

REVIEW DRAFT

I-5 Columbia River Crossing Partnership

Summary of Oregon and
Washington Public Tort
Laws affecting the
Columbia River
Crossing Project

Technical Memorandum 8.5.3-8.6.3

Prepared by

Steven M. Siegel

Date

Review Draft March 23, 2005

Technical Memorandum 8.5.3 - 8.6.3
Summary of Oregon and Washington Public Tort Laws
affecting the Columbia River Crossing Project

Table of Contents

1	Introduction	1
2	Washington	3
2.1	State Agencies	3
2.2	Local Governments	4
2.3	C-TRAN	5
3	Oregon	7
3.1	Public Entities	7
3.2	TriMet	8

Executive Summary

- In Washington, state agencies, local governments, and public transit operators are generally subject to the same actions for negligence and awards for damages as private persons; no special limitations or caps are available for public entities.
- In Oregon, state agencies, local governments, and public transit operators are granted special immunities and limits or caps on damages awards that are not available to private persons.

Technical Memorandum 8.5.3 - 8.6.3
Summary of Oregon and Washington Public Tort Laws
affecting the Columbia River Crossing Project

1. Introduction

There are important differences between Washington and Oregon laws regarding the potential liability of a public entity for negligence in the design or operations of the Columbia River Crossing Project (the “Project”). “Negligence” encompasses a large body of law, but it is essentially the failure to use such care as a reasonably prudent person would use under similar circumstances.¹ Negligence can occur by taking an unreasonable action, or by the failure to take a reasonable action. The following must be demonstrated to prove “negligence”: (i) the existence of a legal duty owed the injured party (the plaintiff) by the defendant (in this case a public agency), (ii) a breach of that duty (i.e. a negligent action or omission, given the standard of care required of the defendant), (iii) a causal relationship between the negligent action or omission and the injury, and (iv) damages to the plaintiff caused by the injury.

Given the size and scope of the Columbia River Crossing Project, its design, construction, and operation may provide fertile ground for allegations of negligence. The list of possible allegations of negligence in the design, construction, and operations of the Project is only limited by the creativity of the tort attorneys; as are the range and size of the alleged damages. For example:²

- Traffic engineering treatments such as shortened tapers and queuing areas may be employed to minimize the size of toll plazas. Motorists injured in accidents at the toll plaza may allege the injury was caused by a negligently designed toll plaza.
- A toll plaza supervisor may place traffic cones in the wrong location or flash an errant message on an electronic sign directing motorists into an obstructed lane, and causing an accident. Motorists injured in the accident may allege negligent operations of the toll plaza, or negligent hiring by the toll authority.
- Light rail train breaks-down on bridge, and a transit rider gets injured following errant emergency directions given by train operator. The injured transit rider may allege negligent operations of the transit facility.

The financial risk that such damage awards may create depends on the applicable state laws. Because the Columbia River Crossing Project may incorporate a multi-modal facility, the remainder of this report focuses on Washington and Oregon public tort laws affecting state agencies, such as WSDOT and ODOT, local governments, and transit operators, such as C-TRAN and TriMet.

¹ Black’s Law Dictionary, Sixth Edition.

² These are hypothetical examples of allegations that may be made by plaintiff’s attorney; they do not address the validity of the allegation. They are solely provided to describe to non-lawyers the types of allegations that could be raised. Further, no decision has been made regarding the inclusion or design of toll facilities or light rail in the project scope; thus, the facts presented herein are also purely hypothetical.

