

TRANSPORTATION CABINET

Frankfort, Kentucky 40622
www.kentucky.gov


Steven L. Beshear
Governor

Joseph W. Prather
Secretary

STATE HIGHWAY ENGINEER POLICY #2007-03

MEMORANDUM

TO: Chief District Engineers
Office of Rural and Secondary Roads
Division of Maintenance

FROM: O. Gilbert Newman, P.E. 
State Highway Engineer

DATE: December 17, 2007

SUBJECT: Installation of Guardrail at New Locations

On September 22, 2005, the Kentucky Supreme Court rendered a decision concerning two separate cases where a vehicle crash occurred at a location where no guardrail existed. In a November 16, 2005 memorandum (see attached copy), the Transportation Cabinet's Office of Legal Services encouraged the Department of Highways to review and, if necessary, strengthen its process for identifying, analyzing, and selecting new locations for the installation of guardrail. Although not specifically mentioned, this encouragement also affects the Office of Rural and Secondary Roads since they also allocate funds for installation of guardrail at new locations.

We have reviewed our processes for identifying, analyzing, and selecting new locations for the installation of guardrail. We propose the following actions be taken to strengthen these processes:

1. Effective immediately, any request for guardrail at a new location will be evaluated to determine if the location meets established warrants for guardrail. If warrants are not met, the requestor will be informed of this finding. If warrants are met, the necessary field information will be gathered and recorded.
2. The Warrants and Guidelines for Installation of Guardrail developed by the Kentucky Transportation Center and implemented by the Department of Highways on May 17, 1990, shall be used to generate hazard index points for each location that meets warrants. The resulting hazard index points will be used to identify relative priorities for guardrail at new locations. Locations on the Rural Secondary System will be identified by county and locations on the State Primary, Secondary, and Supplemental Systems will be identified by district.



3. Due to two, distinct funding sources established by statute, any decision to install guardrail at a new location on the Rural Secondary System will be based on the amount of available funds, cost effectiveness, and hazard index points for all Rural Secondary locations in a specific county. Any decision to install guardrail at a new location on the State Primary, Secondary, or Supplemental Systems will be based on the amount of available funds, cost effectiveness, and hazard index points for all State Primary, Secondary, and Supplemental locations in a specific district.
4. The lists of record for potential new locations for guardrail will reside in the Central Office. The Rural Secondary System lists will be in the Office of Rural and Secondary Roads. The State Primary, Secondary, and Supplemental Systems lists will be in the Division of Maintenance.
5. Upon the availability of funding for guardrail projects at new locations, the Executive Director of the Office of Rural and Secondary Roads will approve recommended projects for the Rural Secondary System and the State Highway Engineer will approve recommended projects for the State Primary, Secondary, and Supplemental Systems.

By strengthening our process for identifying, analyzing, and selecting new locations for the installation of guardrail, we are, in fact, duly considering available funds and cost effectiveness. This will help to minimize potential liability to the Cabinet and promote greater highway safety.

OGN:CAK

Attachment

- c: Bobby Russell, Executive Director, Office of Legal Services
Department of Transportation Safety
Deputy Executive Directors, District 1 - 12



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Ernie Fletcher
Governor

Bill Nighbert
Acting Secretary

Memorandum

Jim Adams
Deputy Secretary

**PRIVILEGED ATTORNEY-CLIENT COMMUNICATION
NOT FOR RELEASE**

TO: Bill Nighbert
Acting Secretary of Transportation

Jim Adams
Deputy Secretary of Transportation

Marc Williams
Commissioner, Department of Highways

Debra Gabbard
Executive Director, Office of Policy and Fiscal Management

FROM: David S. Samford 
Executive Director, Office of Legal Services

RE: Recent Supreme Court Case Law – Guardrails

DATE: November 16, 2005

On September 22, 2005, the Kentucky Supreme Court entered the Opinion of the Court in the cases of Commonwealth of Kentucky v. Robin L. Babbitt, et al, Madison Circuit Court, No. 99-CI-892 and Brandon Taylor et al. v. Commonwealth of Kentucky, Daviess Circuit Court, No. 02-CI-114. Both cases arise from claims asserted against the Department of Highways in the Kentucky Board of Claims, under the authority of KRS 44.070 et seq., regarding the lack of guardrails at the location of two motor vehicle accidents.

The Board of Claims concluded in both cases that the negligence of the respective vehicle's operator was the sole cause of the accident. The Madison Circuit Court reversed and remanded the Babbitt case, however, for a determination as to whether the lack of guardrails somehow contributed to the claimant's damages. The Daviess Circuit Court affirmed the denial of the claim in the Taylor case. Perceiving an inconsistency, the Supreme Court granted discretionary review of both cases.

Under both KRS 44.120 and KRS 411.182(2), liability to the Commonwealth accrues where damages to third parties are caused by the negligent acts of the Commonwealth.

Thus, while the negligent acts of the Commonwealth may not cause a motor vehicle accident to occur, the Commonwealth may nonetheless be proportionally liable for any damages arising from an accident. This appears to be another way of saying that the Commonwealth has a duty to mitigate the damages suffered by motorists by acting non-negligently in the placement of safety devices such as guardrails, rumble strips, signage and stripes.

Said another way, a highway authority is not automatically liable every time a motorist drives his vehicle off the traveled portion of the highway and strikes a roadside hazard. Nor does the failure to follow design guidelines, such as those recommended by AASHTO or the [KTC] Warrants & Guidelines, constitute the equivalent of negligence per se (as implied by the Board in the Babbitt case). **Whether the failure to provide warnings or to erect a guardrail at a particular location constitutes negligence on the part of the highway authority is a fact-intensive inquiry for which the various design guidelines, as well as available funds and cost effectiveness, may be considered.** If a determination is made that the failure to provide warnings or to erect a guardrail constitutes negligence, the factfinder must then determine from the evidence whether the presence of warnings or a guardrail would have prevented or reduced the damages sustained by the claimant and apportion liability in accordance with KRS 411.182.

Commonwealth of Kentucky v. Babbitt, et al, Ky. ___ S.W.3d ___ (Sept. 22, 2005) (emphasis added).

The general rules of comparative fault and apportionment of damages as articulated by the Supreme Court have been often stated. Likewise, the Court's notation regarding the adherence to design guidelines is a familiar factor in evaluating negligence. The Court appears to break new ground, however, when it identifies "available funds and cost effectiveness" as new measures of potential negligence. Therefore, to the extent the Department is not already doing so, all guardrail project proposals should be evaluated from both a design and fiscal standpoint. This may require a more formal methodology for preparing, proposing, evaluating, approving and implementing guardrail projects.

This Office stands ready to assist in the development of any policies or procedures which may be necessary to help minimize potential liability to the Department as well as promoting greater highway safety. A full copy of the Court's Opinion is attached for your reference.