

Highway risk and liability claims

A Practical Guide to Appendix C of The Roads Board report
“Well Maintained Highways - Code of Practice for Highway
Maintenance Management”

2005 Edition

London

November 2005

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1 Introduction

This guide has been prepared in support of the Roads Board Report: “Well Maintained Highways - A Code of Practice on Highway Maintenance Management”. It is based on the Kindred Associations Guidance on Highway Liability Claims, first published in 1995 and revised in 1998.

Purpose of the guide

- to provide local authority engineers, transport planners, landscape architects, elected members, insurers, risk managers and anyone else with responsibility for providing and maintaining the roads infrastructure, an overview of the current position on highways liability arising from maintenance, including latest philosophy and views on best practice and legislation.
- to set out the ground rules for good practice and prepare the foundation for a national claims trend and performance indicator database. Sharing highway related claims information will help participating Highway Authorities to monitor their performance against others and national trends
- to encourage all UK highway authorities to support a national highways claims initiative.

Using the guide

Although the task group have taken every care in the preparation of the guide, neither the authors nor their organisations can accept any legal liability for its contents, which do not necessarily reflect the views of the sponsoring organisations. Where possible this document refers to legislative practice in England, Wales, Scotland and Northern Ireland. Where specific reference is made to case law the implications of the legislation in force must be checked. The information is provided in good faith and on the condition that users will employ their own judgement in implementing any of the examples or suggestions contained in the guide.

Who produced the guide?

In November 2003 the UK National Roads Board formed a sub group whose task was to provide a best practice document for roads authorities to assist in their handling of highway liability claims. In parallel the Institution of Civil Engineers (ICE) tasked a working party of their Municipal Group to investigate similar issues to update earlier work on highways liability undertaken jointly between the CSS, and TAG. To avoid duplication of effort and to provide a common approach a decision was made for the two groups to work together. It was also decided that those involved in similar initiatives, the Association of Public Services Excellence (APSE), the Association of British Insurers (ABI) and the Association of Local Authority Risk Managers (ALARM) should also be invited onto the group.

The members of the UK highway liability joint task group were:

Jim Valentine - ICE	Ian Holmes DfT
Andrew Murray – DRDNI – Roads Service	Lorraine Bennett - APSE
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2 Background to Highways Claims and Risks

2.1 INCIDENTS ON THE HIGHWAY

Each year there are over 4 million incidents on the highway, ranging from fatal accidents, to minor falls or damage. Research conducted by TRL in the 1980s found that over three quarters of accidents were solely due to human error. (TRRL Report 567) Similarly in law, road users are required to be responsible for their own safety. A proportion of these incidents involve individuals who believe that the highway authority is wholly or partly responsible.

Overall accidents on the roads / footways

The combined effect of under-reporting, under-recording and misclassification suggests that there may be 2.76 times as many seriously injured casualties than are recorded in the national casualty figures and 1.70 slight casualties, according to TRL Report 173 *Comparison of hospital and police casualty data: a national study* by H F Simpson. http://www.dft.gov.uk/stellent/groups/dft_transstats/documents/page/dft_transstats_507487.hcsp

Type of incident	Typical Numbers per annum	
Fatalities	3,000	Around 70 pedestrians die each year following injuries sustained on the footway.
Serious Injury Casualties	30,000	Misclassification owing to the difficulty owing to the difficulty in assessing internal injuries at the scene of an accident may hide a total casualty figure of near 100,000 per annum
Slight Injury Casualties	250,000	Two thirds of slight injury accidents are thought to go unreported, suggesting actual casualties are in excess of 400,000 per annum
Damage only accidents	3-4 million	Cost of these is £5 billion per annum
Total number of incidents	Over 4 million	

It is important to be aware of statistical and probabilistic phenomena when considering highway incidents. At a local authority level the number of fatalities can vary significantly from one year to the next, without implying any particular trend. This is even more the case at a site level where effects such as regression to the mean can paint a misleading picture of what is happening on the highway.

2.2 CLAIMS

Highways risks are just one of many risks that the local authority needs to manage. Other examples include arson, long-term claims for abuse of children in the local authority's care, and so on. These have at times resulted in massive claims.

2.2.1 Claims Statistics

Highway related claims, especially those associated with footways, are a major element in national and local government's third party public liability claims. Footway defects produce most of the third party highway related claims. The drain placed on public funds is considerable. Local authorities are thought to spend £100-500 million a year managing highway claims. A local authority with an efficient maintenance regime, maintaining roads according to the Code of Good Practice, and backed by rigorous systems for inspection and claims handling will pay very few claims. However there are some local authorities where the amount paid out in claims has been similar in size to the footway maintenance budget.

It is important to consider claims from the individual's perspective. The outcome of an incident on the highway is influenced by the health of the individuals involved. Falls can have serious consequences for elderly people.

2.2.2 Trends

The trend over recent years has shown dramatic increases both in claims lodged and the cost of claims: -

An 88% increase in the number of claims over the past ten years. (AIA – ALARM Survey 2003)

In 2003/2004 there was a 40% plus increase in Public Liability Insurance premiums for both Public and Private sectors.

2.2.3 Impact of claims on local authorities

Cost of handling a claim

Cost of inspecting site of alleged incident and filing report	£150
Claim Administration - Simple Claim	£200 - £800
Cost of Claim Going to Sheriff Court or Crown Court	£7,500 - £12,500 legal fees alone
Queen's Counsel	£2,000-£4,000 per day

Many local authorities have opted for significant excesses to keep the premium costs down.

The size of these excesses has led many highway authorities to self-fund liability claims up to an amount for catastrophic damages, for example self-insuring claims up to £250,000. In order to adapt to these changes highway authorities have had to arrange internal funding for most highway related claims.

2.3 GENERIC TYPES OF LIABILITY

(a) Non-feasance - not doing something

Examples:

- not having maintained a footway to reasonable standards
- not having identified or remedied a highway defect which was in the authority's control
- not having identified a danger which was in the control of a third party, eg a utility.

(b) Misfeasance – not having done adequately

Examples:

- poor workmanship
- defective materials.

(c) Malfeasance – doing something wrong

Examples:

- unsafe design
- trapping a road user into danger.

2.3.2 Examples of main causes of highway liability claims

This section is based on current case law. It lists potential outcomes. For definitive information, readers should consult the source judgements, and where appropriate take legal advice. It should be remembered that the courts have repeatedly asserted the responsibilities road users have for their own safety.

Cause	Potential Consequences	How an authority could become liable
Trips/Rocking Slabs	Damage to clothing, sprained ankles, broken wrists, arms. In rare cases death can result. In an elderly person complications can be serious.	<ul style="list-style-type: none">• Inadequate frequency of inspection.• Inappropriate intervention level bearing in mind potential danger.• Inaction.
Potholes	Damage to tyres, wheels, tracking, suspension. Rarely, loss of control, and serious or fatal injury. Risk to cyclists/motorcyclists is potentially higher than vehicle users. Risk also applies to pedestrians walking in or crossing the road.	<ul style="list-style-type: none">• Inadequate frequency of inspection.• Inappropriate intervention level bearing in mind potential danger and use.• Inaction.
Poor surface friction	Skidding. Serious injuries or fatalities owing to extreme deceleration from high speeds or crushing owing to sideways impact.	<ul style="list-style-type: none">• Failure to act in the face of history of accidents.• Inadequate frequency of inspection.• Inappropriate intervention level.
Aquaplaning	Aquaplaning occurs at speeds above 40 mph. Serious injuries or fatalities owing to extreme deceleration from high speeds or crushing owing to sideways impact.	<ul style="list-style-type: none">• Failure to act in the face of knowledge about drainage problems.• Failure to act in a way proportionate to the importance of the road.• Responsibility will be apportioned by courts – eg motorist going too fast for conditions, or having worn tyres.

2.3.3 Less frequent causes

Cause	Potential Consequences	How an authority could become liable
Unsigned sharp bend	Skidding off bend. Serious injuries or fatalities owing to high speeds, potential for crush injuries owing to sideways impact, eg with tree or street furniture.	<ul style="list-style-type: none"> • The vast majority of bends are obvious. Driver holds responsibility. There is no duty to provide information about the highway. • The authority could become partly liable by erecting a road sign in an exposed position.
Unexpected hazard in road, for example debris, plant, materials.	Collision	<ul style="list-style-type: none"> • Liability depends on frequency of inspection and promptness of action once danger reported. • The road user has a responsibility for keeping a lookout for obstructions.
Obliterated markings at road junction	Collision if drivers fails to take due care.	<ul style="list-style-type: none"> • Where the use of the road depends on the existence of the markings on which road users customarily depend and that are key to establishing a pattern of movement, temporary obliteration could in exceptional circumstances lead to the entrapment of road users and the authority being held partly responsible.
Worn out sign warning of obvious hazard	Collision	<ul style="list-style-type: none"> • The road user has a responsibility to take the road as they find it. • The Gorringe v Calderdale ruling is that signs and markings are not part of the fabric of the highway, and consequently not covered by the duties under the Highway Act 1980.
Defect in design – road user entrapped into danger	Miscellaneous	<ul style="list-style-type: none"> • Road users bear responsibility for own safety. Courts will apportion responsibility. Claimant will have to establish that they were entrapped into danger. It is only in exceptional circumstances that individuals may be able to establish breach of duty of care.
Restricted visibility at a junction	Collision if drivers fail to take road as they find it	<ul style="list-style-type: none"> • Road users bear responsibility for own safety. Unless the junction is new, it is unlikely the local authority will be liable. • For obstructions on private land see <i>Stovin v Wise</i>

2.4 FACTORS THAT INFLUENCE CLAIMS TRENDS

The factors underlying these trends include:

- **Maintenance backlog on local roads and footways** – Claim opportunities occur because roads and footways have deteriorated due to the historic lack of investment and subsequent maintenance backlog. Effective planned maintenance budget allocations can reduce maintenance-based claims to negligible levels.
- **Media coverage of highway liability claims** – There has been extensive media coverage given to the citizen's right to claim from the highway authority in cases of accident and injury on public or publicly maintained property. Even though many of the claims are small in value, such as tripping on the footway leading to sprains, cuts and bruising; they are expensive to administer and process.
- **High profile advertising** – Adverts now appear in doctors' surgeries, local newspapers, television, national and local radio.
- **Media personalities** – Some figures have been putting their name to such adverts.
- **Growth in no-win no-fee companies** – The legal and claims profession have also increased their advertisements for claimants on a 'No Win - No Fee' basis, although recent spectacular failures in this area may temper future expansion.
- **Open Government – freedom of information** – Open government raises public awareness of expected service delivery through publicised performance targets and monitoring of the quality of service delivery. The promotion of formalised complaints procedures by local authorities also contributes to raise the level of expectation and the commensurate disappointment in any perceived shortfall.
- **Freedom of Information Act** – This is making public bodies far more accessible to individual members of the public. This Act gives the public a statutory right of access to non-personal information held within the Highway Authorities i.e. information which does not relate to people. In other words, the Council can be asked for virtually any information and will be under a legal obligation to provide it.
- **New types of claims being made** – Recently, actions have been brought, not merely for physical or financial loss, but for 'loss of face', that is perceived to cause damage to a person's standing in society. The potential for such claims is very substantial.
- **Level of awards being made** - There are no set financial compensation figures for the loss of a limb or other physical injuries suffered in road or other accidents for which a third party is proved to be at fault. Awards are usually agreed through out-of-court settlements decided by claims handlers and the injured person's lawyer, after studying previous awards by judges. The settlements can vary enormously depending on the age, state of health, family status and even hobbies of the individual concerned. Society is generally dissatisfied with the levels of awards, particularly for the routine types of injuries that are common in footway trips and the like.
- **Fraudulent claims** – surveys suggest that 1 in 7 people are prepared to make fraudulent claims on insurance policies. Local authorities are particularly vulnerable to people asserting that they have sustained injury or loss on the highway, as these events often have no independent witness. The local authority is in the difficult position of wishing to treat legitimate claimants fairly and courteously, and yet deal appropriately with fraudsters.

3 The Law on Highway Liability

3.1 INTRODUCTION AND HISTORY OF HIGHWAYS LAW

3.1.1 Mending your ways

(a) From feudal service to fiscal systems

The origins of highway law go back as least as far as the Saxons and the introduction of a system of government where everyone in the country had a lord, and owed them service – military or civil. It is under this model of government that the duty to maintain the highway emerged. Examples of early highway law include:

The Domesday book records that “if anyone makes a fence or a ditch by which the king’s public way is narrowed....for each offence of this sort he shall pay 100 shillings to the King.”

The Statute of Winchester 1555 required frontagers to wash the streets specifying the number of buckets of water to be used and the frequency.

For many centuries local people were under a duty to “mend their ways”. The original laws talk about repair

“repairable by the inhabitants at large”

and as Lord Scott explains in the *Gorringe v Calderdale* judgement - putting their roads

“into such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year. This duty was enforceable by proceedings on indictment.”

Lord Scott continues, and this is the critical aspect of the tradition

“But if the inhabitants of the parish neglected their duty and allowed the roads to fall into disrepair with the result that someone was injured, they were not liable in damages. See, for instance, *Russell v The Men of Devon* (1788) 2 TR 667, 672 per Lord Kenyon CJ. “

“So firmly rooted in the common law was this rule that, when later statutes put the duty of repair on other bodies, the rule survived and they too were not liable in damages unless the relevant statute made it clear, by express provision or necessary implication, that the duty was to be enforceable by action by the injured person. See *Gorringe v The Transport Commission (Tasmania)* (1950) 80 CLR 357, 375 - 376 per Fullagar J, cited with approval by the Privy Council in *Almeda v Attorney General for Gibraltar* [2003] UKPC 81, para 11. Although the rule related to failure to repair, it is equally clear that there was no common law duty on highway authorities to warn travellers that the roads were in a state of disrepair. A fortiori there was no duty to warn them of any problems that might be presented by the natural contours of the land over which the roads ran. Travellers had to look out for themselves.”

Evidently the highways repairs often left something to be desired, if the following account from around 1800 is to be believed.

“Of all the cursed roads that ever disgraced this kingdom in the very ages of barbarism, none ever equalled that from Billericay to the King's Head at Tilbury. It is for near 12 miles so narrow that a mouse cannot pass by any carriage. The ruts are of an incredible depth.”

Of the road to Wigan:

“I know in the whole range of language no terms sufficiently expressive to describe this infernal road. Let me most seriously caution all travellers who may accidentally propose to travel this terrible country to avoid it as they would the devil.”

