, pleadings and practice are governed by the *Code of Civil Procedure*. *74 Ill. Adm. Code 790.20*. Before filing a claim in the Court of Claims, a claimant must first comply with the notice provision of *Sec. 22/1* of the Court of Claims Act, which provides that notice must be served on the State within one year

from the alleged occurrence to the Office of Attorney General and the office of the Clerk of the Court of Claims. 705 ILCS 505/22-1. The notice must contain the claimant's name, residence, date and approximate time of the accident, location and brief description of how the accident occurred. *Id.* Further, the notice must also provide the name and address of the claimant's attending physician. *Id.*

Once you determine that the accident occurred on a State owned roadway and if time allows, before giving notice to the State, a complete investigation of the accident site should be conducted, including the taking of photographs and measurements of the pothole in question. Having photographs of the specific defects in the road near the time of the alleged occurrence is invaluable. Serious consideration should be given to the hiring of a civil engineer, who is an expert on road conditions, deterioration and maintenance. If there are witnesses to the accident their statements should be obtained as soon as possible.

Pleadings

The statute of limitations for filing a complaint for damages to personal property or bodily injury arising from tort is the same as any other negligent action, two years. 705 ILCS 505/22 h). A case is commenced by filing a verified complaint with the Clerk of the Court, 74 Ill. Adm. Code 790.40. A party filing the case should be designated as the claimant and the State of Illinois and State Agency should be designated as the respondent. 74 Ill. Adm. Code 790.40 a).

The Complaint must set forth ten items in the order specified by the regulation: 1) a statement identifying the nature of the claim and the section of the Court of Claims Act under which relief is sought; 2) all necessary allegations required to state a cause of action; 3) whether the claim has been previously filed in

any State department; 4) the persons that are owners of the claim; 5) that there has been no assignment or transfer of the claim except as stated in the complaint; 6) that the claimant is justly entitled to the amount prayed for in the complaint from the State of Illinois or appropriate agency; 7) that the claimant believes the facts stated in the complaint are true; 8) whether this claim or any claim arising out of the same occurrence has been previously presented to any person, corporation or tribunal other than the State of Illinois and if so the action that was taken; 9) a bill of particulars setting forth the damages in detail and the amount claimed as a result of thereof; 10) whether the claimant is acting in a representative capacity, such as an executor, administrator or guardian. *74 Ill. Adm. Code 790.50 a) 1-10.*

In personal injury cases the claimant is required to attach to the complaint copies of the notices served as required by *Sec. 22/1* of the Court of Claims Act and the bill of particulars should contain the names and addresses of all persons and hospitals providing medical services, the claimant's place of employment and time lost from work . *74 Ill. Adm. 790.50 b) 1-2.* Generally the respondent shall answer within 60 days after the filing of the complaint, however if the respondent fails to answer, a general denial of the facts set forth in complaint shall be considered as filed. *74 Ill. Adm. Code 790.100.* Once the case is at issue, the Court will assign a commissioner who will conduct regular status hearings, hear motions and ultimately conduct a hearing on the merits. *74 Ill. Adm. Code 790.100, 790.110.*

Discovery

If the Attorney General does not file an answer on behalf of the State, the first you will hear from them is when you receive records, pursuant to section 790.140, maintained by IDOT and kept in the regular course of business related to the subject

matter of the case pending before the Court. These records are *prima facie* evidence of the facts set forth in the documents. 74 Ill. Adm. Code 790.140. The records may reflect the department's investigation of the incident after receiving notice, including internal memos from the Claims Office to the Bureau of Maintenance, as well as, computer generated crash detail reports of accidents at or near the alleged occurrence within last 3 to 4 years. These reports do not reflect whether the accidents were caused by the condition of the road. Therefore, you should not be satisfied with IDOT's disclosure at this point. It is imperative that you follow through with comprehensive discovery, just as you would in any personal injury case. Interrogatories and requests to produce should be directed at disclosure of prior repairs, accidents reports, prior complaints and complete maintenance records from the IDOT section responsible for the specific roadway for at least 5 years prior to the alleged occurrence.

Unless you have worked for IDOT you will not be able to decipher the codes used in the maintenance reports without taking the deposition of the section supervisor and other maintenance workers. These reports contain the areas of road, date, time and type of maintenance that was conducted, as well as, the volume and type of material used to make certain repairs. This information can be extremely useful in proving constructive notice of the poor condition of the roadway in the particular section.