2. Washington

2.1 State Agencies

The State of Washington, as sovereign, cannot be sued unless it grants the right to be sued. Article 2, Section 26 of Washington's state constitution authorizes the legislature to regulate law suits against governmental entities. In 1963 the legislature established the right to sue the State for damages resulting from the State's tortious conduct (such as negligence), whether the tortious conduct occurs in its governmental capacity or its proprietary capacity.³ Furthermore, the State may be sued for damages to "*the same extent as if it were a private person or corporation.*"⁴ All provisions of law relating to the limitations of personal actions apply to claims against the state, except that there are special provisions relating to the computation of time limits.⁵

In Washington, an appointed or elected official or member of the governing body of a public agency⁶ is immune from liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity.⁷ However, the public agency remains liable for the tortious conduct of its officials or members of the governing body.⁸ Further, the State of Washington must indemnify its employees in the amount of any judgment, fine, or settlement claim levied against an employee, if:⁹

- The act or omission that caused the liability was in good faith
- If the act or omission that caused the liability occurred within the scope of employee's employment or duties; and
- The Attorney General is providing legal representation with regard to the case, as specified in RCW 4.92.070

Officers and employees of the state may request that the Attorney General defend them in any action for damages arising from their state duties.¹⁰ If the Attorney General finds that the subject act or omission was in good faith and within official duties of the employee or officer, the Attorney General must provide the defense at the State's expense.¹¹ If the preceding conditions are met and the court enters a judgment against the employee or officer, the judgment must be satisfied by the state, and does not become a lien on the employee's or officer's property.¹² There are no special limitations or caps on the judgment amount.

³ RCW 4.92.090

⁴ Id.

⁵ RCW 4.92.050

⁶ RCW 4.24.470(2)(a) "Public agency" means any state agency, board, commission, department, ... political subdivision, or unit of local government of [Washington] including but not limited to municipal corporations, quasi-municipal corporations, special purpose districts, and local service districts.

⁷ RCW 4.24.470(1)

⁸ Id.

⁹ RCW 4.24.490

¹⁰ RCW 4.92.060

¹¹ RCW 4.92.070

¹² RCW 4.92.075

With respect to highway projects, the question arises if damages are awarded, can highway funds be used to pay the damages. The Washington Supreme Court's holding in *Automobile Club of Washington v. City of Seattle*¹³ addressed this question. In this case, the court found that payment of a tort judgment does not directly or indirectly benefit the state highway system, since such expenditure would not contribute toward the safety, administration, or operation of the highway system. As such, funds that are restricted by Article II, Section 40 of Washington's state constitution, such as the Motor Vehicle Fund, cannot be used to pay tort judgments.

2.2 Local Governments

In 1967, the Washington Legislature made local government entities¹⁴ subject to tort claims by enacting what is now codified as RCW 4.96.010:

"All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation..."

As discussed above with regard to RCW 4.24.470(1), local officials or members of local governing boards are immune from liability for any discretionary decision or failure to make a discretionary decision within their official capacity, but liability remains with the public body.

Officers and employees of a local government may request that the local government pay for their defense against an action for damages arising from their governmental duties.¹⁵ If the local government finds that the subject act or omission was in good faith and within official duties of the employee or officer, the local government must pay for the defense.¹⁶ If the preceding conditions are met and the court enters a judgment for non-punitive damages against the employee or officer, the judgment must be satisfied by the local government, and the non-punitive damages do not become a lien on the employee's or officer's property.¹⁷ Local governments may also agree to pay awards for punitive damages, but are not required to do so.¹⁸ There are no special limitations or caps on the amount of non-punitive or punitive damages that may be awarded.

¹³ 55 Wn. 2d 161 (1959)

¹⁴ Under RCW 4.92.090(2) "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, or public hospital.

¹⁵ RCW 4.96.041(1)

¹⁶ RCW 4.96.041(2)

¹⁷ RCW 4.92.075

¹⁸ Id.

2.3 C-TRAN

The transit component of the Project presents added liability risks from that associated with the highway/bridge component. High capacity transit is vulnerable to tort claims for such situations as passengers falling as they get on, off or ride the transit vehicle; accidents or crimes at station areas; accidents in park-and-rides; or and other alleged failures to meet the operator's duty of care. In addition, high capacity transit is subject to accidents with vehicles in shared roadways, and for accidents with pedestrians crossing the right-of-way.