Arthur Young a surveyor to the Board of Agriculture
p185 The Roads of England - RMC Anderson

In the early days a citizen's duty to mend their ways was owed in the form of direct labour. This evolved into a system where the duty could be discharged by payment and over time a system for taxation and payment for the repair of roads developed at the parish level. In 1691 parishes were given powers to levy rates to fund the maintenance and improvement of roads and paths. This was not without difficulties. The imprecise wording of statute was the subject of complaints. A commission that investigated the consolidation of powers in the 1830s commented that:

"the principle upon which one description of property is rated under the laws referred to, has been changed several times by the courts in their decisions; and that the reports, and even the most approved text books upon it, which are not of very recent day, are calculated to mislead the inquirer, who would look in vain for what the law either is or, has been on the subject in any statute, though the power of rating is not a common law power, but is derived entirely from the statute."

General Highway Act, 5&6 W.IV.c.50. with Notes and an Index, Bateman J;
Maxwell, Sweet, Stevens & Sons, London 1835.

The problem of definitions plagues highways law even now. Section 41(1) of the Highways Act 1980 provides that—

"The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty to maintain the highway."

Section 329(1), the definition section, says that—

"'maintenance' includes repair, and 'maintain' and 'maintainable' are to be construed accordingly."

The *Gorringe v Calderdale* case turned on whether a white road marking was included in the definition of what was a highway. Maintenance has traditionally involved the repair of the fabric of the highway, something re-iterated by Lord Denning, and later accepted by the Lords in their decision in *Gorringe v Calderdale MBC* which ruled that a road marking is not part of the fabric of the highway. So “maintain” means “repair”, and the “highway” means “fabric of the existing highway”. The legal costs of the *Gorringe v Calderdale* case were substantial.

Returning to the history, the establishment of the Turnpike movement, funded through tolls, or what we might now describe as road user charging, was a reaction to a rapid growth in the economy and the need to address the poor state of the roads. It is through this system that much of the modern “A” road network evolved, mostly through improvements to existing roads, and some new alignments.

Since this time we have witnessed the arrival of the motorcar and new lifestyles that make full use of them: long distance commuting, out of town shopping centres, and families and friends separated by long distances. Highways have been forced to change from enabling short distance movement at walking pace, to carrying high-speed, short, medium and long

distance motor traffic. Most were never originally intended for high-speed motor vehicles. This is something that should be borne in mind when considering liability, and underlines the importance of the common law approach of motorists being obliged to “take roads as they find them”.

A major change in the law on highway repair came in Section 38 of the Highways Act 1959, which removed the duty to repair highways from “the inhabitants at large” and section 44 placed it upon highway authorities. It also introduced the term “Maintainable at the public expense”.

In the Highways (Miscellaneous Provisions) Act 1961 Parliament created a duty to maintain the highway, but provided the special defence, (now found in S58 HA 1980) if the highway authority had taken reasonable steps to ensure that the part of the highway to which the action related was not dangerous to traffic.

3.1.2 Now and the future

Since the Highways Act 1980 there have been a number of developments. There have been a series of legal cases that have attempted to fill the void created by the circuital definition of highway in the Highways Act, and the absence of a clear definition of “maintain”, or the struggle with the implication of the word “duty”. The Courts have endeavoured to resolve these and other ambiguities. An example as given above is the House of Lords ruling in *Gorringe v Calderdale* 2004 which found that the highway is the surface of the highway, but not signs or road markings.

Other changing areas include:

Human Rights Act 1998 – in *Andrews v Reading Borough Council* 2005 there is an example of a highway authority being obliged to pay compensation to a householder suffering increased noise as a result of a traffic management scheme.

Health and Safety Act at Work 1974 – will this impact on highway authorities where a council employee is injured as a consequence of a failure of the local authority to discharge one of its duties.

The Disability Discrimination Act 1995 – courts have in the past held that the highway must be made safe for the “normal run of driver”, and it has been accepted that highway authorities may make reasonable policies regarding cost.

Corporate Manslaughter – The 2005 consultation on the legislation would place a liability on local authorities.

Actions of Corporate Manslaughter against Highway Authorities will be considered by the Police in accordance with The Road Death Investigation Manual Version 2 2004 which is available to download free of charge from http://www.acpo.police.uk/asp/policies/Data/rd_death_manual_v2_2004_updated_19x04x04.pdf

Highway Authorities should pay particular attention to Section 3.9 The Road (Pages 82 - 86) and Appendix F Examples of documentation likely to be required from the highway authority in the investigation of: (Pages 167 to 171)

Strict Liability on Motorists – in some European nations the notion of placing motorists under strict liability has been discussed.

Compensation Bill – see section 5 of this guide.

These areas will be covered in subsequent editions of the guide.

3.2 PRIME SOURCES OF INFORMATION

3.2.1 Search engines

Web search engines are effective in picking up cases from publicly available material.

The search engine provided by the British and Irish Legal Information Institute is one of the most powerful means available of searching precedents

<http://www.bailii.org/form/search1.html>

3.2.2 UK Courts

(a) Courts Service

<http://www.courtservice.gov.uk>

(b) Scottish Law Courts

www.scottishlaw.org.uk

(c) Northern Ireland

There is no publicly available guidance in Northern Ireland. Central Claims Unit on behalf of the Roads Service Agency of the Department for Regional Development has collated the relevant judgments in Northern Ireland. Assistance on Northern Ireland case authorities can be obtained through Central Claims Unit by contacting Stephen.Murphy@drdni.gov.uk.

3.2.3 Books

An Introduction to Highway Law, Orlik M. Shaw & Sons, 2001 ISBN 0721913318

Highway Law, Sauvain S J. Sweet and Maxwell, 1989 ISBN 0 421 562 307

3.2.4 Law reporting services

British and Irish Legal Information Institute	Access to Freely Available British and Irish Public Legal Information via a search engine.	http://www.bailii.org
All England Law Reports, Butterworths	A comprehensive listing of cases available on CD.	http://www.butterworths.co.uk/
Local Law UK, Sweet and Maxwell	A subscription service.	http://www.localaw.co.uk/
The Incorporated Council of Law Reporting for England and Wales	Some summaries of cases are available free through the web and provide a quick and authoritative reference.	www.lawreports.co.uk/
Rights of way law review	Covers English law of rights of way: and is published in ten instalments annually.	http://www.dspace.dial.pipex.com/rwlr/links/Subs2001.shtml http://www.dspace.dial.pipex.com/rwlr/

3.2.5 Other sources

Zurich Muncipal newsletter "News & Views"	http://www.zurich.co.uk/Municipal/ZMHome/Newsroom/Current+News+and+Views/Current+News+and+Views.htm
Legal Day "Everyday news and links for UK law"	http://www.legalday.co.uk http://www.legalday.co.uk/current/themes/injury.htm
Green Lane Association	http://www.glass-uk.org/

There are many publications giving advice and guidance on interpretation of the relevant Acts. They include:

- Local Authority Liability, Morrell and Foster Ed., Jordans, 2001 – ISBN 085 308 712 1
- Scottish Roads Law ISBN 0-406-08174-3.

3.3 STATUTE AND PRECEDENT

3.3.1 Duties, and Powers

(a) Statutory Duties

The duties placed on local authorities include:

Duties	England and Wales	Scotland & Northern Ireland
Duty to maintain the highway	<p>Section 41(1) of the Highways Act in England and Wales.</p> <p>“Maintain” – has been interpreted in the courts narrowly as – “repair”</p> <p>“The highway” has been interpreted by courts as the fabric of the highway, excluding signs and lines, but including inspection covers etc. The principle established in Reid v BT is that a Utility company can rely on inspections carried out by the highway authority.</p>	<p>Scotland Sections 1 and 2 of the Roads (Scotland) Act.</p> <p>Northern Ireland Article 8 of the Roads (Northern Ireland) Order 1993.</p>
Duty to remove snow and ice	<p>Section 111 of the Railways and Transport Safety Act 2003 (This modifies Section 41 (1) (1a) of the Highways Act.</p> <p>"In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow and ice."</p>	<p>Scotland Section 34 Roads (Scotland Act)</p> <p>"A roads authority shall take such steps as they consider reasonable to prevent snow and ice endangering the safe passage of pedestrians and vehicles over public roads’</p> <p>Northern Ireland Roads Service Agency does <u>not</u> have a statutory duty to remove snow and ice. It has a discretionary power. Under Article 9 of the Roads (Northern Ireland) Order 1993 the Department:</p> <p>"may take such steps as it considers reasonable and practicable to prevent snow and ice interfering with the safe passage of persons and vehicles using a road".</p> <p>Article 9 (3) provides a statutory defence for a failure to exercise this power and does not confer on any person a right to sue.</p>

(b) Other Duties

Duty to promote road safety	<p>There have been cases brought on the grounds that a local authority owed a common law duty of care to exercise its duty under the Road Traffic Act 1988.</p> <p>Rarely have Courts accepted this line of argument. The highest courts such as in <i>Gorringe v Calderdale</i> or <i>Stovin v Wise</i> have held that the Act creates a general duty in the context of other duties and demands placed upon the authority rather than a specific duty owed to an individual, that can be used to establish a duty of care. See 3.3.5 (a)</p>
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(c) Statutory Powers

The local authority has powers enshrined in law. The effect of the ruling of *Stovin v Wise* and *Norfolk County Council 1994 & 1996 3* (see below) is that a local authority is not under a duty to exercise its powers.

3.3.2 Establishing a claim under the statutory duties

England & Wales	Scotland	
Section 41(1) of the Highways Act in England and Wales	Sections 1 and 2 of the Roads (Scotland) Act.	<p>In highway maintenance cases, the Claimant must establish that: -</p> <p>The highway had not been properly maintained pursuant to the relevant statute.</p> <p>The failure to maintain or the danger was causative of the material accident.</p>
Common law duty of care	Common law duty of care	<p>(See <i>Stovin v Wise</i> below)</p> <p>The claimant must establish that</p> <ul style="list-style-type: none"> • it was irrational not to exercise the power • there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss. <p>It is likely to prove very difficult to establish liability.</p>
Section 111 of the Railways and Transport Safety Act 2003 (This modifies Section 41 (1) (1a) of the Highways Act	Section 34 Roads (Scotland Act)	Snow and ice had not been removed pursuant to the relevant statute.
Article 8 Human Rights Act		That the right to family life or property has been affected by an action of the authority that was not in the overall interests of society.

3.3.3 Statute of Limitations

Personal Injury Claims

The claim must be presented in court within three years...

- either *from the date of the incident*
- or *from being first aware of the loss or injury*
an injury was not apparent when the incident occurred and only later did the claimant become aware of an injury or illness, whereupon the three year period will start from when the claimant could have “reasonably” found out.
- or *from reaching the age of 18*
where a person is under 18 years of age, the three year period will start to run upon reaching 18 years of age, i.e. from 18 to 21.
- or *from the date of competency*
where the injured person had a mental disability at the time of the incident, which subsequently improved at a later date, allowing him/her to be competent to make a claim, i.e. the three years will start from the “date of competency”.

Damage Only Claims

The claim must be presented in court within six years.

It should be noted that where the time limit has expired, and providing there are special circumstances, it is possible for the claimant to apply to the courts for permission to issue proceedings.

In view of the above, it is recommended that all claims records and defence information should be kept in a safe place for a period of no less than six years. Options would be to securely store the hard copies, scan and save to a computer, copy to disc. There have been instances of claims being brought decades after the initial incident.

3.3.4 The Highways Act 1980 (England)

(a) Sections 41 and 58

“Section 41 – Duty to maintain highways maintainable at the public expense

- (1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway.

Section 58 - The Special Defence

(1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

(2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters.

- (a) the character of the highway, and the traffic which was reasonably expected to use it
- (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;

- (c) the state of repair in which a reasonable person would have expected to find the highway:
- (d) whether the highway authority knew, or could reasonable have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway
- (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, that warning notices of its condition had been displayed;

but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.

(b) How local authorities may respond to the Highways Act – a very brief summary

Factors used in assessing liability	Recommended response
the character of the highway, and the traffic which was reasonably expected to use it;	As the traffic changes, maintenance must follow suit, or measures be taken to limit the traffic. A hierarchical approach is recommended.
the standard of maintenance appropriate for a highway of that character and used by such traffic;	<p>The “highway” is the fabric of the highway.</p> <p>It extends between the boundaries of the adjacent properties, including verges etc. It is however the existing fabric of the highway is to be put into repair. There is no requirement under the Act to extend or widen: these are improvements.</p> <p>The standard of maintenance applies in accordance to how each section of the highway is being used. For example, the carriageway may sometimes need to be used by pedestrians and should be maintained accordingly.</p> <p>People with special needs should be considered in the maintenance of the highway, but this should be balanced with cost.</p> <p>The underlying policies and funding levels should be rational, and publicly adopted. A hierarchy of standards of inspection and maintenance should be adopted.</p> <p>The policies should be carried through with practical action.</p>
the state of repair in which a reasonable person would have expected to find the highway;	“Well Maintained Roads” gives examples of standards used by local authorities.

whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;	The highway authority must have efficient systems for inspecting highways, and enabling people to report defects.
where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, that warning notices of its condition had been displayed;	Use notices warning of inadequate highway condition where appropriate

3.3.5 Road Traffic Act 1988

http://www.hms0.gov.uk/acts/acts1988/Ukpga_19880052_en_2.htm

Section 38 – Setting out the duty on the person to observe the highway code

“(7) A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under the Traffic Acts, the [1981 c. 14.] Public Passenger Vehicles Act 1981 or sections 18 to 23 of the [1985 c. 67.] Transport Act 1985) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings.”

Section 39 – Setting out the duty on local authorities on road safety

“(2) Each local authority must prepare and carry out a programme of measures designed to promote road safety and may make contributions towards the cost of measures for promoting road safety taken by other authorities or bodies.

“(3) Without prejudice to the generality of subsection (2) above, in pursuance of their duty under that subsection each local authority –

(a) must carry out studies into accidents arising out of the use of vehicles on roads or parts of roads, other than trunk roads, within their area,

(b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for which they are the highway authority (in Scotland, local roads authority) and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads, and

(c) in constructing new roads, must take such measures as appear to the authority to be appropriate to reduce the possibilities of such accidents when the roads come into use.

(4) In this section "local authority" means—

(a) in relation to England and Wales, the council of a county, metropolitan district or London borough or the Common Council of the City of London,

(b) in relation to Scotland, a regional or islands council."

(a) The Road Traffic Act 1988 Section 39: A statute that is "not justiciable"

The Road Traffic Act serves to reinforce the duty on the motorist to act with due care. It also places duties on the highway authority on road safety. In particular the local authority:

"(a) must carry out studies into accidents arising out of the use of vehicles on roads or parts of roads, other than trunk roads, within their area,
(b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents."

The question is whether an individual can use this statute to establish a claim against a highway authority. The House of Lords judgement in *Gorringe v Calderdale* provides the final word.

