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INSTITUTE OF HIGHWAY ENGINEERS

Well Managed Highway Liability Risk

FOREWORD

The Institute of Highway Engineers is delighted to have been invited to review and update the current guidance on Risk and Liability within the highways sector.

Following on from the publication of the UKRLG document "Well Managed Highway Infrastructure" this guide seeks to provide further insight and advice on the risk and evidence-based approach to service delivery and the effective management of highway liability risk exposures.

The guidance applies throughout all parts of the United Kingdom and particular attention has been given to ensure any specific arrangements within the devolved administrations has been identified.

Tony Kirby, President IHE **March 2017**

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SECTION ONE
Introduction

1.1 MANAGING HIGHWAY LIABILITY RISKS IN THE 21ST CENTURY

1.1.1 The value and visibility of the highway asset and its benefit and importance to the community and economic wellbeing of the nation cannot be underestimated. The highway infrastructure provides access to businesses as well as shaping the character of an area and contributing to the social well-being and quality of life in a community. Experience during severe weather events has highlighted the significant cost to the economy and social life when parts of the infrastructure become defective or are taken out of use. Asset management is widely accepted as a means to deliver a more efficient and effective approach to the management of highway assets through long term planning and by ensuring that levels of service are defined and achievable for available budgets; it can also be used to support the case for funding.

1.1.2 The extensive duties that arise from the Highways Act are non-delegable and form the legal basis for a considerable proportion of the local authority claims and litigation experience. The risks arising from this function have escalated in recent years as highway maintenance expenditure has come under pressure through budget reductions and the associated claims process has undergone extensive reform.

1.1.3 From figures provided by RMP and Zurich (the two largest insurance providers to local Councils in the UK), as well as from the Department for Infrastructure in Northern Ireland, we know that in excess of 30,000 claims for compensation are received by highway authorities each year. In the majority of cases (on average about 78%) liability for the claim is not proven and so no compensation is owed. However, for those cases where liability does attach the total amount being paid out in is in excess of £40 million pounds each year.

1.1.4 It should be noted that the estimate provided does not include any allowance for the costs of claims incurred by the many Councils in England, Wales and Scotland who undertake to manage some of their claims in-house. In house figures pertaining to Northern Ireland are included. Although the majority of Councils will purchase liability insurance, most will be retaining much of the liability risk within their own budgets via large policy deductibles (excesses) and aggregate stop losses. The financial burden of these claims will, therefore, directly impact upon operational budgets. In addition to readily identifiable insurance premium and claims costs, the internal administrative handling expenses of these matters also absorbs more precious resources, estimated to be over £10 for every £1 of direct insurance cost.

1.1.5 In October 2016 the UKRLG published a **Code of Practice on Well-managed Highway Infrastructure (WMHI)**, which this guide is intended to support and be considered as supplementary advice, in particular to Section A5, and therefore the two documents should be read in conjunction.

1.2 AFFORDABILITY

1.2.1 The principle of Well-managed Highway Infrastructure is that highway authorities will adopt a risk-based approach in accordance with local needs, priorities and affordability. The risk-based approach to highway infrastructure maintenance is essentially based on an understanding of the highway network, the potential risks, and an appreciation of their likely significance.

1.2.2 It is not possible for reasons of practicality and affordability for any highway authority to maintain all of its highway infrastructure in an as new, defect free condition all of the time, nor does the law require them to do so. In setting standards for maintenance management for any particular category of highway, the authority has to take into account the financial and other resources that it can reasonably make available for the purposes of highway maintenance within its total resources for all its functions.

1.2.3 Highway authorities' resources, both operational and financial, are inevitably finite. This reinforces the need for a risk-based approach to the inspection, identification and repair or removal of defects and hazards.

1.2.4 Financial considerations mean that the ideal maintenance treatment for a particular circumstance may not always be possible. The highway authority must use a structured and prioritised approach to manage the risks associated with the selection of maintenance options.

1.2.5 The concept of affordability acknowledges the financial constraints highway authorities face but it is recognised that the legal position will need to evolve to give effect to this.

1.3 PURPOSE AND OBJECTIVES

1.3.1 This document aims to provide a reference source and practical guidance on best practice in the management of highway liability risk exposures. In particular how to apply the principles of risk management and a risk based approach to highway liability claims exposure which will be beneficial to all levels of performance.

1.3.2 The intention of this document is to provide a practical reference document that covers both the basis of the highway claims function for new entrants into the sphere and also provides a source of tactical, operational and reference guidance for more experienced managers.

1.3.3 **Section Two** provides practical advice and guidance on applying a risk-based approach to highway liability exposures and will cover how the five activities of the ISO 31000 process can be applied to highway liability risk management as well as key considerations for managing highway liability risks within a risk-based approach.

1.3.4 **Section Three** provides an overview of the fundamental legal principles relating to highway liabilities in England and Wales, Scotland and Northern Ireland. It sets out the main statutory provisions and case law that provide the core principles on which highway claims are considered.

1.3.5 **Section Four** details the claims processes, fraud, and the importance of recording and capturing claims management information, which can support a risk-based approach to highways asset management. Specific references will be made to Scotland and Northern Ireland where the claims and litigation processes differ to England and Wales.

1.3.6 **Section Five** sets out the training available and competence requirements of the various personnel involved in delivering the highway service. It stresses the importance of maintaining training plans and records to evidence the training period as well as the need to periodically refresh and update training to ensure the continued competence of staff.

1.3.7 **Section Six** provides guidance on information management and record keeping critical to highway liability management as well as highlighting factors relevant to data protection and freedom of information.

1.3.8 **Section Seven** reviews some of the issues relating to transfer of liability risk when services are outsourced. It provides a list of practical recommendations to help avoid conflict and uncertainty around risk ownership and outlines the items to agree with contractors and include within a claims management protocol.

1.4 LIMITATIONS OF THIS DOCUMENT

1.4.1 Although the task group have taken every care in the preparation of this document, neither the authors nor the organisations can accept any legal liability for its contents, which do not necessarily reflect the views of the contributory organisations. The document refers to legislative practices in England, Wales, Scotland and Northern Ireland, and the focus is primarily on local highway authorities and not the strategic network.

1.4.2 Where specific reference to case law is made 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 within the document.

SECTION TWO

Risk-Based Approach and Highway Liability Risk Management

2.1 INTRODUCTION

2.1.1 WMHI recommends that: -

- A risk-based approach (RBA) be adopted for all aspects of highway infrastructure maintenance, including setting levels of service inspections, responses, resilience, priorities and programmes **(Recommendation 7)**.

2.1.2 This section provides practical advice and guidance on applying a risk-based approach to highway liability exposures. It should be read in conjunction with the information and advice contained within WMHI section A.5 and **Highway Infrastructure Asset Management** Part C.

2.1.3 It will cover: -

- How the five activities of the ISO 31000 process can be applied to highway liability risk management.
- Key considerations for managing highway liability risks within a RBA.

2.2 WHAT IS A RISK-BASED APPROACH?

2.2.1 ISO 31000: 2009 Risk Management Principles and Guidelines sets out the principles of risk management and the organisational framework and process required to develop and implement a RBA. The risk management process described within ISO 31000 is illustrated below.