Should there be a high capacity transit component to the Project, it could be operated by the Clark County Public Transportation Benefit Area (C-TRAN), the Tri-Metropolitan Transportation District of Oregon (TriMet), or another government entity. C-TRAN is a transportation authority organized under RCW 36.57A to provide transit services in Clark County, Washington. As a "local government entity," and by the terms of its own statutory authority¹⁹, C-TRAN can be sued for its tortious conduct. As is the case with WSDOT, Washington statutes do not afford C-TRAN any special limitations on its potential liability.

TriMet does not have its own authority to operate transit service in Washington, but can do so under an agreement with C-TRAN.²⁰ While TriMet is protected by Oregon's tort limits for public entities when operating in Oregon, it is subject to Washington's unrestricted tort laws when operating in Washington. As a result, TriMet is insured for its Washington operations, while such insurance is not needed for its Oregon operations.

The issue of 'standard of care' arises in tort cases. Simply put, some persons or entities are legally expected to provide a higher level of care than the norm. In Washington, the courts have repeatedly held that transit operators, as common carriers of passengers, "owes the highest degree of care toward its passengers commensurate with the practical operation of a coach at the time and place in question."²¹

*Peterson v. Seattle*²² provides a good example of how this standard is applied. The facts in Peterson were summarized by the court as follows:

"... the rear wheels of the bus began to slip sideways toward the right-hand curb. The driver feared the bus might slide into the cars parked at the curb; he stopped the bus, set the brakes, and placed blocks under the rear wheels...The bus stopped with its left front end near the center line and its right rear very close to a parked car. There were six to eight passengers on the bus ... the driver said to them: "This is it," or "This is as far as I can go." The driver helped one man alight from

¹⁹ RCW 36.57A.080 states: "A public transportation benefit area may sue and be sued in its corporate capacity in all courts and in all proceedings."

²⁰ RCW 36.57A.100 requires such an agreement and TriMet would not otherwise be authorized to provide such operations under Oregon law.

²¹ For example, *Price v. Kitsap Transit*, 125 Wn.2d 456 (1994), *Boyd v. Edmonds*, 64 Wn.2d 94 (1964),

²² *Peterson v. Seattle*, 51 Wn.2d 187, 316 P.2d 904 (1957)

the bus. Respondent and a "heavyset" older lady were the last two passengers to leave the bus. They got off at the front door as had the others ... the other lady preceded her down the steps, but that she followed closely so as to try and steady the other lady as she descended the steps ...Being concerned about the older lady's ability to cross the street, respondent turned her head to watch her. Suddenly, respondent's feet went out from under her; she fell to the street..."

The court's analysis in Peterson reveals the scope of a transit operator's duty of care:

"The rule in this state is that the carrier must exercise the highest degree of care consistent with the practical operation of its busses to safeguard passengers from injuries ... We believe that under the circumstances of the instant case it would not have hindered the practical operation of bus service for the driver to have stood by the door and rendered such assistance as the passengers needed as they departed from the bus, helping those passengers who needed assistance across the slippery traffic lane to the sidewalk. It is therefore our opinion ... that the appellant was not prejudiced by the [jury] instructions as to its duties under the carrier-passenger relationship, and that there is no merit in the appellant's contention that the relationship had terminated as a matter of law when respondent set both feet on the street."

Based on this analysis, the Peterson court concluded:

"...If there is any evidence tending to show that the carrier failed to comply with the required standard of care, then the question of negligence must be left to the jury. We think that the care which is exercised must be proportionate to the degree of danger inherent in the particular circumstances."

While the principle that transit operators owe a high degree of care to their passengers is well established, the boundaries of this duty are less defined. For example, the court in *Zorotovich v. Washington Toll Bridge Authority*²³ expressed (in dicta) a 'we know it when we see it' approach to the scope of care required of a transit operator when it stated that:

"Other than when a person is in the act of boarding, entering, riding or alighting from a carrier's conveyance, there is a question of fact as to whether or not the passenger status has been created. It is even in doubt as to whether or not the carrier should be held to a higher standard of care for the maintenance of its platforms or approaches to its station or landing places, as opposed to its actual transportation functions. See Hart v. King County, 104 Wash. 485 (1918), wherein such a distinction was made."