"19. These provisions, with their repeated use of the word "must", impose statutory duties. But they are typical public law duties expressed in the widest and most general terms: compare section 1(1) of the National Health Service Act 1977: "It is the Secretary of State's duty to continue the promotion...of a comprehensive health service ... ". No one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty. *They are enforceable, so far as they are justiciable at all, only in proceedings for judicial review.*"

<http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudget/jd040401/gorr-1.htm>

An earlier case is:

Larner v Solihull Metropolitan Borough Council 2001

An accident had occurred at a junction. The claimant contended that the highway authority had given insufficient warning of the junction, had been negligent, and in breach of its statutory duty under Section 39 of the Road Traffic Act 1984. The Court ruled that Section 39 created a general duty on the local authority to exercise its powers in the manner it considered appropriate, that is, giving a considerable degree of discretion. The Court indicated that in exceptional circumstances it might be possible to establish a common law duty of care, for example if the local authority had acted in a wholly unreasonable manner. The Court rejected the proposition that the local authority were liable.

The overall conclusion from these cases is that it will be difficult to establish a breach of duty of care using the Road Traffic Act. *Gorringe v Calderdale* is the most recent precedent.

3.3.6 Responsibilities of the driver

(a) Drivers are responsible for their own safety

There has been a long standing tradition, as restated in the *Gorringe v Calderdale* ruling.

Gorringe v Calderdale Borough Council (2004)

The "overriding imperative is that those who drive on the public highways do so in a manner and at a speed which is safe having regard to such matters as the nature of the road, the

weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety" (Lord Scott at para 76).

3.3.7 Responsibilities of the highway authority to maintain

Though the law creates a duty to maintain the highway, it does not specify precisely what the highway is nor what maintain means. The reader must turn to legal precedent for further edification.

(a) Meaning of the word "Maintain"

To put and keep in repair

Throughout the many centuries of highways maintenance, when citizens were responsible for their upkeep, no one had ever been liable in private law for non-repair of a highway. But all this was changed by section 1(1) of the Highways (Miscellaneous Provisions) Act 1961. The public duty to keep the highway in repair was converted into a statutory duty owed by the highway authority to all users of the highway, giving a remedy in damages for its breach. The new private law duty was however limited to the obligation which had previously rested upon the inhabitants at large, namely, to put and keep the highway in repair. As Lord Denning MR explained in *Haydon v Kent County Council* [1978] QB 343, that remains the meaning of "maintain the highway" in section 41 of the 1980 Act today.

This is a definitive definition as this extract from the *Gorringe v Calderdale* judgement demonstrates:

52. It is important, therefore, to keep in mind the fairly narrow scope of the section 41(1) duty. It has been authoritatively established by the unanimous decision of this House in *Goodes v East Sussex County Council* [2000] 1 WLR 1356, approving the minority view expressed by Lord Denning MR in *Haydon v Kent County Council* [1978] QB 343, that the duty "to maintain" is confined to a duty to repair and keep in repair. (Lord Scott of Foscote at para 52 *Gorringe v Calderdale*)

To be safe for use by the traffic using it

In *Rider v Rider* 1973, (see below) a lane was being used as an alternative to a busy trunk road which was frequently congested. Consequently traffic on the lane was considerable, including lorries, and damage to the road had occurred. However the highway authority had done nothing to make the road suitable for the increased volume and weight of traffic. The judge held that they had a duty to make the road safe for all users. This is an interesting case in that the majority of the network was created before the days of the motorcar, and is being used for a purpose for which it was not originally intended. The implications of this judgement are that the highway authority should either accommodate the increased traffic where this is affecting the fabric of the road, or take measures to stop an inappropriate use. However what this does not mean is that the highway authority is under a duty, for example to widen the road. This constitutes an improvement, not the maintenance of the fabric. See *Alan Kind v Newcastle upon Tyne Council*.

To be safe for "the normal run of drivers"

The *Rider v Rider* ruling states that the duty is owed to "the normal run of drivers". As to pedestrian use, there is a question over the use by elderly people. It is a reasonable question to ask what the courts would agree is the normal run of pedestrian, or cyclist. The case below gives an indication.

The level of maintenance to be set by balancing risk against cost

In *Sarah McArdle v Department of Regional Development* [2005] NIQB 13 the plaintiff tripped on an edge of 12mm on a path. While it was accepted that the highway authority had to take into account the needs of elderly users, they also had to balance the risk against the cost and find the best compromise. To do otherwise would be unrealistic.

(b) The meaning of the word “Highway” ... maintainable at public expense.

The highway is the space between enclosures, including verges. But all parts of the highway are not the same – different uses and expectations apply

The duty applies to the existing fabric of the highway. There is no duty to surface verges that are being over-run – this constitutes improvement not maintenance.

In *Alan Kind v Newcastle upon Tyne Council* [2001] EWHC Admin 616 the highway was defined as the space between enclosures, including verges. The court however held that there was no duty on the highway authority to improve the road.

<http://www.bailii.org/ew/cases/EWHC/Admin/2001/616.html>

A country lane with verges which was suffering from the impact of increased traffic. The surfaced width of the carriageway was inadequate for a vehicle and an HGV to pass at the same time, and vehicles were over-running onto the verges. Mr Kind had applied for an Order to compel the Council to bring the road into repair. At the appeal the judge Mr Justice Scott Baker ruled that:

- i) The crown court was correct in holding that not all of the highway need be kept in repair.
- ii) The crown court was correct in finding that the effect of the justices' order was to require the council to perform works of improvement rather than repair.
- iii) The crown court was correct in considering the present day character of the highway when determining its state of repair.

This case can be compared with the *Rider v Rider* ruling, relating to damage to an existing surface resulting from increased traffic.

The “highway” for the purposes of the Act does not include signs and markings
(*Gorringe v Calderdale*)

Paths within former council housing estates are highways maintainable at the public expense (*Gulliksen v Pembrokeshire County Council*)

This judgement found that a footpath on a housing estate built by a council acting in its capacity as a housing authority was a highway maintainable at public expense. Where a highway was maintainable at public expense under the Highways Act 1959, they are maintainable at the public expense under s 36(1) of the Highways Act 1980.

<http://www.lawreports.co.uk/civjulb1.0.htm>

3.3.8 Highways and danger

Danger is a difficult area. The public often have a perception of danger that is different to the accident record. Where things appear dangerous, individuals take more care; where the appearance is one of safety individuals may drop their guard and accidents ensue. Consequently individuals sometimes pressurise local authorities to introduce measures that create nothing more than an appearance of safety and perversely introduce true danger.

(a) No duty on highway authority under the Highways Act to give warnings of obvious dangers. Road users not entitled to be forewarned of ordinary hazards of highway use

“Even in the case of occupiers of land, there is no duty to give warning of obvious dangers: see the recent case of *Tomlinson v Congleton Borough Council* [2004] 1 AC 46. People must accept responsibility for their own actions and take the necessary care to avoid injuring themselves or others. And a highway authority is not of course the occupier of the highway and does not owe the common duty of care. Its duties (and those of its predecessors, the inhabitants of the parish) have for centuries been more narrowly defined, both by common law and statute.” (Lord Hoffman at para 10). *Gorringe v Calderdale* 2004

<http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040401/gorr-1.htm>

In the Tomlinson v Congleton Borough Council case an individual had been injured in a lake in a disused quarry, owned by the Borough Council. The court ruled that landowners were not required to give warning of obvious dangers.

Highways Act duty to maintain does not cover the erection of traffic signs

In Lavis v Kent County Council (1992) 90 LGR 416, 418 Steyn LJ, in response to a submission that section 41 of the Highways Act 1980 required an authority to erect a warning sign, said:

"In my judgment it is perfectly clear that the duty imposed is not capable of covering the erection of traffic signs, and nothing more need be said about that particular provision".

Lord Hoffman also stated in para 15 Gorringe v Calderdale

"The provision of information, whether by street furniture or painted signs, is quite different from keeping the highway in repair."

(b) Highway authority responsible for preventing entrapment of users into danger

"Although motorists are not entitled to be forewarned of the ordinary hazards of highway use, plainly they must not be trapped into danger. If, for example, an authority were to signal a one-way street but omit to put "No Entry" signs at the other end..... Such cases, however, may be expected to be few and far between..." Gorringe v Calderdale (2004), Lord Brown of Eaton-under-Heywood at para 102.

Highway authority possibly partly liable if it neglects to repair stop lines upon which the circulation of traffic customarily and explicitly depends

There are two key cases which on the face of it present contradictory findings.

Bird v Pearce 1979 – missing white lines – highway authority partly liable

Double white lines at the mouth of a crossroads had been lost during re-surfacing works. A driver entered from the minor road onto the main road and there was a collision. The minor road driver was held to be entitled to a contribution of one third from Somerset County Council, the highway authority, because they had not taken precautions to alert drivers to the dangers of the crossing.

The critical issue in Bird v Pearce seems to be that by painting white lines at a series of junctions along the road the highway authority had established a priority at the junctions and a required behaviour by motorists. During resurfacing, by omitting to repaint the lines that had been obliterated at just one junction, the highway authority had broken the pattern, and had created a potential source of danger that had not existed before the lines were painted.

By contrast, warning markings and signs do nothing more than provide a commentary on the highway environment, for example a sharp bend. The hazard is created by the presence of the hazard and is independent of the absence or presence of signs. Stop lines on the other hand determine the pattern of traffic, establishing priority of one stream of traffic over another; the priority is utterly dependent on the presence or absence of the lines.

Eveleigh LJ (at 759) in the Court of Appeal stated the following —

'Up to that moment (of painting the white lines along the road) drivers had no justification for relying upon anything other than their own appreciation of the road situation. Once the authority in the exercise of their power created a pattern of traffic flow, drivers could be expected to rely in some degree upon it.'

Lord Hoffman provides this commentary on the *Bird v Pearce* case within the context of the *Gorringe v Calderdale* judgement:

[42] ... The plaintiff was a passenger in a car on a major road who was injured in a collision with a car which emerged from a minor road. The driver of the second car, who was agreed (as between the two cars) to be 90% responsible, joined the county council (as highway authority) as a third party, alleging it had negligently removed and failed to repaint the warning lines which customarily indicated to drivers that they were entering upon a major road. The Court of Appeal held that by removing the lines, the council had created a hazard.

[43] The reasoning of the Court of Appeal appears to have been that by painting the lines in the first place, the council had created an expectation on the part of users of the main road that there would be lines to warn people on side roads that they were entering a major road. This may be a rather artificial assumption and I express no view about whether the case was correctly decided. But I would certainly accept the principle that if a highway authority conducts itself so as to create a reasonable expectation about the state of the highway, it will be under a duty to ensure that it does not thereby create a trap for the careful motorist who drives in reliance upon such an expectation."

Murray v Nicholls 1983 – missing white lines – driver liable

A second case is *Murray v Nicholls 1983 SLT 194*. Lord Rodger of Earlsferry gives an account in *Gorringe v Calderdale* at para 83. A car was driven without stopping out of Devon View Street in Airdrie into Victoria Place where it collided with another car. In consequence a driver was killed and the passengers injured. White lines had been painted at the junction by indicating that priority should be given to traffic in Victoria Place. The stop lines had been largely obliterated through road works by Strathclyde Regional Council some months before the accident and they had not been repainted. There were no signs at the junction. Strathclyde had not had the lines repainted as soon as was reasonably practicable after the works were completed, nor had they erected warning signs. However in this case the action against the highway authority was not successful. The judge, Lord Stott accepted that the previous existence of the white lines at the junction was sufficient to show that it was reasonably foreseeable that, in the absence of such an indication, a vehicle might be driven into Victoria Place without stopping. However it had not been claimed in court that the accident had been influenced by the loss of the stop lines and the pattern of traffic that had been created, as had been the case in *Bird v Pearce*. The claim was merely that the highway authority had failed to exercise their power to repaint the lines in circumstances where it was foreseeable that vehicles would collide. The court found that the junction was typical of those in urban areas, with restricted visibility, and that the creation of a duty to provide stop lines on such junctions was for Parliament, not for a court of law.

These two cases are clearly important, as is the explanation of the different outcomes.. Readers may wish to contemplate the following:

- the absence of the stop lines in *Bird v Pearce* where the presence of stop lines along the road in question was the norm.
 - “by painting white lines at a series of junctions along the road and then omitting to repaint the lines that had been obliterated at one junction, the council had themselves created a potential source of danger that had not existed before the lines were painted. In effect they had trapped motorists into relying on the white line markings as indicating that they were driving along a major road and that they had priority over traffic in the side roads. Lord Roger at 85 *Gorringe v Calderdale*
- the absence of stop lines in *Murray v Nicholls* where the presence of stop lines at urban junctions was by no means the norm.
 - “I am not prepared to hold that the power given to a local authority to mark white lines on the roadway and erect warning signs implies a duty to do so at every crossing in a built-up area where there is a considerable volume of traffic” Lord Stott at 194-5 *Murray v Nicholls*

These two cases raise issues that a highway authority may confront when for example:

- Removing road humps or other traffic calming as a policy decision
- Removing pedestrian guard-railing and other traffic architecture under the philosophy advocated under “Shared Space” and other more recent public realm projects that encourage drivers and pedestrians to negotiate their mutual use of the public realm, rather than being segregated and subject to rules. (See the worked examples below)

Obstruction in carriageway – Street light left in position after carriageway widening

Davies V Carmarthenshire CC 1971

The Defendants had widened a road but left undisturbed a lamp-post so that it was a few feet out into the extended carriageway. The Plaintiff was travelling slowly, with the setting sun hampering her vision, when she struck the lamp-post. The local county court found entirely for her but on appeal she was apportioned 20% liability.

See also Burnside v Emerson cc 1968, Tarrant v Rowlands cc 1979 and Bartlett versus Department of Transport 1984

(c) Highway authority not liable for not exercising statutory power (as opposed to duty)

This has proved a difficult area for judges and there have been conflicting approaches. That in *Anns v Merton* suggested that the more operational a power might be, the easier it would be to impose a common duty of care. However the approach was not accepted by the House of Lords in *Stovin v Wise*. This area of law is important also in dealing with trees on private land next to the highway that are believed to be dangerous.

Stovin V Wise and Norfolk County Council 1994 & 1996 3 WLR 388

A car emerged from a side road into the path of a motorcyclist. The motorcyclist was seriously injured and left wheelchair bound for life. There had been a history of accidents at the site, and the site had been assessed two years prior to the accident by Council employees, who had recommended the removal of a bank on some adjoining privately owned land that was reducing sightlines. The land owner, British Rail was approached, but did not respond. No further action was taken.