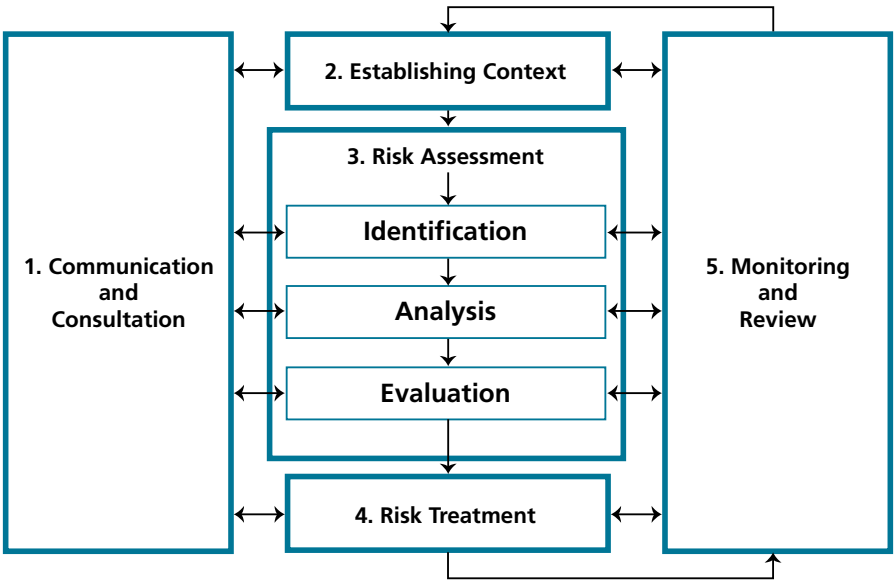


Figure 1

It sets out five essential 'activities' that are required to manage risk. WMHI suggests that this model should be applied to the management of the strategic, tactical and operational risks that impact highway asset management.

2.2.2 This document is focused on the risks associated with highway liability exposures and the following seeks to provide guidance on the development of a RBA and the application of the ISO 31000 process to this area of risk exposure.

2.3 APPLYING ISO 31000 TO HIGHWAY LIABILITY RISK MANAGEMENT

2.3.1 **Communication and Consultation**

Communication and consultation impact across all stages of the process. With regards highway liability exposures there are a multitude of individuals and groups who have a relevant interest and with whom the highway authority should regularly communicate and consult.

These include: -

- General public.
- Elected Members.
- Senior Executives of the Council.
- Insurance and risk management colleagues and insurance provider.
- Legal service providers.
- Claimants and their representatives.
- Professional bodies and industry groups.
- Contractors and suppliers.
- Neighbouring and similar authorities.

This is not an exhaustive list, rather it is provided to illustrate that highway authorities should not operate in silos. To establish a RBA with regards highway liability exposures it is necessary to engage with a wide variety of stakeholders, each of whom has an interest or contribution to make.

2.3.2 **Establishing the Context**

It is the risk context stage that enables a recognition that the highway liability risk exposure may differ significantly between one authority and another. Factors that influence the context may be external, such as the prevalence of adverse weather or a change in interpretation of the law, others will be internal, such as local policy and priorities. Some will be generic and so apply to all highway authorities, others are more specific to the individual authority.

2.3.3 Examples of factors that influence the context of risk with regards highway liabilities include: -

- Highways are a valuable and highly visible asset, essential to the social and economic well-being of a community.
- Highway authorities have a non-delegable statutory duty to maintain highways and failure to do so can result in serious injury or death to road users, damage to property and can lead to civil claims.
- The characteristics of the network such as size, type, inventory, usage, current condition, environmental exposures, criticality etc.
- Local policy and priorities, finance and affordability which in turn will influence the risk appetite / risk tolerance to various types of events and so determines how risks are managed.
- The highway maintenance service delivery model adopted by the authority, which may range from a direct labour in-house to a fully commissioned service.

2.3.4 Risk Assessment

ISO 31000 sets out three distinct stages of risk assessment. Namely identification, analysis and evaluation. This approach can be applied to highway liability risks as follows: -

Identify Risk	This stage involves identifying the events or circumstances that might result in highway liability claims. All highway authorities will have experience and knowledge of these claims. Obvious examples include liability exposure for: ● Personal injury following trips and slips on surface defects ● Vehicle damage caused by surface defects
Analyse the Risk	At this stage the risk is analysed to determine the potential consequences should it occur (that is the reasonably foreseeable extent of the injury or damage that might result) and also the likelihood of the risk occurring. There are numerous sources of information that will assist authorities analyse consequence and likelihood of the various risks identified. These include but are not limited to – ● Underlying condition surveys and information ● Network hierarchy / type of road and usage ● Number / scale of defects identified during inspections ● On-site safety assessments by highway inspectors ● History of complaints / claims ● Criticality of the section of network
Evaluate the Risk	The evaluation stage of risk assessment determines the authority's response to the risk. This is will be based on the analysis undertaken and the authority's appetite or tolerance for the scale of risk this reveals. Simply put, this is the stage at which a decision is made on the course of action to be taken. It is frequently the case that risk registers and/or a risk matrix (eg a Red Amber Green heat map) is used at this stage to plot and record the analysis of the risk and so help risk evaluation and determine the action to be taken.

2.3.5 **Risk Treatment (Manage Risk)**
This stage of the process describes the actions and activities implemented to manage the risk. This will include actions that reduce the likelihood of the risk materialising for example: -

- Routine inspections by trained and competent highway Inspectors.
- Maintenance and repair programmes that respond in a timely manner to defects presented.
- Condition surveys and programmed repairs and improvement schemes.

2.3.6 Some actions may be designed to reduce the impact or consequence of the risk, for example: -

- Insurance cover for highway liabilities to manage financial impacts.
- Application of surfaces and treatments to minimise damage from incidents.
- Indemnity arrangements with suppliers included within contracts.
- Efficient claims management to reduce loss/ leakage from the handling process.

2.3.7 **Monitoring and review**
All elements of the process should be regularly monitored and WMHI highlights the need for regular evidence-based reviews to form part of the RBA. Examples include the need to review: -

- The underlying context of the risk exposure as this may change over time. In turn such changes may alter the authorities risk appetite and so influence the decisions taken to manage the risk.
- The risk assessment process should be monitored to ensure it is being implemented in accordance with the procedures, instructions and training provided. The outcome of this might indicate, for example, the need for refresher training to be provided to highway Inspectors.
- The effectiveness of risk treatment/risk management solutions should be monitored. This might include for example routine defensibility review of settled claims and determining key performance indicators relating to highway liability risk, setting targets for improvement and benchmarking against similar authorities.

2.4 KEY CONSIDERATIONS FOR MANAGING HIGHWAY LIABILITY RISK WITHIN A RBA

2.4.1 The need to adopt a RBA is fully aligned with the principles of asset management and was always implied within the 'old code' Well Maintained Highways. The major change with WMHI is that this is now more explicit and no prescriptive or minimum standards have been set.

2.4.2 Highway authorities will be expected to adopt a RBA to determine and implement levels of services in accordance with local needs, priorities and affordability.

2.4.3 The application of this approach to safety inspections, defect repair and recording and monitoring of information are perhaps the most critical with regards to highway liability risk management. Below we list a number of key considerations for highway asset managers and risk and insurance managers when developing the RBA.

2.4.4 **The underlying legal framework remains unchanged**
A review of the current law relating to highway liability is provided in Section 3, this remains unchanged. Equally as with WMH (the 'old Code') it is clearly stated that WMHI is a code of practice, providing guidance on highways management but it is not statutory.

2.4.5 The outcome of highway claims will remain highly 'fact sensitive' and the courts view on what constitutes a dangerous defect will not have changed because of the introduction of the new code. In order to defend a claim an authority will still need to demonstrate that it had taken reasonable care to identify and respond appropriately to a defect presenting a danger to road users.

2.4.6 **Establishing the frequency of safety inspections**
WMHI recommends that this should be derived based on the category of the asset within the network hierarchy but also take into consideration a number of other factors, listed below: -

- Category within the network hierarchy.
- Type of asset.
- Critical assets.
- Consequence of failure.
- Network resilience.
- Use, characteristics and trends.
- Incident and inspection history (including claims and complaints).
- Characteristics of adjoining network elements.
- The approach of adjoining highway authorities.
- Wider policy or operational considerations.
- Deteriorated condition.

This approach enables an authority to take into consideration a number of risk factors that will support a decision to subject a section of the network to less frequent or more frequent inspections than might be the case if the network hierarchy category were the sole consideration.