Thus, whether TriMet or C-TRAN operates the transit component of the Project, there are notable and unresolved liability risks that are not capped when operating in Washington.

²³ *Zorotovich v. Washington Toll Bridge Authority*, 4 Wn. App. 801 (1971)

3. Oregon

3.1 Public Entities

Like Washington, Oregon waived its sovereign immunity to being sued. Under ORS 30.265(1), every public body²⁴ is subject to suit for its torts²⁵ and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. The Oregon Torts Claim Act (OTCA) defines “tort” follows:

*“Tort means the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.”*²⁶

This definition adopts a wide view of torts. Not only does it encompass traditional torts, such as negligence, it includes any breach of a legal duty (except contracts or quasi-contracts). For example, the court has ruled that certain “unlawful employment practices” are torts within the meaning of OCTA²⁷, as is a state agency’s breach of a statutory duty to assist individuals in reestablishing their business²⁸.

Officers, employees, and agents of public agencies acting within the scope of their employment or duties are immune from claims for, among others:²⁹

- Injury to or death of any person covered by any workers’ compensation law.
- Based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.
- Arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

²⁴ Under ORS 30.260(4), “public body” includes, among others,: (a) the state and any department, agency, board or commission of the state; (b) cities, counties, other political subdivision or municipal or public corporations; (c) intergovernmental agencies created under ORS 190; and (d) nonprofit corporations organized under ORS chapter 65 that has only political subdivisions or municipal, quasi-municipal or public corporations in this state as members.

²⁵ Under ORS 30.260(8), “tort” means the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.

²⁶ ORS 30.260(8)

²⁷ Griffin v. Tri-County Metropolitan Transportation Dist. of Oregon, 318 Or. 500 (1993)

²⁸ Urban Renewal Agency v. Lackey, 275 Or 35 (1976)

²⁹ ORS 30.265(3)

When an officer, employee, or agent of a public entity is immune from liability based on the above provision, the public body is also immune from a claim based on the act or omission of its officers, employees, or agents that is granted immunity.³⁰

Absent such immunity, tort actions against public bodies are permitted. However, tort actions are not permitted directly against officers, employees, or agents of a public body for actions or omissions occurring in the performance of duty; except if it was willful or wanton neglect of duty.³¹ If an action or suit is filed against an officer, employee, or agent of a public body, the public body must be substituted as the only defendant. Further, public agencies must indemnify its officers, employees and agents, whether elective or appointive, against tort claims

The limitations on tort claims set forth ORS 30.260 to 30.300³² represent the key differences between Oregon and Washington public tort law. ORS 30.270 sets limits on the amount of damages that may be assessed against a public body or its officers, employees or agents.³³ These limits include:

- \$50,000 per claimant for claims for damage to or destruction of property
- \$100,000 per claimant as general and special damages for all other claims arising out of a single accident or occurrence³⁴
- \$500,000 for any number of claims arising out of a single accident or occurrence
- No award for damages on any such claim can include punitive damages

Further, the remedies provided by ORS 30.260 to 30.300 are exclusive; no other form of civil action or suit is permitted.

3.2 TriMet

ORS 267.200 provide that mass transit districts, such as TriMet, may be sued in its own name. As a public agency, TriMet is afforded the special immunities and limitations on damage awards discussed above for any its acts or omissions in the State of Oregon. These immunities and limitations do not apply when TriMet is operating in Washington.

³⁰ ORS 30.265(2)

³¹ ORS 30.285

³² ORS 30.265(1)

³³ Providing they are acting within the scope of their employment or duties.

³⁴ Unless those damages exceed \$100,000, in which case the claimant may recover additional special damages, but in no event shall the total award of special damages exceed \$100,000