The House of Lords postulated a test for establishing a duty of care:

"In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are,

first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and

secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised." (Lord Hoffmann *Stovin v Wise* (953D-E)

In this instance it was held that the council had not acted irrationally, and secondly the state had provided for a system of compulsory insurance to provide compensation.

(d) Worked examples

The following examples aim to explore the legal issues a highway authority may wish to address when considering some of the more recent debates on highways and public realm. It is easy to become lost in the interplay of the precedents and to forget that human lives and loss are involved.

Worked example 1: Implications for removal of road humps

There have been a number of instances where local political parties have adopted policies of removing road humps. This worked example is intended to illustrate the issues that the highway authority might wish to consider in order to ensure it did not inadvertently become subject to an action against which it could offer no defence should an incident or incidents subsequently occur.

In the case of road humps it might be argued that by installing them the local authority has signalled a desire to create a safe environment, and has acknowledged some danger in the un-traffic calmed road. However, if the reasoning as per *Murray v Nicholls* applies, then a local authority having introduced road humps under a statutory power may not subsequently be under a common law duty to keep them.

The question then arises as per *Bird v Pearce*, whether by installing road humps the highway authority has created a pattern of movement or use upon which the safety of individuals depends, and which is the primary consequence of having introduced road humps. Here, it could be argued that their introduction will have created the expectation of a safe environment by residents, parents, children etc, and may have encouraged people to have adapted their lifestyles, and to walk and cycle more. Such broader policy objectives are to be found at both national and local levels.

The local authority would need to demonstrate it had not acted irrationally to ensure a defence against breach of duty of care under the Road Traffic Act. This might prove difficult in the face of a large body of evidence that road humps reduce fatalities and serious injuries. There may also be issues under the Human Rights Act Article 8. Common assent by local people to the removal of the humps by a thorough process of consultation could be an important step in demonstrating rationality.

Other factors to consider might include:

- Delays to fire services: here the highway authority might properly assess the likely benefit of reduced response times, given the proportion of call-outs in response to false alarms, or non-life threatening situations, versus the likely increase in fatal, serious or slight injuries through the loss of the traffic calming, and the potential loss of wider benefits to health through increased walking and cycling, or to the environment.
- Delays to ambulances: here the highway authority might properly assess the balance of lives saved by reduced call-out times versus any increase in fatal, serious or slight injuries and accidents through the loss of the traffic calming and the wider benefits to health through increased walking and cycling. Here there has been debate about the equivalence of lives saved, with traffic calming being of benefit to all ages of road users, while ambulance services tending to help those nearer the end of their natural lives.

It is of course for the courts to determine a particular case on its own merits, but a highway authority contemplating a programme of road hump removal, might wish to consider addressing the points raised above.

Worked example 2: Implications for the removal of pedestrian railings

There has been a vigorous debate over recent years over the use of pedestrian railings in town centres. Some schemes have been introduced which avoid the use of pedestrian railings with the hope of encouraging walking and reducing street clutter. Kensington High Street has been a much discussed example. The analysis below suggests that highway authorities may have considerable discretion in their actions.

In terms of rationality, a local authority wishing to remove pedestrian railings might argue the case from the perspective of broad policies on health, liveability and so on.

Railings may discourage walking by forcing pedestrians to follow indirect paths when crossing roads, whilst leading to some pedestrians taking risks by climbing over railings in an attempt to follow a more convenient and direct route. The cumulative effect of numerous junctions with inconvenient pedestrian routes may be significant in terms of reduced walking, increased vehicle use and congestion, and attendant health problems associated with reduced exercise and increased air pollution. There are other arguments such as quality of streetscene and liveability that might help to justify removal. The cost of the railings themselves will be considered and a local authority might take a view that there were other areas of expenditure that brought greater good to the public.

A second issue to address is whether as per *Bird v Pearce*, the removal of railings in some way creates a trap for pedestrians. Part liability in *Bird v Pearce* was established by arguing that stop lines had created a pattern of movement, creating a right of way of one stream of traffic over another, a pattern that prevailed in adjacent junctions. The temporary removal of one stop line at a junction therefore created a trap, although the driver was also liable for failing to exercise due care.

It would be difficult to argue that railings are the primary mechanism on which a pattern of movement depends. They do not work in the way that a stop line does - creating a right of way for one user over another. The effect of pedestrian railings is physical not legal. The absence or presence of barriers is obvious to all, both pedestrians and drivers, and it is difficult to envisage any aspect that could create a hidden danger. It should also be remembered that they are not crash barriers, and not designed prevent an out of control vehicle from running off the carriageway onto the footway.

By introducing signal controlled crossings the flow of traffic will be regulated and a pattern of movement created. This may lead to the bunching of pedestrians where footways are narrow. The highway authority may wish to consider the risks of a large group of pedestrians accumulating and the pressure of the crowd leading to individuals being forced into the carriageway. They may also wish to consider whether it is the narrowness of the footpath that needs to be addressed, and whether the carriageway has been over-widened.

A highway authority will wish to demonstrate that it has considered these issues and that in its opinion the removal of railings is justified.

Worked example 3: Implications for the conversion of the public realm into “shared space” type environments – with few signs, lines,

Again in recent years there have been debates about creating a different type of public realm with minimised traffic architecture and regulation. One approach is to remove stop lines etc that formerly guided and regulated traffic and established a pattern of movement, in order to transform a highway or public space into environment with far less regulation, less clutter, and one which emphasises place rather than passage.

With regard to the reasoning in *Bird v Pearce*, the highway authority would need to establish that it had not created a trap for road users in changing the established pattern of movement. It would seem advisable for a local authority to advise road users of the new arrangements at least in the early stages. Evidence of consultation and public involvement in developing the proposals may help to demonstrate rational action, as may temporary signs, notices, advertisements or leaflets.

One of the objectives of this type of scheme is to change the highway environment so that motorists are less confident to speed, and pay greater heed to other road users. This may involve changing the appearance of a street over some considerable distance so that visually it looks like a place and less like a thoroughfare, in the expectation that drivers, taking the road as they find it, will

adjust their manner of driving accordingly. Ensuring these visual queues are in evidence may be important in demonstrating rational action.

Where a scheme is entirely novel, to demonstrate that it had not acted irrationally, it would seem advisable for a highway authority to have some specific and/or scientific justification for the measures. It should be noted that, for a single site, it may be impossible to demonstrate statistically that there has been any significant increase or decrease in fatal, or serious injury accidents, owing to the generally low accident rates at single sites. It can take years before meaningful statistics emerge. However evidence that there had been direct observation of the scheme could provide valuable support.

3.4 FAILURE TO REPAIR OR REPAIR PROMPTLY

Where there are long standing problems relating to highways repairs, a failure by the highway authority to act can lead to it becoming liable. The courts nonetheless will expect motorists to react to obvious hazards and will apportion responsibility accordingly.

3.4.1 Edge Deterioration – failure to respond to defect promptly

Rider v Rider & Another 1973

The Plaintiff was being driven in her husband's car when it suddenly swung across the road and hit an on-coming van. She was injured in the collision. The van driver was by common consent blameless. Passing traffic at the bend where the accident happened had damaged the road's tarmac edges. No repairs had been carried out to the road for at least six months. The trial judge held that the highway authority had failed to maintain the highway and was therefore two thirds responsible for the accident, an apportionment which was upheld on appeal.

3.4.2 Failure to repair surface in face of history of accidents - skidding

Rogers v National Assembly for Wales 2004

The claimant's car collided with another car and he suffered injury. It was alleged that the cause was a defective road surface resulting from the highway authority failing to maintain the road. The Judge agreed, and rejected the S58 defence, there being a history of accidents on the road. On appeal it was held that when wet the road was liable to cause skidding. The Judge in the lower court was entitled to make findings of fact based on that evidence. This case underlines the importance of knowing what is happening on the road network and acting expeditiously.

<http://www.hardwickecivil.co.uk/pi/caselaw/04020101.htm>

3.4.3 Collapsing verges

Several cases have been reported where water had drained from farmland and caused instability of the highway verge. The verge collapsed and the authority was held responsible in that they were aware of the position but did not take precautions.

3.4.4 Failure to deal with poor surface water drainage leading to skidding – Shared liability 66:33

Burnside v Emerson cc 1968

The plaintiff and first defendant were driving their cars in opposite directions on a main road and were about to pass each other. It had been raining hard for some hours and a pool of water had formed. As his car struck the water it swerved across the road into collision with the plaintiff's car. The second defendants were the highway authority. Their attention had been drawn before the accident to the tendency of the road to become flooded.

The pool of water was admitted by the second defendants' surveyor at the trial to be a danger to traffic and the existence of the pool was due to their failure to maintain the drainage system in a satisfactory condition. The highway authority was held liable, but the first defendant was also negligent in driving too fast. Blame was apportioned two-thirds to the driver and one-third to the highway authority.

The points to note here are that it was a main road, implying a level of service; it had been raining hard for some time, implying some duty on the drivers to adjust their manner of driving to the conditions.

3.4.5 Failure to deal with ponding after heavy rain – shared liability 50:50

Tarrant v Rowlands cc 1979

The first defendant was driving his car at dusk at 40 mph along the A6 road when he ran into a pool of water on the road that he had not seen. He lost control of the steering and crashed head-on into a van driven by the plaintiff. There was evidence that water was usually found lying in that place on the road after a good deal of rain.

The principles to be followed were those laid down in *Burnside v Emerson* (above) applying the Highways Act 1959, s44 (now Highways Act 1980, s41) and the Highways (Miscellaneous Provisions) Act, s1 (now Highways Act 1980, s58).

The first defendant was also to blame for failing to see the pool. He was driving too fast in the conditions prevailing. The division of responsibility for the accident was determined as 50-50.

The points to note here are that it was an A road, suggesting that a higher level of service by the highway authority would be appropriate than for the main road in *Burnside v Emerson*.

Tarrant v Rowlands and *Burnside v Emerson* allude to the importance of a hierarchical approach in inspecting the highway and the standard of maintenance provided.

3.5 CONDITION OF HIGHWAYS SURFACES: WHAT IS AND IS NOT DANGEROUS

In general courts have taken a view that in terms of a judgement of whether a highway surface is or is not dangerous the test is foreseeability of danger to users of the highway from the perspective of a reasonable individual.

3.5.1 A test of dangerousness is one of reasonable foresight of harm to users of the highway

Mills v Barnsley MBC 1992

The Plaintiff tripped when she caught her heel in a hole in an area of paving bricks. The corner had been broken off one of the paving bricks leaving a triangular shape 2 inches in width with a maximum depth of $\frac{3}{4}$ inches. The Plaintiff maintained that her heel had penetrated soft material at the base of the hole, which was part of it, giving a total depth of 1 inch. In the first instance the Plaintiff succeeded.

On appeal it was accepted that the inspection system of once a month was reasonable. It was also reasonable for the Highway Inspector to comment that had the difference been spotted it would not have been regarded as serious. The Court of Appeal ruled it would be wrong to adopt a mechanical approach and state every trip above 1" would always be dangerous. A test of dangerousness is one of reasonable foresight of harm to users of the highway. The Court of Appeal held that the defect in this case was minor, the risk to pedestrians was low, and the highway was not, therefore, dangerous.

Winterhalder v Leeds County Council

Mrs Winterhalder tripped on a 2.5 inch gap between kerbstones whilst walking in Potternewton Lane, Leeds. Her claim was dismissed at first instance in Leeds County Court.

The Court of Appeal reiterated the principle in *Mills v Barnsley* that a court should beware imposing an over-onerous duty on a local authority and re-affirmed the principle that the duty is to remove hazards which might foreseeably be characterised as causing a danger to pedestrians. Swinton Thomas LJ stated

"As has been said in previous cases, it is quite impossible and very misleading to state that a depression or a gap or a dip of any particular dimension forms a danger to pedestrians. Any case such as this is fact-sensitive and will be resolved on the basis of its own facts".

3.5.2 Size of Trips

Not ¾ inch

Meggs v Liverpool Corporation 1968 1 WLR 689

An individual fell on paving that had in places had sunk by ¾ inch or projected by ¼ inch. On appeal Lord Denning ruled for the Corporation. Thousands had used the footway successfully and knew of its condition, yet none had thought to report the footway as being dangerous. Lord Denning did not consider that the occasional ¾ inch irregularity made the footway dangerous or not reasonably safe.

Not ½ inch

Littler v Liverpool Corporation 1968

This case provided the famous "a highway is not to be criticised by the standards of a bowling green" quotation, from the memorable Lord Denning. Here an individual running along the footway had tripped on a slab protruding ½ inch. The judge took the view that the criterion was the foreseeability of danger in the eyes of a reasonable person.

Not 20mm

James v Preseli Pembrokeshire DC 1992 & Thomas v Preseli Pembrokeshire DC 1992

This case arose out of a tripping accident in Milford Haven in 1988 where Mrs James and Miss Thomas fell in the same area of paving within the space of a month. The defects on which the plaintiffs fell were between 10 and 20 mm. Initially one of the plaintiffs was successful in their action in court, and the highway authority successful in the other. For the appeal it was decided to hear both cases together. The Court of Appeal confirmed that the difference of level in question was not unreasonable and the existence as such did not impose a liability on the highway authority. The Court stressed that 25mm standard used by some highway authorities was a trigger point for maintenance; this was different to saying that it was a direct measure of danger.

The second issue was that an individual would need to identify a specific defect as the cause of injury. It was not enough to say that there was an area of paving in poor condition.

The Northern Ireland Court of Appeal has upheld as reasonable the 20mm actionable defect intervention threshold of the Department in the case of *Frazer v DOE (NI)* [1993] 8 NIJB 22.

Whether the presence of elderly persons can demand higher standards of highway maintenance

The *McArdle v Department of Regional Development* [2005] NIQB case provides guidance on whether persons who are elderly warrant a higher standard of surface maintenance. The ruling was that the highway authority whilst having to consider the needs of disadvantaged users, had also to consider available resources. This is best done through the development of a rational hierarchy of footways. (See Well Maintained Roads)

3.5.3 Standards for carriageway, vs footway and footpath

(a) Pedestrian use of carriageway

Pedestrians are fully entitled to use not only the footway, but also the carriageway, and are obliged to if they wish to cross a road. These two cases provide useful guidance on the sort of standards to apply.

Bird v Tower Hamlets London Borough Council (1969) 67 LGR 682

An individual stepping out of a van onto the carriageway hurt their ankle in a depression 3 inches deep left after a resurfacing operation. The authority's engineer admitted slight danger to pedestrians. The judge ruled for the plaintiff stating that the highway authority should keep the carriageway safe for pedestrians, given that they were entitled to pass and repass along it.

Ford v Liverpool Corporation (1972) 117 SJ 167

A pedestrian, while crossing the road, fell on an inspection cover which had dropped by about one inch. The judge found for the highway authority, stating that pedestrians must expect to find some obstructions in the carriageway mentioning also cat's eyes and pedestrian crossing studs.