2.4.7 It will be important when dealing with issues of highway liability that an authority is able to clearly explain the approach it has taken to determining safety inspection frequencies for different sections of the highway and be able to demonstrate how the factors listed informed that approach.

2.4.8 **The method of inspection and what to inspect**
It is for authorities to determine the most appropriate way to undertake inspections. The key point for highway liability management is that the method selected should enable clear observation of defects for each asset type.
WMHI suggests the possibility of integrating inspections with other activities, such as combining inspections of town centres by Street or Community Wardens with the safety inspections of the same area.

2.4.9 The code however highlights that where combined inspections are adopted particular care should be taken to ensure that consistent levels of quality are maintained and that those carrying out inspections are trained, qualified and competent. This is a major consideration with regards highway liability and reference should be made to Section 5 of this guide for more information on training and competency standards required.

2.4.10 The code recommends that Inspectors be provided with a checklist of items to be inspected to help ensure consistency, and that that safety inspections incorporate highway trees, including those outside but within falling distance of the highway.

Authorities therefore should include some basic arboricultural guidance in training of Inspectors but that arboricultural specialists should advice on the frequency of inspections and works required where a high risk is identified. WMHI also suggests that a separate programme of inspections of high risk trees should be undertaken.

2.4.11 Reports from members of the public are another source that some authorities may choose to use to complement its formal inspection programme. If this method is used it is important that quality assurance methods are used to check reports, that records are maintained and training provided to those taking reports and assigning actions to respond.

2.4.12 **Competency of those conducting inspections**
WMHI states that those involved in managing, developing and implementing the risk-based approach must be competent to the satisfaction of the Highway Authority.

It acknowledges that competence is especially important in the case of inspections and surveys, where the quality and treatment of data and decision making could have significant legal and financial consequences. It is therefore fundamental that anyone carrying out inspections understand the concepts involved in applying a RBA and have the skills to carry out dynamic on-site risk assessments in relation to potential safety defects.

2.4.13 All highway authorities need to consider how they will answer this challenge and how they will demonstrate the competency of those conducting safety inspections. Further information is provided in Section 5 of this guide.

2.4.14 **Defect risk assessment and repair**
WMHI notes that although some general guidance can be given by authorities on the likely risk associated with particular defects, on-site judgement will always need to take account of particular circumstances.

2.4.15 Highway authorities will need to determine and provide clear guidance on defect *investigatory levels* across the range of foreseeable highway defects. Any item with a defect level which corresponds to, or is in excess of, the defect investigatory level adopted by the authority is to be further assessed for likely risk.

2.4.16 It should be noted that the term '*investigatory level*' has been used deliberately to infer that there is no expectation that repair action will necessarily be taken following the investigation. This is not an 'intervention level'. Rather the action to be taken will be determined by the dynamic risk assessment undertaken during the site inspection.

2.4.17 It is for the Highway Authority to set its investigatory levels in accordance with the RBA adopted and the context of the authority. As explained previously this will be influenced by a number of factors including local needs, priorities, affordability and risk appetite.

2.4.18 With regards highway liability risk management it is important that investigatory levels are set to ensure that defects likely to create danger to users of the network are investigated, adequately risk assessed and appropriate action taken.

2.4.19 Many authorities already employ the use of a risk matrix to assist with the analysis and evaluation of defects identified. An example is provided within **Highway Infrastructure Asset Management.**

LIKELIHOOD OF EVENT OCCURRING	CONSEQUENCE OF EVENT OCCURRING				
	NEGLIGIBLE	LOW	MEDIUM	HIGH	SEVERE
NEGLIGIBLE	1	2	3	4	5
VERY LOW	2	4	6	8	10
LOW	3	6	9	12	15
MEDIUM	4	8	12	16	20
HIGH	5	10	15	20	25
KEY TO RISKS					
LOW		MEDIUM		HIGH	

HMEP, UKRLG, Highway Infrastructure Asset Management Guidance Document, 2013, p79

Figure 2

2.4.20 Variations on this model do exist. Some authorities have amended the approach to provide four risk ratings to align with their repair response categories: -

- Red (Urgent) Category 1
- Amber (High Risk) Category 2
- Yellow (Medium Risk) Category 3
- Green (Low Risk) Category 4

2.4.21 It is for the Highway Authority to adopt the method that best suits its requirements but whatever approach is taken it is important that this aligns with the principles of a RBA, that it is documented and approved by the Council's executive, and that those using the process are trained and competent in its application.

2.4.22 With regards highway liability management it is advisable to implement a system to ensure that where the outcome of an on-site inspection of a defect that meets or exceeds the investigatory level is a decision to take no action, that the reasons underlying the risk assessment and decision not to act are recorded.

2.4.23 **Aligning the RBA with neighbouring authorities**
So far as possible key elements of the RBA adopted, such as the frequency of inspections, investigatory levels set, and action responses should align with those in neighbouring and similar authorities.

If for any reason this is not the case it would be advisable to determine and record any factors where the context of the risk differs from those authorities against whom you may be compared.

2.4.24 Documentation and records
WMHI notes that the efficiency, accuracy and quality of information and records maintained by authorities will be crucial both to the effective management of the service and to the defence of claims against the authority for alleged failure to maintain.

2.4.25 As stated this is a very important factor for highway liability risk management. Highway authorities should maintain records of the following: -

- Documented RBA and executive approval of the approach.
- Policy and procedures agreed at executive level (minutes of relevant meetings).
- Training provided to staff and qualifications maintained.
- Guidance and instructions provided to staff.
- Complaints and reports made by members of the public.
- Network hierarchy classifications.
- Records of inspection and surveys.
- Maintenance records including work by independent contractors.
- Records of accidents.
- Records of previous claims

For further details on information management, data protection and freedom of information requests see Section 6.

SECTION THREE
The Law on Highway Liability

3.1 INTRODUCTION

This section aims to provide an overview of the fundamental legal principles relating to highway liabilities in England and Wales, Scotland and Northern Ireland.

3.1.1 The law relating to highway liabilities continues to evolve and therefore this section does not provide a definitive guide but sets out the main statutory provisions and case law which provide the core principles on which highways claims are considered.

3.1.2 This guidance has been written to accompany the recently published "Well Managed Highway Infrastructure" Code of Practice. As such, the impact the Code of Practice will have and the extent to which the law will further evolve are not yet known.

3.2 DEFINITIONS

3.2.1 At common law, a highway has been defined as:-

> *"A way over which there exists a public right of passage...a right...at all seasons of the year freely and at their will to pass and re-pass without let or hindrance".* (Willis J, ex parte Lewis (1888) 21 QBD 191 at page 197)

3.2.2 and a public highway as:-

> *"A public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and re-pass".* (Lord Chancellor, DPP v Jones 2000)

3.2.3 The statutory definition of a "highway" from the Highways Act 1980 is not helpful: -

> *"The whole or part of a highway",*

But this does demonstrate that a highway can include a carriageway, a footway, meaning a pedestrian path abutting a carriageway, and a footpath, being a pedestrian path without an associated carriageway.

3.2.4 Our focus is primarily upon the *"highway maintainable at the public expense"* which is defined by section 36 of the Highways Act 1980. The definition results in a two stage process. Firstly it is essential to consider whether the locus meets the above definition of a *"highway"*, rather than being private property, and in that event a view can be taken on whether the locus is *"maintainable at the public expense"*.

3.2.5 Under section 36(1) that includes all highways which were maintainable at public expense under the Highways Act 1959, but also: -

a) a highway constructed by a highway authority, unless on behalf of someone else;
b) a highway constructed under Part 2 of the Housing Act 1985;
c) a highway that is a trunk road or a special road;
d) a footpath created in terms of a public path creation order, a public path diversion order, or an order under sections 247 or 257 of the Town and Country Planning Act 1990, or dedicated under a public path creation agreement.

