

DPRCG 2024 CONVOCATION

Steering Clear of MOT Liability

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THE VALUE OF
TRUST

Learning Objectives

In today's presentation, attendees will:

- Consider how firms are getting ensnared in MOT (maintenance of traffic) cases;
- Understand the risks associated with MOT and how to minimize them;
- Understand the importance especially of scope of duty in MOT contracts;
- Understand the need for and advantage to considering potential available coverage beyond professional liability.



DAILY NEWS

World - Business - Finance - Lifestyle - Travel - Sport - Weather

Issue: 240104

THE WORLD'S BEST SELLING NATIONAL NEWSPAPER

Est - 1965

First Edition

Monday 5th June

Police investigating hit-and-run fatality

Authorities are investigating a tragic incident after a dead body was discovered in a ditch along a road currently under construction. The victim, whose identity has not yet been released, was found early Monday morning after a passerby noticed the body and immediately alerted local law enforcement. Preliminary investigations indicate that the individual was the victim of a hit-and-run. According to police reports, the victim sustained serious injuries consistent with being struck by a vehicle. Investigators believe that the incident occurred late Sunday night or early Monday morning, when the area was less populated and visibility was reduced. "The discovery of this body is both shocking and heartbreaking," said Police Chief Sarah Belen during a press briefing. "We are working diligently to piece together the events that led to this tragedy and are urging anyone with information to come forward." Witnesses in the area reported hearing unusual noises around the



The Accident

- 2018: A twenty-three-year-old pedestrian was struck and killed by a vehicle while walking home from work late at night within the project zone, on east side of city street
- Driver left the scene, but turned himself in the next day after seeing a report on the news about the accident

The Accident

- Driver had been socializing with friends for several hours and was driving home; he was aware he was driving in construction zone; denied drug or alcohol use
- Driver reported that, at time of the accident, thought he'd struck either a dog or perhaps a construction barrel
- Driver criminally convicted of failing to remain at scene of accident, resulting in a fatality, and sentenced to three years



Background Facts

- Project was to repave roads, add sidewalks, and add pedestrian traffic control devices to sections of city street
- The section of street involved in the project did not have pre-existing accommodations for pedestrians in the form of sidewalks, dedicated pedestrian travel paths or dedicated pedestrian footpaths



Background Facts

- Prior to commencement of project, west side of street had no sidewalk, and east side of street had a paved shoulder
- Neither project design nor MOT provided for pedestrian traffic management during the project



The Contract

Hanson's Contract with the City:

- Observe construction phase of project for compliance with the plans and report to the City
- Provide a Resident Project Representative (RPR) and inspectors to perform administrative and record keeping functions, serve as liaison between contractors and City, observe the unfolding construction work, and inspect the work for compliance with the project plans



The Contract

Hanson's Contract:

- Nothing in contract referred to pedestrian safety
- Nothing required Hanson to evaluate design plans or MOT, or make recommendations for changes to design or MOT
- Administer the contract in accordance with the current edition of the City manual, which included provisions about pedestrian safety
- Preamble to City manual stated that nothing in the manual shall operate or be construed to modify, supplement, or otherwise change or alter the provisions of the contract documents between Hanson and City

The Lawsuit

- Estate sued various parties including general contractor, paving contractor, design engineer, sign and barricade company, City, and Hanson
- Driver named as well but dismissed out early in the proceedings after a settlement was reached
- Hanson tendered both to its general liability and professional liability carriers and both picked up the defense

The Lawsuit

- “The collision was also in part caused by the negligence of agents and/or employees of the [City, Paving Company] and Hanson Professional Services Inc., operating a construction zone and failing to adequately place cones or barricade the construction area, impeding the use of the public walkway, and/or failing to warn of the danger.”
- “Defendants, [City, Paving Company] and Hanson Professional Services, Inc. knew or should have known, through the exercise of reasonable care, of the dangerous conditions that existed at the time of the incident.”

The Lawsuit

Hanson's defense:

- Duty defined by either (1) contract; or (2) conduct
 - Undisputed that Hanson did not voluntarily engage in conduct outside of its contract duties (no gratuitous assumption)
 - No express contract duty to provide for pedestrian traffic
 - Contract duty limited to observing construction in progress for compliance with design which, again, Hanson did not provide
 - Undisputed that the construction in place at time of accident followed the MOT, design plans and specifications

Additional Challenges

- Expensive case to litigate, including multiple parties
- Driver should have been the target defendant but was not for lack of “deep pockets”
- Plaintiff argued that despite contract language, someone on the project should have taken more steps to protect pedestrians, even though construction followed the design plans and MOT
- If plaintiff can get in front of a jury, she has a very sympathetic case

The Outcome

- After conducting written and oral discovery, Hanson's defense counsel filed motion for summary judgment on basis of no Hanson duty
- Motion for summary judgment granted by trial court
- Granting of summary judgment in favor of Hanson affirmed by Court of Appeals; State Supreme Court declined to review further



The Outcome

- “The Estate contends that . . . Hanson assumed a contractual duty to the public using [street] during the project, including [pedestrian], to safeguard pedestrian traffic.”
- “by its plain and unambiguous terms, the City Manual cannot be construed in a way that modifies or supplements the PSA, and, therefore, it cannot provide a basis for establishing a contractual duty for Hanson in the manner the Estate argues. . . . Accordingly, we affirm the trial court’s grant of summary judgment as to Hanson.”

Lessons Learned

1. Look before you leap with MOT projects
2. Carefully define and limit your scope
3. Stick to your scope and just say no to scope creep!
4. Make sure you've read and understand any other documents incorporated into your contract
5. Only do MOT projects in Illinois and Indiana (Just kidding, but seriously!)
6. When in doubt, tender to GL as well as to PL
7. Teamwork pays!



Questions?



The information contained herein is intended for informational purposes only. Insurance coverage in any particular case will depend upon the type of policy in effect, the terms, conditions and exclusions in any such policy, and the facts of each unique situation. No representation is made that any specific insurance coverage would apply in the circumstances outlined herein. Please refer to the individual policy forms for specific coverage details.

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