(b) Verges

Thompson v Hampshire County Council [2004] EWCA (Civ) 1016

A pedestrian was walking in the dark along an "A" road on a verge, with a narrow beaten earth track, when she fell into a ditch. It was too dark to see where she was putting her feet, and she carried no torch. The Council were sued for breach of its statutory duty "to maintain the highway" under what is now section 41 of the Highways Act 1980. The court dismissed the claim, finding that the highway authority was not responsible, under its statutory duty to maintain the highway, for the highway's layout.

<http://www.courtservice.gov.uk/judgmentsfiles/j2709/thompson-v-hampshire.htm>

See also *Rider v Rider* and *Kind v Newcastle*.

3.6 INDUSTRIAL DISPUTES

Bartlett versus Department of Transport 1984

The DoT had been unable to grit a road owing to industrial action over pay. The unions had threatened to suspend all gritting in the area were the DoT to bring in a private contractor to grit the trunk road. The DoT put up notices to warning drivers that the road had not been gritted. A driver was killed while overtaking and the DoT were sued.

The judge held that the DoT was not in breach of its duty to maintain:

- the DoT had taken reasonable care by providing the notices, and seeking to divert traffic onto other routes.
- The duty to maintain was owed to the public as a whole, and consequently the decision not to bring in a private contractor and hence risk the total suspension of gritting, was justified.

It was also considered that the driver had been driving too fast for the conditions, actions which would have made him 80% liable.

3.7 FAILURE TO INSPECT

Local authorities operating a reasonable system of inspection should be able to defend themselves from claims where a third party has caused a danger to road users. The liability should rest principally on the party that causes the danger.

Nolan v Merseyside County Council and Northwest Water Authority 1982

The Plaintiff had tripped and been injured as a result of a missing hydrant cover in the highway. Merseyside County Council was the highway authority and neither they, nor Northwest Water Authority, had any system of inspection. In the first instance the Water Authority was held 100% liable for the Plaintiff's claim and the legal costs.

On appeal it was held that both the County Council and the Water Authority were equally responsible for the claim being made. While the hydrant cover did not belong to the Council, it was part of the highway. Had there been an inspection system in place the missing cover might have been noticed, and there would have been an opportunity to warn the Water Authority. The Civil Liability (Contribution) Act 1978 has some relevance to this case.

Griffiths v Liverpool Corporation 1966.

An individual tripped on a rocking slab that protruded ½ inch. Liverpool Corporation accepted that the defect was dangerous as did the judge in the Lower Court. The Corporation appealed on the basis that they had exercised due care. The Court of Appeal found for the claimant, and that had there been a 3 month inspection system in operation, the defect would have been made good. However, the judge qualified this judgement, that it was inevitable that there were irregularities in surfaces such as cobblestones and cats eyes, and that it was a standard that in his view should not become a precedent or guide in ordinary circumstances.

3.8 ABSENCE OF INSPECTION RECORDS

It should be obvious to anyone that the inability to produce inspection records will seriously weaken a highway authority's case.

An elderly gentleman was walking along a footpath to a cemetery that was under the control of the highway authority. The gentleman allegedly tripped over and sustained serious head injuries. The Surveyors' department of the Authority claimed that the footpath had been inspected regularly and no defects were found. However, the dates of the inspections were not recorded and therefore the defence of the claim was seriously impeded.

3.9 DESIGN DEFECTS AND LIABILITY

Please refer to section 5 of this guide for further advice and discussion on design, risk and liability.

There have been very few cases relating to alleged defects in design. The ruling that motorists are responsible for their own safety still applies.

King v. DETR- QB, RCJ, May 2002, [2003] EWCA Civ 730, JPIL (2003) C141

A motorcyclist suffered severe injuries as a result of a collision with a roundabout. It was argued that the highway authority was liable for the design and construction of a motorway slip road which led to the plaintiff travelling too fast towards it. The lower court found the DETR liable but also that negligence by the motorcyclist had contributed to the accident. On appeal the judgement was that the lower court had incorrectly found the design of a roundabout and its approaches a cause of the accident.

Kane v New Forest DC [2001] 3 ALL ER 914

A pedestrian emerging from a footpath built by the District Council onto a road was hit by a car. The sightlines from the footpath onto the road were poor. The Court of appeal found the District Council negligent, in that it had been aware as planning authority that the sightlines were poor, and that they had caused the danger.

Levine v Morris 1969

A motorist lost control of his car in heavy rain on a bend on a dual carriageway, having just overtaken a vehicle. His car left the road and collided with the concrete column of a road sign, resulting in the death of the passenger Mr Levine. The court held the Department of Transport 25% liable, taking the view that it was foreseeable that accidents would happen on

the bend, and that there was a duty to have considered alternative sites that offered less risk.

The road here was a dual carriageway. It does not follow that the case would have been won had the road been in an urban area where one might expect to find pedestrians on the outside of a bend, as well as the occasional column.

3.10 ICE AND LOSS OF CONTROL

There are separate statutes in England and Wales, Scotland and Northern Ireland. There are subtle but significant variations

3.10.1 England and Wales

Section 111 of the Railways and Transport Safety Act 2003 (This modifies Section 41 (1) (1a) of the Highways Act)

"In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow and ice."

It is significant that the Section 111 modifies section 41 of the Highways Act, and the above duty should be read in that context. Of course this leaves open the interpretation of "reasonably practicable", and "endangered".

(a) England and Wales position pre 2003

Penhaligon

The leading liberal MP David Penhaligon was killed in an accident on an icy road. The motor insurers blamed the highway authority for failing to salt or grit the road surface, in response to forecasts of sub-zero temperatures. The Court, however, pointed out that forecasts should be viewed as "guidelines", not "tramlines".

Even though the forecast was for icy roads, the Council's patrols found that there was rain and cloud cover instead. When conditions changed and ice did begin to form, they began their gritting, but within ten minutes the accident occurred. The judge ruled that:

"Otherwise than in exceptional circumstances, no general duty is imposed on a Local Authority to take precautions in advance to prevent the roads icing."

Goodes v East Sussex County Council 2000

"In *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356 this House decided that the duty therefore did not require the highway authority to remove ice or snow from the road. The presence of ice and snow did not mean that the highway was out of repair. Removing ice and snow was a different kind of obligation which could be imposed on highway authorities only by Parliament. " Lord Hoffman, *Gorringe v Calderdale* 2004 at 14

Goodes v. East Sussex County Council [2000] 1 WLR 1356.

3.10.2 Northern Ireland

The 2003 Act does not apply in Northern Ireland, where the Department for Regional Development still only has a power and not a duty to remove snow and ice.

3.10.3 Scotland

The Roads (Scotland) Act 1984 provides in Section 34 that:

“A roads authority shall take such steps as they consider reasonable to prevent snow and ice endangering the safe passage of pedestrians and vehicles over public roads’.

Syme v Scottish Borders Council 2002

An individual having slipped on an icy pavement and sustained injuries. They sued the Roads Authority at common law under the Roads (Scotland) Act. The judge held that the plaintiff had no case to make. The only circumstance under which the authority could have been liable were for it to have acted irrationally, and the remedy for this was judicial review.

<http://www.bailii.org/scot/cases/ScotCS/2002/264.html>

It is important to understand the reasoning on this decision:

“While Scots law does not recognise the public law/private law dichotomy in the way which English law does for the purposes of determining, for example, what matters are amenable to judicial review, I, nevertheless, consider that the distinction drawn by Lord Browne-Wilkinson does have its counterpart in Scotland in that it is essential to recognise that the non-performance or misperformance of statutory duties, by public authorities, may be justiciable only by means of judicial review and by the application of the substantive law which has been developed in that field, as opposed to an ordinary action for damages based on statutory "fault" and it is essential not to confuse the two.” Lord Clarke at para 6

This judgement has parallels with the failure in the *Gorringe v Calderdale* case to establish a specific duty to improve road safety under the Road Traffic Act 1988.

3.11 DEFENDING AN ACTION

3.11.1 Statutory defence for repair and maintenance

A statutory defence requires the authority to prove that it operates a reasonable and adequate system for highway repair and maintenance, as set down in

Section 58 of the Highways Act 1980 (England and Wales)

Section 1 of the Roads Scotland Act 1984

Article 8 of the Roads (Northern Ireland) Order 1993 after Section 1 of the Roads (Scotland) Act 1984

Under section 58(1) of the Highways Act 1980 – Special defence in action against a highway authority for damages for non-repair of highway

“in an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to provide that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic”

Therefore, if an Authority can prove that it had in place adequate policies and procedures to maintain the highway, and the policies and procedures were being performed, and there was no prior knowledge of “the defect” before the incident date, the claim can be repudiated.

Frances Balmer v Department of the Environment for Northern Ireland

In *Frances Balmer v Department of the Environment for Northern Ireland* 24 October 2003 McCollum LJ, reinforced the principle of reasonableness of inspection systems:

Mrs Balmer fell on 1 January 1998 due to a pothole in the road. Prior to 1999 the Roads Service Agency was an Executive Agency of the Department of Environment. It has since 1999 been part of the Department for Regional Development. This explains the DOE (NI) reference.

The Department's statutory defence under Article 8 of the Roads (Northern Ireland) Order 1993 was upheld and the case was dismissed.

In dismissing the claim and upholding the inspection system Lord Justice McCollum commented in paragraph 40 of his judgment:

"No system can ensure immediate discovery and repair of all hazards".

3.11.2 Providing evidence to justify the statutory defence

The highway authority will need to prove that it has acted reasonably through the production of adequate documentation and evidence:

- all reasonable steps were taken to ensure that the highway was safe
- and/or the Plaintiff contributed to the injury or loss by their negligence.

Carriageways, cycleways and footways vary in their use and nature. It is not in the public interest for all to be inspected and maintained to the same standard. Consequently "Well Maintained Highways" emphasises the importance of a regime based on a rational hierarchy.

A system should be formally considered and adopted through the authority's due process and, as a minimum, should include.

- The regime of safety inspections and the method of recording them.
- The manner in which complaints and accidents statistics are recorded and dealt with.
- The response times for carrying out repairs, along with a system for recording and analysing the efficiency and effectiveness of the repair.

In defending an action, the highway authority will therefore need to establish that it has acted reasonably, by the production of adequate documentation and evidence. This will include:

Inspection Records - Maintenance Management Systems offer the possibility of computerised reporting of defects and recording of repairs undertaken. While there are less sophisticated systems that may meet the requirements the use of a data base system linked to real time information is highly recommended.

Reliability of Records - inspectors need to be trained as to what constitutes a defect. Inspector's qualifications also need to be recorded, including corroboration on when and where they were trained, and when and where they were refreshed.

3.11.3 Claims of Substance

Claims of substance should be flagged at an early stage and brought to the attention of a senior officer for appropriate action. It is important to distinguish between

- a. claims against practice, and
- b. claims against policy

and to refer them to the appropriate person within the Authority, for example, the Claims Manager, or a senior engineer with appropriate responsibility. Evidence such as coroner's statements should be sought early on.

3.11.4 Statutory Defence and Risk Management

There are two fundamental risk management issues: -

a) **Conformity with national standards and good practice.**

The whole system of highway maintenance and repair must be judged in the light of national criteria and standards.

See “Well-maintained Highways Code of Practice for Highway Maintenance Management” Chapter 9 Inspection assessment and recording, page 90. The code of practice produced under the auspices of the UK’s Roads Board is generally looked to by Courts as the acceptable standard for road maintenance.

There may, however, be sound reasons for authorities departing from the Code’s guidance, but it is recommended that where this happens the deliberation process over the departure is formally recorded.

Authorities should publish the standards they are working to. Under the Freedom of Information Act this type of information can be successfully sought by members of the public. It can also form part of an Authority’s defence to say that they are working to standards and policies that have been published and subjected to public scrutiny.

The standards should be subject to regular review.

Copies of “Well-maintained Highways Code of Practice for Highway Maintenance Management” and examples of best practice inspection manuals can be found on the Roads Board web site. www.ukroadsboard.org

b) **Provision of records:** The highway and maintenance systems must be reliable and effective in risk management terms as liability claims can follow many years after the event. It is therefore essential that, when a claim is investigated, there is a robust audit trail with ready access to all relevant documents.

Data kept should include

- the date of inspections
- the precise location of any defects found
- ‘nil returns’ where no defects were found
- how and when any identified repairs were carried out.

The danger presented by a defect will depend on where it is: for example in the middle of a footway, or right at an extreme edge by a wall, where people never walk. The recording system needs to be able to make these distinctions.

There are now many proprietary electronic systems for the recording of defects and repairs. These are generally known as routine maintenance management systems (RMMS). The operation of a good RMMS linked to a sound locational referencing system, that records the precise location of defects, is an essential tool to any authority.

The use of geographical information systems linking real time inspection data to background mapping systems should also be seriously considered.

The function of maintaining the records and producing sound evidence to support the RMMS will be an important part of the job specification of the Senior Highways Officer.

4 Recommendations for Local Authorities

4.1 A STRATEGIC APPROACH TO MANAGING HIGHWAYS RISKS

Experience shows that where a local authority is inspecting and maintaining its roads and public rights of way according to current codes of practice, and efficient systems of recording and risk management are in place, highways liability compensation can be reduced to 5 figure levels.

4.1.1 The local authority's wider responsibilities

The primary responsibilities of the highway authority is to provide a public service, to protect the individual citizen, to prevent any hurt or loss, and in doing so to use the authority's resources effectively, guarding against fraudulent and unreasonable claims.

It follows that the authority's actions, standards and procedures should be designed to fairly process genuine claims whilst at the same time ensuring that fraudulent claims can be identified and legal prosecution or financial redress pursued as a key part of a deterrent process.

Objective for strategy	<ul style="list-style-type: none"> • Balance maintenance costs, inspection costs, claims costs in a way that is in the long-term interests of the general public
Objectives for highways	<ul style="list-style-type: none"> • Contribute to objectives of the Local Community Plan/Strategy, and the Local Transport Plan • Provide safe, efficient convenient movement, at reasonable cost • Provide attractive environment • Assess and manage risks to the public
Objectives for claims handling	<ul style="list-style-type: none"> • Minimise public expenditure on claims • Provide statutory defence • Provide fair route to redress • Block fraudulent claims
Risk management	<ul style="list-style-type: none"> • Ensure roads and inspection policy, and winter maintenance policy meet above objectives • Assess risks to the local authority • Ensure existence of information system that enables identification of trends, clusters, and problems on the highway

Highway authorities are requested to assemble data and submit a return onto the National Claims Cost database. A specification for the data to be collected is available on www.ukroadsboard.org together with further information on making returns.