3.2.6 The 1980 Act contains detailed processes for additional highways to be added by notice, agreement, or improvement, and section 36(6) and (7) require every county council, metropolitan district council and London borough to keep an accurate, up to date list of the streets within their areas which are highways maintainable at the public expense.

3.2.7 For the purposes of England and Wales, the question of the extent of the highway has been determined as including the whole width between enclosures, and although that is not to say that the verge requires to be maintained in a condition suitable for vehicles to pass over it *(Kind v Newcastle Upon Tyne Council* [2001] EWHC Admin 616), this has been held to mean that if a defect on the verge is likely to create a danger to road users, a failure to address that could be actionable *(West Sussex County Council v Russell* [2010 EWCA Civ 71; *Rider v Rider* [1973] KB 505; *Jones v Rhondda Cynon Taff CBC* [2008] EWCA Civ 1497).

3.2.8 **Scotland**
In Scotland, there is no direct statutory equivalent to the *"highway maintainable at the public expense"*. Under the Roads (Scotland) Act 1984 Section 151(1), a "road", the Scottish equivalent to a "highway" is:-

> *"Any way (other than a waterway) over which there is a public right of passage (by whatever means) and whether subject to a toll or not and includes the road's verge and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes and any reference to a road includes a part thereof."*

Carriageways, footways and footpaths are expressly included in the definition of roads.

3.2.9 The responsibility to manage and maintain roads is limited, with reference to section 1 of the 1984 Act, to those roads which: -

> *"Are for the time being entered in a list (in this Act referred to as their "list of public roads") prepared and kept by them under this Section".*

Accordingly, rather than status as a highway maintainable at the public expense being determined by facts and circumstances, with the list being ancillary, in Scotland the list determines which roads are to be maintained by the roads authority.

3.2.10 It remains possible, by virtue of occupation and control, for a Scottish local authority to have responsibility for roads which are not adopted under the 1984 Act, by reason of the Occupiers' Liability (Scotland) Act 1960. This regularly arises in relation to roads within housing estates.

The Scottish definition of a road being much more explicit, it is clear that the road includes the verge.

3.2.11 **Northern Ireland**
In Northern Ireland the equivalent of the *"highway"* is the *"road"* which essentially means a public road and one which is maintainable by the Department for Infrastructure (the Department), and includes: -

a) a road over which the public have a right of way on foot only, not being a footway;
b) any part of a road; and
c) any bridge or tunnel over or through which a road passes

3.2.12 As with the legal position in England and Wales, road can include a carriageway, a footway and a footpath. Carriageway is defined as a way constituted or comprised in a road being a way over which the public have a right of way for the passage of vehicles, footway as a way comprised in a road which also comprises a carriageway, being a way over which the public have a right of way on foot only and footpath as a pedestrian path without an associated carriageway.

3.2.13 The relevant legislation governing highways in Northern Ireland is The Roads (Northern Ireland) Order 1993.

3.2.14 The statutory duty to maintain relates solely to the 'surface' or 'fabric' of the road and does not include a road verge although if found to be reasonably foreseeable that a defect in a verge is likely to cause a danger to road users, any failure to address the defect may well give rise to liability being established against the Department.

3.3 MAINTENANCE STATUTORY DUTIES AND DEFENCES

3.3.1 The statutory duty to maintain the highway arises from section 41 of the Highways Act 1980 and provides:-

"…the highway authority for a highway maintainable at the public expense is under a duty… to maintain the highway."

3.3.2 It follows that the duty includes putting the highway into repair once out of repair. The standard of the repair is dealt with later, however the highway should be maintained so that it is reasonably free of danger to all users of the highway who can be expected to use the same and who are using the same in the way normally to be expected of them.

3.3.3 The duty extends to maintaining the fabric and structure of the highway including existing drainage. Exactly what constitutes being part of the structure of the carriageway is dependent on the specific factual circumstances and has been found to include items bonded to the highway surface.

3.3.4 The section 41 duty cannot be delegated whether by outsourcing or otherwise.

3.3.5 The legislature has balanced the section 41 duty to maintain by providing a statutory defence in section 58 of the Highways Act 1980, which reads: -

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 to be 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 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;
   e. where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what 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.

3) This section binds the Crown.

3.3.6 Section 58 envisages a risk-based approach when establishing systems of maintenance by having regard to what is "reasonable" and the factors in section 58 (2).

3.3.7 A highway authority need not place reliance on section 58 until such time as the claimant has proved a breach of section 41 by proving: -

(a) the highway was dangerous to traffic or pedestrians in the sense that danger may reasonably have been anticipated from its use by the public;
(b) the dangerous condition was created by the failure to maintain or repair the highway; and
(c) the injury or damage resulted from such a failure - *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291.

3.3.8 The burden of proving the section 58 defence rests with the highway authority.

3.3.9 **Scotland**
In Scotland, the statutory obligation under section 1 of the Roads (Scotland) Act 1984 is to manage and maintain (which is defined by section 151 to include repair) public roads, but the duty which any individual road user will rely upon in claiming damages is a common law duty of reasonable care arising from the relationship which section 1 creates between roads authority and road users.

3.3.10 That being so, the 1984 Act does not contain any equivalent to the statutory defence created by section 58 of the 1980 Act. This is an unusual situation, as generally Scots law will not accept that there is a duty owed to a particular individual as a result of a statutory duty owed to the public at large by a local authority. It is, however, well settled.

3.3.11 There is accordingly no need for a statutory defence, as the duty incumbent at common law is a duty of reasonable care only, and liability arises from negligence only.

3.3.12 The court will still consider whether the accident was caused by a defect which ought to have been identified as giving rise to a foreseeable risk of injury or damage, a question for the court alone which will turn on the specific facts and circumstances of the case *(MacDonald v Aberdeenshire Council* 2014 SC 114).

3.3.13 It will also be necessary to demonstrate how often inspection ought to have taken place and why *(Gibson v Strathclyde Regional Council* 1993 SLT 1243). Most often the justification will be reference to the authority's own policy, or the Code of Practice in place at the material time. If the injured party is unable to show that a defect giving rise to a foreseeable risk of harm existed to be found at a time when inspection ought to have taken place or did in fact take place, the case will fail *(Cordiner v BR Board* 1986 SLT 209; *Hanlon v BR Board* 1991 SLT 228).

3.3.14 **Northern Ireland**
In Northern Ireland, Article 8 of the Roads (NI) Order imposes a statutory duty on the Department to maintain the roads.

3.3.15 Similar to the provisions of section 58(1) of the Highways Act 1980 above, under Article 8(2) in an action against the Department in respect of injury or damage resulting from its failure to maintain a road it shall be a defence to prove: -

(a) that the Department had taken such care as in all the circumstances was reasonably required to secure that the part of the road to which the action relates was not dangerous for traffic; or
(b) that the injury or damage-
   i. resulted from works (other than works by or on behalf of the Department) carried out on or under that part of the road to which the action relates; and
   ii. resulted from an event which occurred before the completion of the re-instatement or making good of that part of the road in accordance with any relevant requirement.

3.3.16 Similarly, the equivalent of section 58(2) of the Highways Act 1980 is Article 8(3) of the Order which provides that the court shall in particular have regard to the same considerations albeit inserting the word *'road'* for *'highway'* and *'Department'* for *'highway authority'*.

3.3.17 The burden of proving the Article 8 defence rests with the Department.

3.3.18 Essentially, if the Department can prove that it had in place adequate policies and procedures to maintain the highway, which were being performed, and there was no prior knowledge of a defect before the date of incident, the claim may be repudiated. In the case of *Balmer v DOE 24.10.03*, Lord Justice McCollum reinforced the principle of reasonableness and upheld the Article 8 defence stating *"no system can ensure immediate discovery and repair of all hazards"*.