In deposition an IDOT engineer will be hard pressed to deny an obvious defect in the road in need of repair depicted by photographs taken within days of the alleged occurrence. Using the credentials of the Department's engineer can also assist you in establishing that defects such as potholes generally do not occur over

night and take several weeks, if not months, to develop as a result of temperature changes, moisture, salt and volume of traffic. There is a code in the maintenance reports for “road patrol”. Road patrol is when the employees of IDOT drive the section of the road looking for downed signs, large debris, tires, dead animals, as well as, potholes that need to be filled. Attention should be drawn to how often road patrol is done in a given area. Regularly conducted road patrol in the area of the pothole provides little justification for the failure to see an obvious defect in the roadway.

Trial

After discovery is completed your assigned commissioner will set the matter for trial. More than likely, the major issue at trial will be whether the State had notice of the pothole that caused a dangerous condition. The state is not insurer of safety and the mere fact that the defect on the highway may have caused an accident is not determinative of negligence. *Kling vs. The State of Illinois, 54 Ill. Ct. Cl. 305 (2001)*. However, the State has a duty to exercise reasonable care in maintaining its highways so that defective and dangerous conditions do not exist. *Id.* The claimant must prove by preponderance of the evidence, that he suffered injuries as a result of an accident on the State highway due to a dangerous defect; the State had actual or constructive notice of the dangerous condition or defect; the State was negligent; and the State’s negligence was the proximate cause of the injuries. *Id at. 9*. Unless you find a “smoking gun” in discovery, such as an accident report identifying the same pothole, you will have to prove the knowledge of the defect by constructive notice. The particular facts of each case will determine whether there is a constructive notice. *Id.*

Constructive notice is defined as “notice arising by presumption of law from the existence of facts in circumstances that a party has a duty to take notice of ...; notice presumed by law to have been acquired by a person and thus imputed to that person” *LaSalle Nation Bank vs. Dubin Residential Communities Corporation*, 337 Ill. App. 3d 345 (1st Dist. 2003) citing Black’s Law Dictionary 1088 (7th ed. 1999). The simple way of explaining notice is the respondent “knew or should have known of the hazard and did not take steps to remedy the hazard in a reasonable or timely manner”. *Dennis vs. The State of Illinois*, 51 Ill. Ct. Cl. 142 (1998). Constructive notice will be imputed where the defect causing a dangerous condition is substantial and must have existed for such a length of time that a reasonable persons would conclude that immediate repairs should be made or warning signs should be posted. *Block vs. The State of Illinois*, 52 Ill. Ct. Cl. 398 (2000).

The cases where constructive notice is imputed demonstrate the importance of the initial investigation, photographs and corroborating witnesses. Even without photographs of the alleged pothole the substantial nature of the defect can be proven with eye witness testimony. *Immordino vs. The State of Illinois*, 47 Ill. Ct. Cl. 78 (1995). Photographs that reflect the nature of the defect can be evidence of how it caused a vehicle to loose control, even though no actual measurements of the pothole are presented. *Wysopal vs. The State of Illinois*, 52 Ill. Ct. Cl. 227 (2000). Objective evidence such as photographs of a claimant’s vehicle showing flat tires and bent rims can also be used to prove the substantial nature of the defect. *Pugh vs. the State of Illinois*, 54 Ill. Ct. Cl. 447 (2001). Further, prior repairs and the nature of the repairs in the area of the pothole are extremely helpful. For example, evidence that IDOT used temporary cold patch to fill potholes in the area of the alleged

accident can be used to show constructive notice. *Immordino vs. The State of Illinois*, 47 Ill. Ct. Cl. 78 (1995).

At the close of evidence the commissioner will take the exhibits and give the parties time to submit legal memorandum or just case law. The commissioner then will write an opinion and send it with the exhibits and transcript of the hearing down to the Court of Claims in Springfield. Eventually, you will be served with a written opinion and judgment by the Court signed by three Court of Claims judges. However, be patient, it is not unusual to wait up to 18 months before receiving the final order. Further, if you prevail, the claim will not be paid until after the Illinois General Assembly passes special legislation approving payment of the award.

Conclusion

Proving liability in the potholes cases against the State of Illinois rests on certain basics common to any lawsuit. First, familiarize yourself with the Court of Claims Act and the regulations. Second, conduct a thorough investigation of the accident site. Obtain good photographs and witness' statements. Follow through with written discovery and thoroughly prepare for depositions and cross examinations of IDOT employees to establish constructive notice.