The relative performance of authorities can be assessed by way of the national data benchmarking system and reference to key performance indicators. This system facilitates comparison of expenditure effectiveness, claim number trends and repudiation and average claim costs.

4.1.2 A system to provide a statutory defence

The onus is always on the authority to provide a statutory defence in the cases involving highways maintenance. It will need to be able to convince a court of law that:

- its policies on highways maintenance were robust, reasonable and were being complied with
- it was exercising a reasonable duty of care in inspecting the highway for condition and safety
- the individuals making the inspections were suitably trained or qualified.

In formulating a defence it should be borne in mind that claims can vary from trivial matters such as chipped windscreens and punctured tyres, through to claims of the utmost severity, including paraplegia, brain damage and fatality. In exceptional cases, damages claims may total many millions of pounds. It will be the same recording system that provides the defence for the local authority.

4.1.3 Providing a defence for new works

Similar principles will be used in providing a defence. A local authority will need to provide evidence that:

- new works were safe and properly designed, and did not inadvertently trap road users into danger
- a local authority may wish to cite in evidence that the works complied with appropriate standards or design guidance or according to principles that have been properly applied. It is commonly thought that responsibility can be avoided by copying guidance or designs. However it can also be argued that that a responsible, qualified designer could be held responsible if a design is copied without proper consideration of local circumstance.

For further details see Section 5.

4.1.4 A system to manage risks

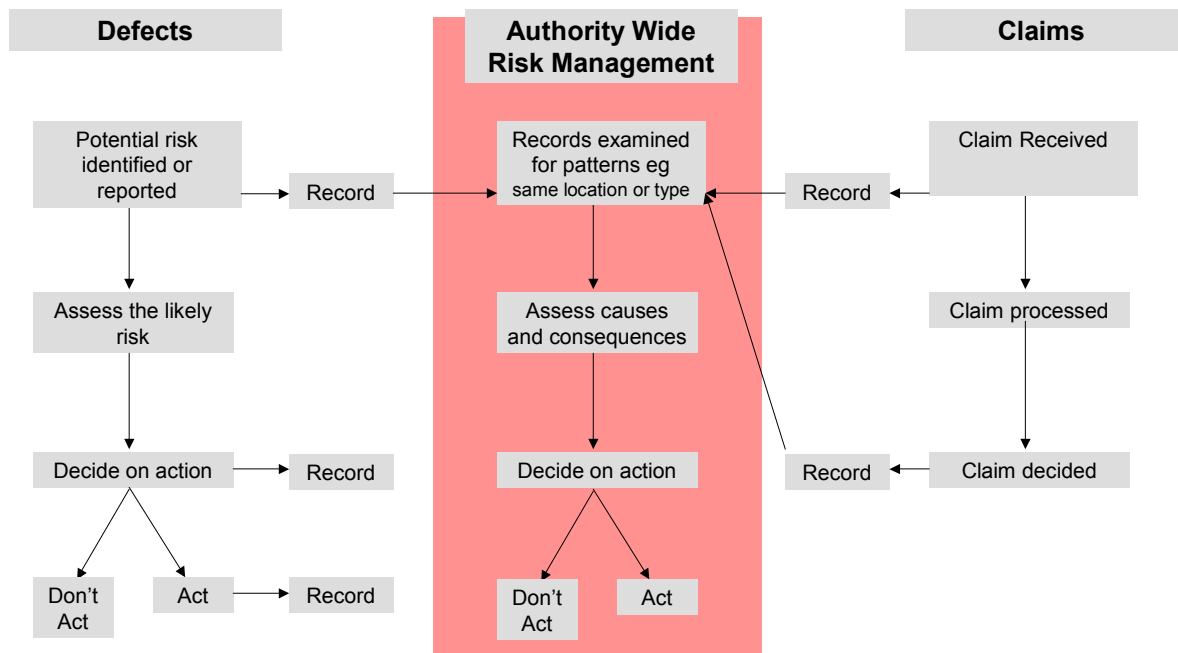
The local authority should operate a system that enables risks to be identified, assessed, and appropriately managed, with a record kept at each stage.

Highways defects, and the causes of highway incidents and claims should be analysed and those that are likely to lead to the greatest risk to the public and cost should be identified and dealt with first. This pro-active, needs-prioritisation approach will reduce potential claims exposure and lead eventually to lower insurance costs.

Local authority departments must cooperate in the introduction of risk assessment systems for all highways associated functions. Systems will need to identify areas of high claims experience and instigate lines of investigation to reduce the extent of potential claims. Simply sitting back and hoping the problem will go away, or not happen, is a recipe for disaster. There needs to be a "culture" change in most organisations for both members and officers if everyone is to be aware of risk management. It is likely to be difficult to demonstrate that criteria for highways management or design are objective, where they have been influenced by short term political needs.

Information from the system should be communicated within and outside the local authority.

Schematic diagram of a risk management system in a highway authority



(a) Reasonable, robust, publicly endorsed policies and procedures

- **Agreed safety inspection procedures** – Authorities need agreed safety inspection procedures, making clear who needs to do what, when, and how this information should be recorded.

“Well-maintained highways: Code of Practice for Highway Maintenance Management” gives advice on inspection frequencies, but these need to be carried out systematically. When this inspection information is combined with details of individual insurance claims, it can be used to formulate policies and priorities for spending scarce maintenance resources.

- **Agreed adverse weather procedures** – that make clear what needs to be done and by whom to manage issues such as salting and flood response.
- **Hierarchy** – Policies and practices should be appropriate to circumstance. They can be based on a hierarchy of routes and locations that reflect use and importance. See “Well-maintained Highways” chapter 8 for further details.

(b) Effective data collection and record keeping

- **Collecting data** on everything from traffic flow and accidents to overgrown vegetation and repeat works (such as a sign or fence that is constantly being repaired after minor accidents, or increased frequency of potholes and rutting which indicate an increase in traffic) should all be shared swiftly between departments.
- Personnel in highways departments must be aware of the duties placed upon Highway Authorities by the Highways Act 1980, the practices required to ensure that those obligations are met and the requirements to ensure that the production of evidence which will hold up in Court.

(c) Highways inspection staff who are trained and qualified

- **Inspection** – New recruits must be trained in the authority's policy and approach to the process of inspection and repair. Such training should be formalised and a record kept of training given.
- **Claims handling skills** – It is strongly recommended that in addition to the training in the practical aspects of the role, training should also be given in the overall approach to claims management.
- **Courtroom skills** – Consideration should also be given to courtroom skills training for all staff involved in these areas of activity.

(d) Effective communication and use of data

- **Communication within the authority** – Authorities should pay special attention to the interactions between departments, in order to identify weaknesses that can develop in the systems of otherwise excellent highways functions, particularly if lines of communication are not clear. For example, claims handlers should communicate incident trends and the outcome of claims to the highways teams so that changes in procedure or operation can be made.

(e) Corporate Approach

- A corporate approach towards service provision will be increasingly important within the 'enabling' role that the Government has decided to impose on local government.

(f) Inspection Regimes

- For full details on Inspection Regimes, see the Chapter 9 of "Well Maintained Highways – Code of Practice for Highway Maintenance Management."

Outsourcing of Safety Inspections

Some highway authorities have out sourced parts or all the safety inspection process to contractors (or consultants). Where this happens, the highway authority needs to be mindful of the fact that they have a duty to maintain the highway network and may become involved in any insurance claim from a member of the public irrespective of who is responsible for completing safety inspections. The highway authority must also ensure the contractor's procedures are effective and they must also undertake regular audits to confirm that the procedures are working.

Where outsourcing is being considered it is very important that within the contract the contractor is very clear what defects information they are expected to collect and the frequencies the inspections that are to be carried out. Additionally it is important that there is a mechanism for amending both frequency of inspection and items collected.

If outsourcing has occurred, the highway authority may still receive claims because the insurance claim is still against the highway authority. They would then pass the insurance claim onto the contractor to settle. The contractor may however consider they have no liability and refute the claim. The claimant may decide to refer the claim back to the highway authority who, have no option but consider whether there is any liability. If there is, the quality of the contract becomes important.

The highway authority has to consider the appropriateness of the insurance claim. It is recommended that the highway authority deal with the claim as if it were against them and process in the usual way. Once the claim is settled then any liability which is the responsibility of the contractor must be referred to the contractor for final settlement.

It is recognised that this is a complex matter and may affect the number of authorities who consider outsourcing however where accidents are thought to be the result of a CAT 1 defect, the quality of the contract and the relationship between both parties will become apparent.

(g) Repair Times

See 9.4.18 of “Well-maintained Highways - Code of Practice for Highway Maintenance Management” and in particular Table 5 on page 98

(h) Agent Authorities

Where the highway authority has agents for the highway function, it is recommended that in respect of highway insurance claims that the highway authority takes responsibility for the administration of all highway liability matters.

This has the following advantages:

- the consistency of approach to all insurance claims
- the real cost of insurance claims is known by the highway authority
- management information on the levels of insurance claims is available to the highway authority
- legal decisions in respect of individual claims are made by the highway authority only.

Where the agent staff are responsible for safety inspections and highway maintenance work including Cat 1 defects, it is important that these officers work with the highway authority’s Risk Management team to ensure that all insurance claims are treated in accordance with the Civil Procedure Rules 1998 for England and Wales (Woolf) recommendations.

(i) Record Keeping/Benchmarking/Monitoring (local and against other authorities)

Please see the details of the National Cost of Claims Database on the website www.ukroadsboard.org

4.1.5 Spreading the Risk

Highway incidents are chance events, subject to natural statistical variation. There will be slight variations in the total number of claims received by a highway authority from one year to the next. However when it comes to serious injury or fatal crashes, the variations in percentage terms will be far more extreme. It is conceivable that the number of fatal accidents within a local authority area can double, or halve from one year to the next. A fatal accident for which the authority is liable, can result in it facing a bill of several £ millions in one year, far in excess of a typical year’s claims. The local authority will need to find ways of dealing with this variation.

Examples of typical year to year variations

Numbers of Claims:

	Large Authority 1,000,000 persons	Small Unitary 100,000 persons
Minor claims	+/- 5%	+/- 20%
Major claims / £million	Possibly 1-2 claims in a five year period	Unlikely to be a claim in a 10 year period

Cost of Claims

	Large Authority 1,000,000 persons	Small Unitary 100,000 persons

Minor claims	+/- 5%	+/- 500 %
Major claims /£million	+/- 100%	+/- 10,000%

Notwithstanding these above figures it would be quite possible for a single small local authority to be subject a series of large claims as the result of statistical variation – through no fault of its own.

There are different ways that local authorities spread the risks including:

- risk wholly carried by an insurance company
- risk capped by an insurance company, with the local authority self-insuring on the more numerous, and more predictable smaller value claims.
- risk wholly carried by the local authority – in effect sharing the risk amongst the local tax payers.

4.1.6 Liability

Public or third party liability arises when someone who is not an employee of the local authority suffers injury or property damage for which the authority is legally liable.

Such liabilities used to be covered almost entirely by Public Liability Insurance, with Councils bearing very small excesses, or no excess at all. Over recent years, however, the number and cost of public liability claims (particularly those against highway authorities) has risen to such an extent that insurers are increasingly reluctant to offer insurance cover, and when they do, it often involves the insured bearing high excesses on each and every claim, and/or a high aggregate excess before the insurer becomes involved in any claims payments. As a consequence a small authority may bear the first £10,000 of each and every claim, and a large authority, perhaps the first £250,000 of each and every claim. It is therefore necessary for local authorities to provide internal funding for these losses. This funding is normally held centrally for all claims below the deductible. It is either top-sliced before department budget allocations take place, or each department is required to make a contribution out of its allocated budget. The latter option is increasingly preferred as it enables each department to be required to contribute according to its claims record and the risk it presents.

This is not good news for highways departments which are generally recognised as receiving at least 50% by number and 50% by cost of the claims against local authorities. However, what it does do is give a clear picture of the loss situation that will enable Highways Managers to factor this into their maintenance planning and to identify the cost benefits of targeted action.

4.2 CLAIMS PROCEDURES FOR HIGHWAY AUTHORITIES– DETAILED EXAMPLES AND OTHER CASE STUDIES

4.2.1 Birmingham claims procedure

Author – Lorraine Bennett, Birmingham City Council

(a) The claims sequence

Receipt of incident report

A claimant, representative or councillor reports that an incident has occurred on the public highway. A report can be made by letter, telephone call, e mail, fax or personal visit to the office.

You first need to establish if the report is a “complaint” or a “claim”. In most instances the reporter will have already made this clear. However, where clarification is needed, ask the question “are you reporting a defect for repair?” Do not automatically ask the question “are you making a claim of negligence against the Authority?”

The claimant/representative must provide the date and time of the incident, a description of the alleged cause, e.g. difference in flagstone levels, where it happened, e.g. footway outside No. 6 Rosedale Road, and were there any witnesses.

Where incident reports have been made verbally or in person, claimants/representatives should be advised:

- a Claims Questionnaire Form will be sent to them for completion and return,
- before a joint site inspection, an initial inspection of the incident location will take place, whereupon the defect (if found) will be measured and photographed,
- any necessary repairs will be arranged.

When sending a Claims Questionnaire Form, it is recommended that a “Frequently Asked Questions” leaflet is also sent. The leaflet should give a brief outline of the claims processing procedure and what to expect, e.g. there is no automatic right to compensation, how will my claim be assessed, repairing defects is not an admission of liability, keep original paid receipts showing financial loss etc.

Under no circumstances should there be any admission of liability and, where appropriate, correspondence should be written “without prejudice”.

It is recommended that personal injury claims are immediately sent to the Claims Administrators as the Civil Procedure Rules 1998 for England and Wales (Woolf) apply in respect of timescales.

Recording claims details

Where possible the following details should be recorded from telephone conversations, letters and claim form questionnaires:

- claimant details (status, first name, last name, home address, correspondence address, contact numbers for home, work, fax, and e mail address)
- claimant’s representative (company name, address, reference, contact name, contact numbers for work and fax, and e mail address)
- date of birth
- employer

- occupation
- national insurance number
- incident date and 24 hour clock time
- incident location
- description of the alleged defect and the incident
 - the direction of travel
 - the point of fall or accident
- injuries
- damages (e.g. tyre, loss of earnings, travel expenses, private medical fees, lost promotion etc)
- weather conditions
- GP/hospital details and attendance
- original copies of estimates, quotations and repair receipts
- sketch and/or photographs having indicated thereon the location of the defect, direction of travel, houses, lamp columns, etc
- witness details
- date reported to the highway authority
- claim number allocated.

Recording details of “potential claims” is also recommended should a formal claim be made or proceedings issued at a later date.