3.4 ASSESSMENT OF DANGEROUSNESS

3.4.1 The most common type of highways claim arises out of footway tripping claims. There is extensive case law as to the standard of repair and what amounts to a failure to maintain under section 41 of the Highways Act 1980. In deciding whether there has been a breach of duty under section 41, is for the court to make its own assessment as to whether the footway was dangerous.

3.4.2 While guidance can be taken from previously decided cases, the courts have repeatedly stated that highway tripping claims are fact sensitive, and each case will be decided on its own facts. That said judges are frequently referred to guidance from a number of frequently cited cases.

3.4.3 The test as to whether a footway is dangerous is whether there is reasonable foresight of harm to users of the highway. It is a mistake to isolate and emphasise the difference in levels between flagstones unless the difference is such that a reasonable person who noticed and considered it would regard it as presenting a real source of danger. Uneven surfaces and differences in level of about an inch may cause a pedestrian to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green - *Littler v Liverpool Corporation* [1968] 2 All ER 342.

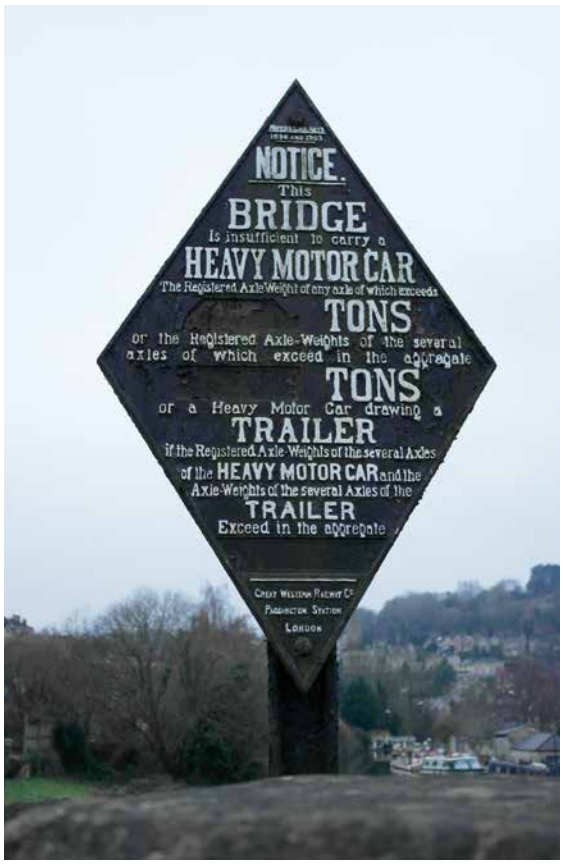
3.4.4 Everyone must take account of the fact that there may be unevenness here or there. There may be a ridge of half an inch or three quarters of an inch occasionally, but that is not the sort of thing which makes it dangerous or not reasonably safe - *Meggs v Liverpool Corporation* [1968] 1 WLR 689.

3.4.5 It would not be right to say that a depression of less than one inch will never be dangerous but one above will always be dangerous, such a mechanical approach is not to be encouraged. The test of dangerousness is one of reasonable foresight of harm to users of the highway. Each case will turn on its own facts. The public must expect minor depressions and minor obstructions - *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291.

3.4.6 It is for the claimant to prove that the particular spot where the accident occurred was dangerous. It is irrelevant that there were other spots nearby that were dangerous or that the area as a whole needed resurfacing - *James & Thomas v Preseli Pembrokeshire District Council* [1993] PIQR P114.

3.4.7 The court will have regard to a highway authority's inspection and maintenance regime but it is for the Court to make its own independent assessment of dangerousness - *Dalton v Nottingham County Council* [2011] EWCA Civ 776.

3.4.8 However, a failure by a local authority to comply with its own policy as to standards of safety is not determinative of whether the Council is in breach of duty, since the council's policy may fall below or exceed that which is reasonable. The test to be applied is an objective one - *Esdale v Dover District Council* [2010] EWCA Civ 409.



3.4.9 **Scotland**
In the Scottish Courts there guidance to be gained from previously decided cases on assessing the dangerousness of a defect, such as *McClafferty v British Telecommunications plc* 1987 SLT 327, where a protrusion of ¾ of an inch was assessed not to create a foreseeable risk of harm, but in reality, these determinations tend to be very fact specific, and such cases are of most benefit as a guide to the factors which the court will take into account in making its assessment.

3.4.10 As in England and Wales, road users are expected to anticipate, and be capable of safely negotiating a certain amount of imperfection in the road surface.

3.4.11 **Northern Ireland**
In Northern Ireland the test of *'dangerousness'* is also applied by the courts on a case by case basis. In a much cited case the 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 NIQB 22.

3.4.12 The position was reaffirmed in the High Court case of *McArdle v Department for Regional Development* [2005] NIQB 13. Mr. Justice Higgins also stated that the levels of maintenance have to be considered in terms of the availability of resources and also acknowledged the need to balance the risk against the cost and find the best compromise and that to do otherwise would be unrealistic.

3.4.13 In the more recent case of *McKee v DRD* [2013] NIQB 94, Mr Justice Gillen also noted the "reality of tight budgets and strict economies" faced by the Department.

3.4.14 Judges in Northern Ireland have also criticised any mechanical approach of measuring a defect based on policy and guidelines. In *McCutcheon v Department for Regional Development* (unreported oral judgment of Mr Justice Hart 4 October 2007) involving a 15mm raised manhole cover above a footway with medium volume pedestrian traffic, the defect was found to be non-actionable. The defect was noted on inspection and the trial judge affirmed that the 15mm edge ought not to have been noted but commended the Department in carrying out a public safety repair of the defect and affirmed that the carrying out public safety repairs as a proactive measure where finances permit does not undermine the statutory defence.

3.5 TRANSIENT DEFECTS

This section does not deal with the presence of ice and snow which is dealt with later.

3.5.1 There has been significant case law in this area with numerous attempts by claimants to extend the section 41 duty beyond mere maintenance. The most informative case law arises from issues in relation to the flooding of carriageways with the seminal case being *Burnside v Emerson* [1968] 1 WLR 1490 in which two vehicles collided head-on due to heavy ponding on the carriageway of an A road. The highway authority had notice of the tendency for the carriageway to pond which occurred due to a combination of the gully not being at the lowest point, a heavy rainfall event and a failure by the highway authority to cleanse the gullies. The Court of Appeal held that a failure to cleanse gullies amounted to a failure to maintain under section 41 thus the claimant was successful although was also held 50% liable for driving too fast for the prevailing conditions.

3.5.2 The same conclusions were reached in *Mitchell v Department of Transport* [2006] EWCA Civ 1089 where the drainage had not been maintained adequately such that there was significant vegetation growing out of the same. The Court of Appeal confirmed that the drainage system was part of the fabric of the highway and must be maintained as part of the section 41 duty.

3.5.3 However, a brief period of flooding is not necessarily evidence of the failure to maintain the highway. Further there is no duty to drain a highway as opposed to maintain existing highway drainage; *Jubin v Bridgend County Borough Council* [2005]. If such a duty were imposed it would have the effect of converting the power to drain under section 100 (1) of the Highways Act 1980 into a duty which is generally not permissible.

3.5.4 Liabilities can also be incurred by a highway authority where a highway culvert when built had an adequate capacity for a natural water course but subsequently had insufficient capacity due to an increase in flow resulting from developments upstream.

3.5.5 In *Bybrook Barn and Others v Kent County Council* [2001] LGR 239 the Court of Appeal held the highway authority liable in such circumstances as having originally constructed the culvert it was under a duty to do what was reasonable which in this particular case meant increasing the capacity of the culvert at, what was held to be, reasonable cost.

3.5.6 It is unlikely that claims involving mud, vegetation and/or loose gravel will succeed under either sections 41 or 130 Highways Act 1980 following the Court of Appeal decisions in *Ali v City of Bradford MDC* [2010] EWCA Civ 1282 and *Valentine v Transport for London* [2010] EWCA Civ 1358. However, should a highway authority create a nuisance itself it may be held liable at common law.

3.5.7 **Northern Ireland**
In Northern Ireland the maintenance duty under Article 8 does not require the installation of new gullies and road drains where none is presently installed. The Department may be held liable where any gully or drainage system it designed and/or installed fails to meet current best standards and creates a hazard for road users.

3.5.8 The Article 8 maintenance duty also includes the regular cleaning of gully systems. The Department adopts both a proactive and reactive approach in dealing with gullies, the latter usually being the cleaning in response to a public complaint and former being scheduled cleaning operations.

3.6 ICE AND SNOW

3.6.1 This section deals with the present position since the implementation of section 41 (1A) of the Highways Act 1980 which came into force on 31 October 2003 and was inserted into the Highways Act by section 111 of the Railways and Transport Safety Act 2003. The position is different prior to the implementation of section 41 (1A) when generally no duties arose in relation to ice and snow pursuant to the House of Lords decision in *Goodes v East Sussex County Council* [2000] 1 WLR 1356.

3.6.2 Section 41 (1A) provides that:-

> *"In particular, a highway authority is under a duty to ensure, so far as is reasonably practicable, safe passage along the highway is not endangered by snow or ice."*

3.6.3 Section 41(1A) is an extension of the section 41 duty. This means that highway authorities will also be able to rely on section 58. Thus, if a highway authority can prove that it took *'... such care as in all the circumstances was reasonably required …'* then it can avoid liability.

3.6.4 Courts have consistently found that highway authorities cannot be expected to salt and/or grit the full extent of the highway network and that a risk-based approach, which of itself encompasses an element of available finance, should be adopted. It is entirely appropriate for highway authorities to prioritise the network in terms of its winter service activities. The duty is limited by what is *"reasonably practicable"*. The reasonably practicable test is a broad one. A highway authority is not under an absolute duty to ensure that all roads are clear. Compliance with the Code of Practice, reasoned and documented policy decision-making should generally afford a defence subject to operational compliance.

3.6.5 In *Rhiannon Pace v The City and County of Swansea* [2007] the judge established the policy test to be: -

> *"Was the local authority's winter maintenance plan proper and reasonable?"*

In answer, the judge said:-

> *"It is clearly impossible for a highway authority to eliminate all risk of ice forming on the roads. It is also impossible for the plans to be devised at so high a level of protection that the very greatest level of protection is always provided. To place almost limitless amounts of salt on the roads may perhaps increase the levels of protection but it would do so at an entirely unrealistic and undesirable economic and environmental cost. A highway authority must instead devise a plan in accordance with best practice, using sufficient quantities of salt to address the foreseeable risks efficiently but with manageable and, importantly, sustainable constraints."*

3.6.6 The court will examine highway authority decisions and decide whether their policy was reasonable. It is for the highway authority to establish evidentially that it has a reasoned winter maintenance policy that is compliant with the winter service section of the Code of Practice: Well-Managed Highway Infrastructure and/or good practice together with a reasoned prioritisation for treating roads. Operationally records regarding weather reports, decision-making, and treatments (the date and time) should be available together with GPS data to maximise the prospects of establishing a section 58 defence.

3.6.7 Section 150 Highways Act 1980, whilst providing that obstructions on a highway from the accumulation of snow should be removed by a highway authority, does not give rise to a private law right to damages.

3.6.8 **Scotland**

In Scotland, the requirement to address clearance of ice and snow is to be found in section 34 of the Roads (Scotland) Act 1984: -

"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".

3.6.9 The assessment of reasonableness is therefore placed in the hands of the authority, and is subjective rather than objective. However, again, the cause of action will be at common law based on reasonable care, rather than a claim based on the statutory provision as such *(Syme v Scottish Borders Council* 2003 SLT 601).

3.6.10 The duty of reasonable care in these circumstances requires an exercise of discretion to prioritise areas in need of the most urgent attention, which necessarily might leave other areas untreated for a period. The key is to demonstrate the reasoning for and reasonableness of the assessment made, and to demonstrate that the plan devised was followed through, or if it was deviated from, that there was a reasonable justification for this.

3.6.11 **Northern Ireland**

Under Article 9 of the Roads (NI) Order the Department has a power, not a duty to remove snow and ice: -

1. The Department may take such steps as it considers reasonable and practicable to prevent snow or ice interfering with the safe passage of persons and vehicles using a road.
2. Without prejudice to the generality of paragraph (1), the Department may: -

    a. enter into arrangements with any person for the treatment of roads affected by snow or ice;
    b. place receptacles on roads for the purpose of making available to persons using a road affected by snow or ice material for the treatment of that road.

3. Nothing in this Article operates to confer on any person a right of action in tort against the Department for failing to exercise any power conferred on it under this Article or in respect of injury or damage resulting from the presence of snow or ice on a road.

3.6.12 Article 10 of the Order goes further in imposing a duty to remove any obstruction from the roadway including snow.

Article 10 states: -

1. If an obstruction occurs in a road from accumulation of snow or from the falling down of banks on the side of the road, or from any other cause, the Department shall remove the obstruction.
2. If the Department fails to remove an obstruction which it is its duty under this Article to remove, a court of summary jurisdiction may, on an application made by any person, declare the thing complained of to be an obstruction and state a period (not being less than 24 hours) within which the court considers it reasonable, having regard to all the circumstances of the case, that the obstruction should be removed.
3. In considering whether to make a declaration under this Article and, if so, what period to state for the removal of the obstruction, the court shall in particular have regard to: -

    a. the character of the road to which the complaint relates, and the nature and amount of the traffic by which it is ordinarily used;
    b. the nature and extent of the obstruction; and
    c. the resources of manpower, vehicles and equipment for the time being available to the Department for work on roads and the extent to which those resources are being, or need to be, employed by the Department on such work elsewhere.

4. Where the Department has a duty under this Article to remove an obstruction from a road, it may: -

    a. take any reasonable steps (including the placing of lights, signs and fences on the road) for the purpose of warning users of the road of the obstruction;

3.6.13 It goes on to state that nothing in this Article operates to confer on any person a right of action in tort against the Department for failing to carry out any duty imposed on it under this Article.

3.7 CONTRACTORS AND STATUTORY BODIES

3.7.1 Authorities often outsource aspects of their highway inspection and maintenance regime.

3.7.2 A highway authority has an absolute duty to maintain the highway, which is a non-delegable duty. This means that even if a highway authority arranges for a contractor to do work on the highway which causes danger to users of the highway, the authority will be liable to a claimant for failure to maintain even though it has employed an apparently competent contractor to carry out the work.

3.7.3 In this situation a highway authority will seek a contribution or indemnity from the contractor. These claims are likely to be based in negligence but also for breach of contract where any indemnities in the contractual agreements will be an important consideration.

3.7.4 Where claims arise out of apparatus in the highway belonging to others it is usual for the claim to be brought against the highway authority because of their non-delegable duty under section 41 Highway Act 1980. It is common in these circumstances for a local authority to then seek a contribution or indemnity from the undertaker.

3.7.5 The leading case of *Nolan v Merseyside County Council and North West Water* (unreported, Court of Appeal, 15 July 1982) held that where both the highway authority and utility company are in breach of duty but otherwise without fault, it is appropriate to apportion liability equally. An equal apportionment is open to challenge where there is some degree of blame on the part of the authority or the contractor.

3.7.6 A utility company is entitled to rely on the inspections carried out by a highway authority, but will be fixed with the same knowledge of a defect as the authority *(Reid v British Telecommunications PLC* (unreported, Court of Appeal, 1987).

3.7.7 It is thought that these decisions involving utilities are open to challenge on the basis that utility companies are public companies which ought to have the resources to properly inspect and maintain their own apparatus instead of being able to rely on highway authorities with their limited budgets to the extent allowed under earlier court decisions.