The Authority should assess the basis of any claim from a potential fraud perspective using fraud indicators. Medical records (GP and/or Hospital) should always be obtained at an early stage as they can point to inconsistencies which can indicate fraud. Particular types of accident have characteristic injuries. Unusual combinations of injuries can be evidence that the individual has fabricated a claim. These records should be obtained by the Authority direct and not from the third party lawyer acting for the claimant.

Formally acknowledging the claim

Under the Civil Procedure Rules 1998 for England and Wales, once a personal injury claim has been formalised, the Authority must then send an acknowledgement letter within 21 days from the date on the Letter of Claim, or the date when sufficient information is received to enable an investigation to commence. The acknowledgement letter must give full particulars of who will administer the claim (this could be an in house team or an external organisation). From the date of the acknowledgement letter, the Authority is allowed 90 days to reach a decision on liability.

Whilst Damage Only claims are less complex and usually processed far more speedily than Personal Injury, it is strongly recommended that the investigation does not exceed the 90 day pre-action time limit.

Initial site inspection

When the defect and location is known to the Authority, the Authority has knowledge and must respond as soon as possible by inspecting the incident location, taking photographs, measuring the defect and arranging for any necessary repairs. In the interests of public safety, dangerous defects must be made safe and repaired as quickly as possible. A good response time could prevent further incidents occurring on the same defect. If this did happen, your Authority would be liable because you had prior knowledge. By responding quickly you will be able to demonstrate to the court that your Highway Maintenance Procedure is adhered to. Repairing the defect is not an admission of liability and can be carried out as a precautionary measure. All information gathered on the Initial Site Inspection should be included in the formal Highway Accident Investigation Report at a later date.

Formal/joint site inspection

In cases of personal injury, the claimant/representative should be given an opportunity to attend a joint site meeting for the defect to be identified and measurements agreed. Some claimants/representatives provide good quality photographs having indicated thereon the defect and direction of travel. Providing there is no doubt, the claimant/representative may be happy for the site visit to proceed without them. However, Authorities should exercise their discretion most carefully before dispensing with a joint site inspection.

At the site inspection a Claims Investigator may consider the defect is the maintenance responsibility of another, e.g. Statutory Undertaker, private landowner. Information sources such as the Street Works Register and Highway Adoption Records should confirm this for the claim to be referred to a third party. The referral letter to the third party must state what has happened and why the claim is being referred to them. Similarly, the letter to the claimant/representative must also state why referral is taking place and provide the third party's name and address details. Whilst the Authority should have no further involvement, the Authority could subsequently be included in court proceedings as First Defendant. Therefore, should proceedings be issued it is essential that the Authority's investigation procedure is not downgraded in any way. Data protection requires that permission is sought from the claimant to send info to a third party.

It is recommended that the defect and location is photographed using a digital camera, and measured with an aid, e.g. measuring board or wooden block. The aid will give an indication of the scale of the defect and where possible should be included in the photographs. It is essential that short and long distance photographs are taken in order to show the defect at the right angle and level, and place the defect within the area. Photographs should record the claim number, date and time taken (the photographer's name and claimant's direction of travel can be included in the Highway Accident Investigation Report).

Nationally, repair criterion is subject to individual assessment by each Authority, but an appropriate level for investigation/intervention currently stands at 20mm (three quarters of an inch).

If a delay develops in setting up a joint site inspection, or in pin-pointing the defect, you must advise your Claims Administrators immediately.

Time under CPR doesn't start running until the exact spot is identified.

For low value Damage Only claims, an Authority may choose to dispense with a joint site inspection if the incident location and defect can be identified with confidence.

(b) Highway authority claims processors (administration)

It is recommended that Authorities ensure their Claims Processors have the necessary skills to process public liability claims of negligence, e.g.:

- above average verbal and written communication skills
- ability to ask "open" questions
- good listening skills
- good word processing and IT skills
- ability to deal with difficult and aggressive claimants
- able to read, comprehend and evaluate information
- able to make constructive comments to assist Claims Administrators and Litigation Solicitors
- basic knowledge of highway materials and terminology
- checking paid receipts are legitimate and the amount is appropriate for the damage being claimed
- ensuring claims are dealt with fairly and efficiently
- know where a variety of information is stored/located, e.g. Complaints Register

- productive claims enquiries are dependant upon the processor corresponding with the appropriate officer within the Authority and making sure the reply answers the enquiry, i.e. do you know who does what?
- aware of claim processing timescales and court procedures.

(c) Highway authority claims investigators (Incident location)

It is recommend that those Authorities with a significant claims experience each year, should employ a dedicated Claims Investigator(s) who will have received formal and recognised training, e.g.:

- above average verbal and written communication skills
- ability to ask “open” questions
- courteous and appropriate questioning of the claimant/representative until a clear answer is given
- good listening skills
- ability to deal with difficult and aggressive claimants
- good word processing and IT skills
- good highway maintenance technical knowledge
- know how to prepare for meetings with claimants/representatives
- know where information is stored/located, e.g. Public Lighting Inspections
- aware of claim processing timescales and court procedures
- able to respond accurately, clearly and with confidence when questioned in court.

NB Gathering the right defence information is the key to successfully defending a court action.

(d) Preparing the highway accident investigation report

The claims investigator’s report should include:

- the claimant and representative’s details
- incident date and time
- incident location
- description of defect
- personal injuries
- damage
- site inspection date(s)
- photographs
- measurements
- any utility/contractor involvement
- defence information

With regard to defence information, under the Civil Procedure Rules 1998 for England and Wales, the Standard Disclosure List to the claimant for the 12 month period prior to the incident date is as follows:

- records of inspection for the relevant stretch of highway
- maintenance records, including any independent contractors who have worked or were working in the relevant area
- records of the minutes of highway authority meetings where maintenance or repair policy has been discussed or decided
- records of complaints about the state of the highway
- records of other accidents which have occurred on the relevant stretch of highway

The report must have a professional appearance, be limited to accurate information which can be supported, and must not contain any “unofficial” manuscript notes or personal comments.

It is recommended that the report is completed within 15 working days

The Report should be sent to the Authority’s Claims Administrators for further investigation and determination.

(e) Claims administrators

In reaching a decision, the Claims Administrator will probably request further information from the Highways Department before repudiating, settling or referring the claim to a third party.

Providing the Claims Administrator has sufficient information to make a decision, then the Authority will have no further involvement, as contact will be directly with the claimant/representative.

The Claims Administrator may access medical records and scrutinise documents for leads where suspicion is aroused. Where allegations of fraud have been made, in-depth and persistent questioning will follow.

Claims Administrators need to be familiar with highway authority systems and procedures. Therefore, Authorities should consider inviting new Claims Administrators to their offices to explain systems and procedures, and introduce key officers.

The Claims Administrators should keep the Authority regularly informed of determinations and settlement values, which are then passed to the Highways Department for information.

(f) Preparing for Court

It is recommended that statements are standardised for the following:

- initial site inspection (without claimant/representative)
- routine highway safety inspections (safety inspector’s role and how inspections are carried out)
- claims investigator (role, site inspections carried out and defence documents identified)
- department’s statement of policies and procedures (e.g. inspections, repairs, complaints)
- department’s statement of truth

Benefits can be gained where those officers who are required to give evidence in court meet the Authority’s litigation solicitor and/or Barrister on or before the hearing date. The meeting will enable the legal representative to go through the officer’s statement, make the officer fully aware of his/her responsibilities on the day, court procedure, likely duration and other parties who will also be present.

(g) Claims computer database

It is recommended that the recording of claims is held on a computer dedicated to the processing of claims and with a data export facility for the production of standardised letters and forms.

Claims trends can be a Performance Indicator for influencing Highway Maintenance strategy, e.g. targeting investment, determining inspection frequencies, investigatory/intervention levels and repair material selection procedures. In this regard a “pick list” field of why claims were repudiated, settled or referred would be useful for Authorities to review priorities.

A layered mapping system linked to the incident location would also be beneficial for “hot spot” roads and types of claim.

To budget and resource functions, database reports are essential in demonstrating trends and costs. Output from these reports should be fed into a decision making framework that allows for continuous service improvement.

For potential fraud, the database could have a surname, postcode or national insurance number “memory” which will provide a screen prompt when an identical entry has been made on a new claim.

Ideally the claims database should also be accessible to the Claims Administrators for current information.

Where claims records and highway maintenance information are stored on computer(s), there must be a facility in place to print hard copies of the information held, and regular computer backup discs taken should the information held be corrupted.

The Association of British Insurers – Fraud Initiative

The ABI have launched an Injury Fraud Initiative which will provide an automatic download that will throw up matches. Both Claims Administrators and Insurers are signatories to the personal injury database. This will operate in conjunction with the Department for Work and Pensions (Compensation Recovery Unit).

Department for Work & Pensions (Compensation Recovery Unit)

Where compensation payments have been made, the CRU deals with the recovery of amounts of social security benefits paid as a result of an accident, injury or disease. Examples of benefit are:

- loss of earnings
- cost of care
- loss of mobility

A person should not be compensated twice by getting social security benefits and compensation from a liable third party.

Therefore, all claims for personal injury have to be notified by insurers to the CRU. The CRU will notify the compensator, i.e. insurer, if they uncover a match on the claimant’s name, address or national insurance number. Such matches may be full or partial. A match does not automatically show that the claim is fraudulent but it does provide an alert and gives the insurer a warning notice that further investigation may be needed.

4.2.2 The Claims assessor procedure

The following is a guidance as to the various processes a claim may go through from the initial notification until its final conclusion.

Receipt and acknowledgement of correspondence

Once these documents are received, a file is set up for future correspondence regarding that particular incident. The claim form and letter from the Third Party/Solicitor is scrutinised for relevant information that may affect what action is required.

Normally, a letter is sent to the Insured acknowledging receipt of the claim form. A letter is also sent to the Third Party/Solicitor requesting in particular, the allegations of negligence being made, details of where the accident occurred, details of any witnesses and details of any injury or damaged sustained.

Investigation

Once a reply from the Third Party or his/her Solicitor is received investigations are usually carried out to determine whether the allegations are true and whether liability is likely to attach to the Insured. These investigations can be done by correspondence/telephone but quite often the use of the Insurance Companies Claims Inspector is adopted or an outside Loss Adjuster. The advantage to using a Claims Inspector/Loss Adjuster is that they can actually visit the accident locus to take photographs/measurements and can arrange to interview the relevant personnel involved and any witnesses.

Once the investigations are complete the Claims Department will make a decision as to whether the claim can be defended or whether settlement should be made. In some instances, primary liability may attach but it is felt that the Third Party contributed to the accident in which case a suitable reduction is made in the compensation.

Settling a claim

The Third Party/Solicitor is made known that liability is not going to be an issue and copies of any medical evidence is requested together with documentary evidence to support any other losses.

When receipt of this documentation is to hand, particularly the medical report, a decision is made as to whether a settlement can be proceeded with or whether the Claims Department need to obtain their own medical evidence. This usually occurs where the injury seems exaggerated, contentious or particularly serious.

Once the medical evidence is finalised by both sides, steps are then taken to settle the claim. This can either be done by correspondence or more often than not by discussion either over the telephone or face to face.

Defending a claim

The Third Party/Solicitor is advised that liability is denied. Sometimes, the Claims Department may expand on this by outlining the reasons for this denial.

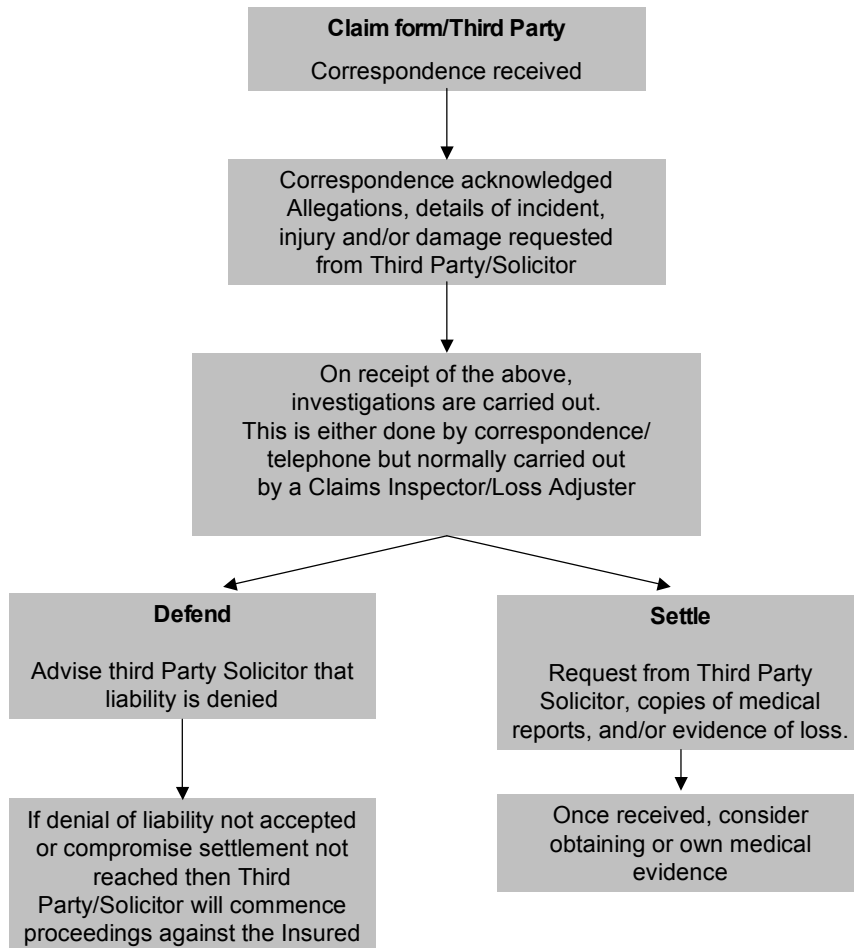
The Third Party/Solicitor may accept this or attempt to reach a compromise settlement but often, proceedings will be served on the Insured.

The proceedings are passed to the Insurance Company and they in turn, instruct a firm of Solicitors to represent the Insured.

The Solicitors representing the Insured attend to the procedural matters and provide advice on liability, quantum and tactics. Also, any further investigations that are required are put in hand.

On the basis that the case remains defended, the matter is heard at Court and a Judge decides on the question of liability.

Claims procedure



4.3 TRAINING

4.3.1 Properly trained people are essential

- If the council is to provide evidence which is to be used in court, it is important to be able to demonstrate that the individuals who operate the inspection and recording system are adequately trained.
- Training should cover the supervisor on the ground through to senior officer level.
- Each individual must be aware how their input to the claims process is important.
- It will be necessary to demonstrate that the training has taken place, and suitable records should be kept.