3.7.8 The position with regard to claims for property damage arising out of works on the highway is largely now governed the New Roads and Street Works Act 1991, which also extends to Scotland, albeit that the equivalent terms are separated from those applicable to England and Wales.

3.7.9 Under section 82 (section 141 in Scotland) undertakers are required to compensate those who have apparatus in the street in respect of any expenses incurred in making good damage to that apparatus as a result of the execution by the undertaker of street works. The section imposes strict liability.

3.7.10 In *Yorkshire Electricity Distribution Plc v Telewest Ltd* [2006] EWCA Civ 1418 the Court of Appeal made it clear that street works under the Act are works in a highway other than those carried out by the highway authority for purely highway purposes. In this situation there can be no liability under section 82, though liability can still arise in negligence.

3.7.11 **Scotland**

Further, in Scottish claims, regard should be had to the decision in *Foster v Dundee City Council* 2012 SLT (Sh Ct) 49, where a Sheriff held that Reid was not sound when read with Scottish authority with which it contrasts, and considering the inspecting roads authority to be akin to a competent contractor, there was no reason to depart from the usual rule that the liability for any negligence in the manner in which that inspection was carried out should remain with the inspecting authority. On the facts in *Foster,* where inspection had been undertaken but a defect missed, the Sheriff held that the utility should not be fixed with knowledge of this but should avoid liability. This is not an uncontroversial decision and as the decision of a single Sheriff, in one Sheriffdom only which has neither been reviewed on appeal nor considered in other reported judgements to date, this may not be the last word on this point.

3.7.12 **Northern Ireland**

In the unreported case of *Megaw v DOE*, the judge commented that an annual inspection by utilities, in addition to any reliance upon the Department notifications of defects should be considered as a minimal requirement which should increase where the utility company is on notice of a particular issue at the locus or a history of vandalism. Under the Street Works (Northern Ireland) Order 1995 (the 1995 Order) utilities or any party working on the highway should give notice to The Department. Private individuals or companies may need to make road openings and have to take out a street works licence under Article 11 of the 1995 Order. Utilities work under their respective statutory powers.

3.8 COMMON LAW NEGLIGENCE

3.8.1 In England and Wales the liability of a highway authority will normally arise under its statutory duty in terms of the Highways Act 1980.

3.8.2 However, in situations where public authorities have used discretionary powers, undertaken acts, entered in to relationships or accepted responsibilities which give rise to a common law duty of care, a claim for damages based on common law negligence may arise *(Lord Hoffmann, Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL15; *Smith LJ, Yetkin v London Borough of Newham* [2010] EWCA Civ 776). Removing safety bollards from an otherwise closed road, erecting bollards in a highway, removing warning signs from a road junction or planting vegetation in the central reservation are all examples where a common law duty has been held to arise.

3.8.3 However, care needs to be used when considering actions undertaken in pursuit of a discretionary power, such as the power under section 65 of the Road Regulation Act 1984 to erect traffic signs, rather than under a statutory duty.

3.8.4 In *Stovin v Wise* [1996] 3 WLR 388, Lord Hoffmann indicated that a duty of care could only arise based on a statutory power, if at all, in circumstances where it would have been irrational not to have exercised the power, so that in effect it was almost a duty to act and also, there were exceptional grounds for holding that the policy underlying the statute required compensation to be paid to those who suffered loss because the power was not exercised. On the facts of that particular case, an omission to serve an order upon an adjoining landowner requiring removal of an earth bank which limited sight lines did not give rise for a good claim, and Lord Hoffmann noted that: *"Drivers of vehicles must take the highway network as they find it".*

3.8.5 It has also been held that section 39 of the Road Traffic Act 1988, which provides a power to undertake road improvement works for road safety reasons could not create a duty which would allow a particular individual to make a claim in damages *(Gorringe v Calderdale Metropolitan Borough Council, supra, Stovin v Wise* [1996] AC923).

3.8.6 **Scotland**
Although in Scotland most roads claims are based on common law, and on the relationship with users of the road which it has been held is created by the imposition of the statutory duty in section 1 of the Roads (Scotland) Act 1984, the same considerations arise in relation to potential liability for exercise of discretionary powers, the position as detailed in *Gorringe* and *Stovin* holds good.

3.8.7 **Northern Ireland**
In Northern Ireland the liability of the highway authority will normally arise under its statutory duty imposed by the Roads (Northern Ireland) Order 1993 although common law claims, particularly in negligence can and do arise in situations where public authorities have undertaken acts, entered in to relationships or accepted responsibilities which give rise to a common law duty of care, a breach of which has resulted in loss.

3.8.8 Similarly, the same considerations arise in relation to potential liability for exercise of discretionary powers as detailed in the *Gorringe* and *Stovin*.

SECTION FOUR
Claims Management

4.1 INTRODUCTION

4.1.2 In this section we deal with claims processes, fraud, and the importance of recording and capturing claims MI which can support a Risk Based Approach (RBA) to highways asset management. Specific references are made to Scotland & Northern Ireland where the claims and litigation processes differ to England & Wales.

4.1.3 As explained in Section 3, Highway Authorities have a statutory duty to maintain the highway. When things go wrong and someone suffers damage or personal injury as a result of a defect on the highway caused by a failure to maintain then a claim for damages may arise.

4.2 TYPES OF HIGHWAY LIABILITY CLAIMS

4.2.1 Highway/Road Authorities deal with a wide range of claims for compensation however, the majority of claims for damages that Highway/Road Authorities receive fall into two distinct types

4.2.2 **Personal injury claims** – usually brought by pedestrians injured when tripping or slipping on footpaths, but also by cyclists and motorists injured when encountering potholes on the carriageway or where the condition of the road surface is an issue.

4.2.3 Under the Limitation Act 1980 in England and Wales or the Prescription and Limitation (Scotland) Act 1973 in Scotland there is usually a 3 year time limit to bring a personal injury claim.

4.2.4 There is a 3 year time limit to bring a personal injury claim but where a minor is involved the period does not commence until they reach the age of 18. The courts also have discretion to extend this in certain circumstances. The relevant legislation is the Limitation Act 1980 in England and Wales, the Prescription and Limitation (Scotland) Act 1973 in Scotland, and Article 7 of the Limitation (Northern Ireland) Order 1989.

4.2.5 **Vehicle damage claims** – usually made by motorists for vehicle suspension, wheel and tyre damage caused by driving over a carriageway pothole. There is a 6 year time limit to bring this type of claim in England, Wales, and Northern Ireland, and a five year limit in Scotland.

4.3 HIGHWAYS CLAIMS PROCESSES

4.3.1 Claims are processed according to their stated financial value but the majority of highways claims are dealt with under the **Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability)** which is designed to deal with claims valued between £1,000 and £25,000 arising from accidents occurring after 31 July 2013.

4.3.2 Claims are submitted by claimant representatives through the **Claims Portal**, which is an online claims reporting facility. Insurers and Claims Handling Agents to Highway Authorities, and Local Authorities who handle their claims in-house, are generally registered on the Claims Portal and claims are submitted electronically using a **Claims Notification Form (CNF)** direct to the insurer or claims handler. A Highway Authority may not therefore be the first to know a claim has been made against them.

4.3.3 Whilst claims that fall within its remit should be made through the Claims Portal, some CNFs are still submitted direct to the Highway Authority in either electronic or paper formats. Consideration should therefore be given to publishing Claims Portal IDs and Insurer/ Claims Handler information on the Authority's website or on other social media platforms.

4.3.4 CNFs need to be acknowledged within one business day and for Public Liability claims the Highway Authority, via their insurer or claims handler, is required to make and communicate a decision on liability within 40 business days from the date the CNF was sent.