Training should include:

	Highway Inspectors	Claims Investigators	Claims Processors	Senior Staff
Well Maintained Roads - Code of Practice for Highway Maintenance Management	O	O	O	O
Local Inspection Policy Procedures and Guidelines	O	O	O	O
Safety at Street Works and Road Works: A Code of Practice	O	O	A	A
Defect recognition	O	O	O	A
Highway Law and Administration	O	O	A	O
Measurement and Materials recognition	O	O	A	A
Claims Investigation	A	O	A	A
Court Proceedings	O	O	A	O
Tree condition awareness	O*	A	A	A

O=Operational competence – fit to practice
A=Awareness

*Tree assessment should be undertaken by a qualified arboriculturist.

4.3.2 Examples of training include

(a) Birmingham City Council's IMTAC

A comprehensive modular training programme specific to highway maintenance practitioners:

What is IMTAC?

IMTAC is a 3 stage, modular training and assessment course specifically designed to train Highways Inspectors to the minimum standard required by the City Council.

Who is it for?

All officers involved in highways inspection and raising orders for work on the highway will be required to attend, and successfully pass, the relevant stage of the course before they are deemed competent to carry out work on the highway.

How is it verified?

Delegates understanding and competency is verified at the end of each module by an appropriate 'end test'.

Delegates who successfully complete each module of the training course will be given a certificate of competence appropriate to the stage (or level) of their training.

What is the progression route?

Delegates will not be allowed to progress to stage 2 unless they have successfully completed stage 1.

Stage 3 of the IMTAC course is designed specifically for supervisors.

Stage 1 – Essential competencies

Modules:

- 1.1 Highway Maintenance Policies
- 1.2 Safety at Street Works
- 1.3 Highway Act Enforcement
- 1.4 Defect Recognition
- 1.5 Measurement & Estimation
- 1.6 Materials Recognition

Stage 2 – Additional competencies

Modules:

- 2.1 Prohibition Notices
- 2.2 Customer Care & Service Standards
- 2.3 NRSWA Appreciation & Enforcement
- 2.4 Claims Investigation & Court Proceedings
- 2.5 Partnership Working

Stage 3 – Supervisory competencies

Modules:

- 3.1 Corporate Policies
- 3.2 On Street Appraisals
- 3.3 Data Management

(b) City & Guilds 6033 – highway inspection and monitoring qualification

The Skills Training Centre write and operate the City & Guilds 6033 – Highway Inspection and Monitoring qualification and can also offer highway inspection technical and legal courses.

www.skillstrainingcentre.co.uk

4.4 FRAUD

4.4.1 Incidence and types of fraud

Surveys suggest that 1 in 7 individuals have no qualms about making fraudulent insurance claims, and highway liability claims have long been seen as a soft target by fraudulent claimants. Fraud arises by making claims that are:

- Fictitious
- Not in the circumstances alleged
- Exaggerated

Information from ALARM surveys shows that 55% of claims are thought to be opportunistic. Some local authorities believe that up to 2/3rds of claims contain an element of fraud.

4.4.2 Ways to manage fraudulent claims

Provision of public information

- How to report defects.
- How to report fraudulent claimants
- Publicise successful convictions for fraudulent claims in local media

Pro-active claimant handling – interviewing claimants, preferably at the accident location, and reviewing contemporary records and reports for consistency.

Robust inspection and recording – that will stand up in court.

Sharing of data within authority enabling cross referencing of claims and claimants

For highway trip claims the availability of good computer records allows cross-referencing by claimants and witnesses to see if there is any common feature that might cause a suspicion of fraud. In the past it has often been too easy for a claimant to find a pavement defect and then construct a highways liability claim around it.

Sharing of information outside the authority enabling cross referencing

- Sharing with other local authorities
- Sharing with other insurance organisations

Examples of anti-fraud initiatives

- Claims Underwriting Exchange Register (CUE) <http://www.cueuk.org/>
- Motor Insurance Anti-Fraud and Theft Register run by the Association of British Insurers (ABI). www.abi.org.uk
- NAFIN – National Anti-fraud Investigation Network
- Fraud reporting line – operated by some local authorities, encouraging people to report incidents of fraud.

4.4.3 Examples of fraudulent claims that have been discovered

Local authorities, as providers of a public service, are vulnerable to people who take advantage of what is a position of trust. However there is a growing number of authorities who are taking effective action against fraudulent claims and local authorities are particularly vulnerable in this respect. One of the issues is that with a range of different ways of funding claims there is no longer one central gateway or 'control' to identify the fraudster. There are many different agencies currently involved in claims handling, these include insurers, solicitors, dedicated claims handlers, loss adjusters and in-house claims staff. Ensuring information is shared between can help throw up repeat claimants.

An increasing number of fraudulent claimants are being exposed. And the more and more would be "claimants" are realising that their activities run a significant risk of fines and

criminal convictions that can lead not merely to imprisonment but also to loss of jobs and careers.

Examples include:

(a) Finding a highways defect after the event

Any authority which is operating an effective and reasonable inspection, recording and repair regime will be able to defend these claims successfully. Fraudulent claimants will be wasting their time. With the information of the claim held on a database, a highway authority will be able to identify an individual making repeat fraudulent claims, leading to the individual being investigated by the police.

(b) Falsely claimed injuries

Here fraudulent claimants need to beware being “shopped” by members of the community who object to public funds in effect being stolen.

- A man who alleged he had fallen on grassland owned by a local authority was exposed by neighbours who knew the accident had taken place in his own garden when they saw reports of damages he had received from the council and he was forced to repay them
- An amateur footballer who received £11,000 for an alleged knee injury following a pavement trip was ordered to repay the damages with interest. A retrial was sought after reports of his goal scoring whilst playing in the Sunday league appeared in local papers.

(c) Falsely claimed defect

- The husband of a woman claiming damages after tripping on a paving slab was caught on CCTV pulling up the slab before photographing the alleged defect. Security staff reported the incident to the highway authority and a prosecution followed. This underlines the effectiveness of coordination between public authorities and contractors.
- An individual claimed he had fallen into a missing gully cover and sustained injuries. The judge firstly accepted that the highway authority’s inspection system was reasonable, and secondly considered it surprising that no member of the public had reported the alleged defect should it have arisen between inspections. The judge found for the highway authority.

(d) Optical illusions

- Photographing a small matchbox next to the defect and then producing a large matchbox in court.

4.5 LIABILITY CLAIMS ASSOCIATED WITH HIGHWAY TREES

4.5.1 Introduction

There are two issues of liability associated with highway trees:

(a) Damage to buildings arising from subsidence linked to trees and tree-roots

Extensive information on the management of risk of damage to structures from highway trees was contained in “Highways Liability Claims – The Issues 1st published in 1997”. The focus was on damage to property from tree roots. This information has not been updated.

(b) Damage or injury caused by falling trees and branches.

See "Well-Maintained Roads – Code of Practice for Highway Maintenance Management"

- 9.6 Safety Inspection of Highway Trees
- 9.13 Service Inspection of Landscaped Areas and Trees
- 10.9 Condition of Landscaped Areas and Trees

5 Risk and Design

Highway authorities, in the pursuit of their own and government policies on issues such as sustainability, health and liveability, will be seeking to produce or procure street and public realm schemes which meet high standards of design and address issues such as encouraging walking, cycling and the needs of disabled users, as well as enhancing the environment. It is essential to obtain a balance between these objectives, safety and the avoidance of placing the authority in a position where it could be held liable. On a trunk road or motorway the task is relatively easy as there are very few users or stakeholders other than motorised road users. However on a street there will be many different needs and interests to reconcile.

Three principles that have been established by Court judgements are worth bearing in mind:

1. Court rulings repeatedly state that road users are responsible for their own safety and have a duty to take the road as they find it. This defines the road user as an intelligent being, able and expected to exercise their own judgment. It is not necessary for the design of a scheme to take that independence of judgment out of the hands of the road user.
2. The highway authority should avoid creating a trap for road users.
3. The highway authority should not act irrationally.

There is one further legal position that emphasises the role of public authorities and the public good:

"the [Housing] Act [1985] is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done."

Lord Hoffman, in *O'Rourke v Camden London Borough Council* [1998] AC 188

This should reinforce in the minds of highway authorities and designers the importance of providing a service that provides safe movement, but also recognises the profound role highways and the public realm have in making normal life possible in its full breadth and diversity: of exercise and public health; of human interaction and social inclusion; of efficient communication and of the support of economies and employment. It also acts as a warning against focusing too narrowly on one issue to the exclusion of others.

Finally there are the provisions of the Draft Compensation Bill, which may be enacted in 2006:

"PART 1

NEGLIGENCE

1 Deterrent effect of potential liability

A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity.”

On the face of it, this amounts to Parliamentary backing for those who would wish to take a risk management approach, balanced with other “desirable activity”. Highway authorities should be able to make a strong case that “desirable activity” includes the design and creation of highways and the public realm that follow the broader policy set by Government, local authorities and other organisations.

5.1 OPTIONS FOR HIGHWAY AUTHORITIES

There has been considerable debate over the balancing of needs and requirements that are to be addressed in a street, and some local authorities have developed their own systems to assist in this process.

The options below were developed through a workshop held at the Institution of Mechanical Engineers on 1st November 2005, at which leading design and highway experts from a wide range of disciplines were present.

5.1.1 Procedural system

Highway authorities can ensure procedures are in place to obtain rational, balanced decisions, with the minimum of bureaucracy, and to create an audit trail that could subsequently be used as evidence in court.

The workshop suggested that the requirements and objectives for a local authority could be established in a general document such as a street scene guide, urban design guide, or public realm strategy. Such documents may also include consideration of how to balance conflicting interests between users and uses of a street or the public realm. The documents should also set out an agreed procedure for approval of the design of projects.

Suggested approval procedures for larger and more sensitive projects were to:

1. Set clear concise scheme objectives.
2. Work up the design against objectives (preferably as a simple 3D illustration).
3. Review by expert panel, including the results of safety audits.
4. Sign-off by identified elected member with vested powers.

A complementary approach for minor schemes is as follows:

1. Set specific scheme objectives if appropriate.
2. Work up the design against objectives (preferably as a simple 3D illustration)
3. Senior manager to review design, including results of safety audit, and make decisions where there are conflicts. The manager must be able to take a holistic view, and bring in specialist professional and political advice as necessary.

The review stage will help to ensure that poor quality designs do not reach the public realm. To ensure high quality designs, attention needs to be paid to the initial stage: to the way in which the scheme objectives are set, to feasibility and pre-planning. It is at this stage that holistic audits of the site, community consultation and so on are so important.

5.1.2 Modified road safety audit

The road safety audit as described in the DMRB standard is optimised for vehicle-based environments. Highway authorities may wish to consider following a modified procedure if they intended to seek a safety audit on a scheme in the complex environment of a street.

The key is to ensure the road safety audit is open, robust and objective so that its recommendations can easily be balanced by other design objectives.

A highway authority may wish to consider requiring the following additional information to be provided with each recommendation resulting from a road safety audit:

- A risk factor
- Quantification of risk
- Evidence/justification

The recommendations should then be reviewed by the designer against the overall scheme objectives. This should be set down in a short Design Review Report, which evaluates how each recommendation of the audit balances in relation to other scheme objectives (liveability, sustainability, etc), and states what course of action will be taken to the overall benefit of the public.

(a) Risk Factor

It is suggested that Safety Audit could build on the approach adopted in “Well Maintained Roads – a code of practice on highway maintenance management”, which recommends the use of a Risk Factor approach for use in Highway Safety Inspections as detailed below:

Risk Impact

9.5.4 The impact of a risk occurring should be quantified on a scale of 1 to 4, assessed as follows:

- 1 Little or negligible impact
- 2 Minor or low impact
- 3 Noticeable impact
- 4 Major, high or serious impact.

9.5.5 The impact is quantified by assessing the extent of damage likely to be caused should the risk become an incident. As the impact is likely to increase with increasing speed, the amount of traffic and type of road are clearly important considerations in the assessment.

Risk Probability

9.5.6 The probability of a risk occurring should also be quantified on a scale of 1 to 4 assessed as follows:

- 1 Very low probability
- 2 Low probability
- 3 Medium probability
- 4 High probability.

9.5.7 The probability is quantified by assessing the likelihood of users, passing by or over the defect, encountering the risk. As the probability is likely to increase with increasing vehicular or pedestrian flow, the network hierarchy and defect location are, consequently, important considerations in the assessment.

Risk Factor

9.5.8 The risk factor for a particular risk is the product of the risk impact and risk probability and is therefore in the range of 1 to 16. It is this factor that identifies the overall seriousness of the risk and consequently the appropriateness of the speed of response to remedy the defect. Accordingly, the priority response time for dealing with a defect can be determined by correlation with the risk factor, as shown in the Risk Matrix in Table 5 below.

Table 5 – Risk Matrix

Probability →Impact↓	Very low (1)	Low (2)	Medium (3)	High (4)
Negligible (1)	1	2	3	4
Low (2)	2	4	6	8
Noticeable (3)	3	6	9	12
High (4)	4	8	12	16

Response Category	Category 2(L) response	Category 2(M) response	Category 2(H) response	Category 1 response
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Road safety audit recommendations can also be clarified by a similar risk factor. This gives the designer a clear indication as to the importance of particular issues and problems raised, and an auditable trail.

An example of how the risk factor system could be applied to design works is given below.

Probability	Very low 1	Low 2	Medium 3	High 4
Impact				
Negligible 1 Low speed – few vulnerable road users	Category 1 1	Category 1 2	Category 1 3	Category 2 4
Low 2 Low speed – high incidence of vulnerable road users	Category 1 2	Category 1 4	Category 2 6	Category 3 8
Noticeable 3 High speed – low incidence of vulnerable road users	Category 1 3	Category 2 6	Category 3 9	Category 3 12
High 4 High speed – high incidence of vulnerable road users	Category 2 4	Category 3 8	Category 3 12	Category 1 16

The highway authority may establish a standing policy on the extent of a designer’s discretion in responding to a recommendation. For example:

Category 1	Recommendation must be heeded unless redesign avoids problem
Category 2	Implementation of recommendation strongly recommended unless redesign avoids problem
Category 3	Implementation of recommendation discretionary
Category 4	Implementation of recommendation not critical to reasonable safety

(b) Quantification

It may be possible to quantify some Road Safety Audit Recommendations using predictive tools. For example, TRL’s Safenet2 could be used to provide an overall assessment of risk for a scheme and help to identify the consequences of alternatives. Individuals using prediction systems must have adequate training. They must be able to understand the underlying models, assumptions and evidence base used in making the predictions, in order to judge whether the predictions are valid for a particular street or element of the public realm.

(c) Evidence

Safety audit recommendations may include or refer to evidence or underlying science that justifies the conclusions and recommendations being drawn.