4.3.5 Where admissions are made within the Portal an advantageous **Fixed Recoverable Costs Regime (FRCR)** sets modest legal fees for claimant representatives.

4.3.6 Where the CNF is not acknowledged, liability is denied or a decision has not been communicated within 40 business days, the claim will exit the Portal and a different set of costs rules will apply. Claims will also exit the Portal where the defendant raises the issue of contributory negligence.

4.3.7 Where liability is accepted it is important to settle claims within the Portal to benefit from the FRCR.

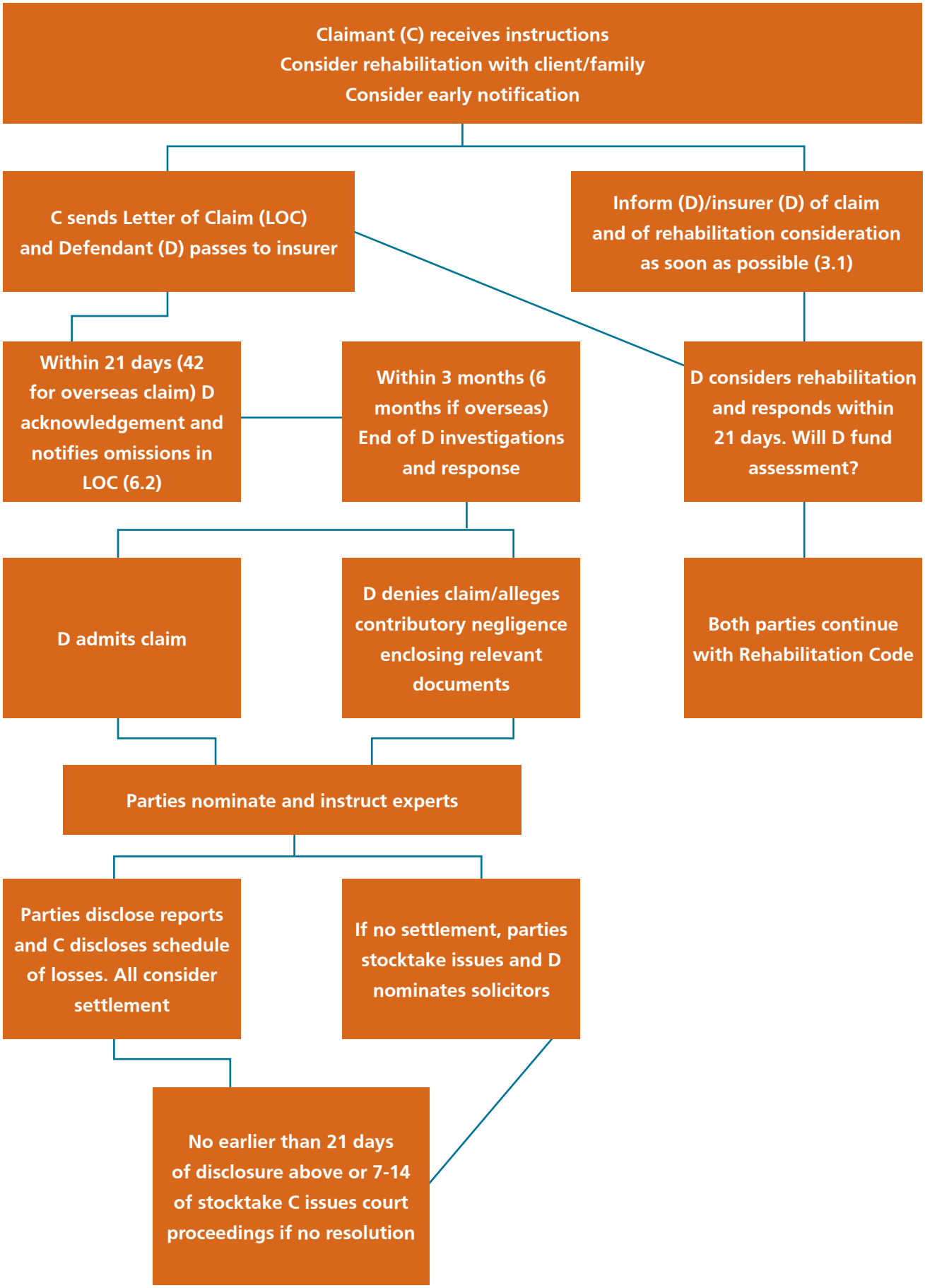
4.3.8 It is important to note that admissions made within the Portal are binding.

4.3.9 Claims arising before 31 July 2013 and those that drop out of the Portal are dealt with under the **Pre-Action Protocol for Personal Injury Claims**, although claim volumes for incidents arising before 31 July 2013 should be minimal because of the 3 year limitation period.

4.3.10 The Protocol sets out expected pre-litigation behaviours for Fast Track claims valued between £1,000 and £25,000, although the courts will expect the "cards on the table" approach promoted by the Protocol to be adopted on all claims regardless of value

- A Letter of Notification may be sent to a defendant placing them on notice of a potential claim and should be acknowledged within 14 days.
- The Protocol encourages the use of medical rehabilitation by the parties where appropriate.
- Letters of Claim should contain all information required by the defendant to investigate liability.
- Letters of Claim should be acknowledged by the defendant within 21 calendar days.
- The defendant will have a maximum of three months from the date of acknowledgment of the Letter of Claim (or of the CNF where the claim commenced in a portal) to investigate and communicate a decision on liability.
- The courts have the power to impose sanctions on parties who do not adhere to the Protocol.

Figure 3 – ILLUSTRATIVE FLOWCHART OF LIKELY PROGRESSION OF THE CLAIM UNDER THIS PROTOCOL



4.4 DISCLOSURE

4.4.1 A defendant is obliged under the Protocol to disclose all documents that are relevant to the issues in question.

4.4.2 The Protocol states that cases against local authorities where highway design defect is alleged the following documents should be disclosed: -

i. documents produced to comply with Section 39 of the Road Traffic Act 1988 in respect of the duty designed to promote road safety to include studies into road accidents in the relevant area and documents relating to measures recommended to prevent accidents in the relevant area;
ii. any Rule 43 reports produced at the request of a coroner pursuant to Schedule 5 of the Coroners & Justice Act 2009, for accidents occurring in the same locus as one covered by an earlier report.

4.4.3 For highways tripping claims the Protocol states that documents from the Highway Authority for a period of 12 months prior to the accident should include: -

i. records of inspection for the relevant stretch of highway;
ii. maintenance records including records of independent contractors working in relevant area;
iii. records of the minutes of Highway Authority meetings where maintenance or repair policy has been discussed or decided;
iv. records of complaints about the state of highways;
v. records of other accidents which have occurred on the relevant stretch of highway.

4.4.4 When dealing with disclosure under the new Well-managed Highways Infrastructure: Code of Practice, how a highway authority evidences its Risk Based Approach to highways asset management and their approach in implementing the 36 recommendations within the Code will be important. Particular consideration should be given to Recommendation 5 – Consistency with other Authorities, Recommendation 8 – Information Management, Recommendation 15 – Competencies and Training, and Recommendation 16 – Inspections.

4.4.5 Where a highway authority contracts out some or all of its inspection and maintenance functions the authority should ensure that the obligations of contractors around the production, retention and provision of documentation in support of highways inspection and maintenance policies are clearly stated within the contract. As previously stated, a highway authority has a non-delegable duty of care, so when services are contracted out the authority is reliant upon third parties documentation when managing highways claims.

4.4.6 Clearly documented processes and effective lines of communication should therefore be in place between the highway authority and all key stakeholders to ensure the authority's obligations around disclosure are met.

4.5 LITIGATION

4.5.1 The majority of claims made against Highway Authorities do not end up in court and are either successfully denied or settled before litigation.

4.5.2 Where claims are litigated they will fall into 3 claims tracks: -

- **Small Claims Track** – for personal claims under £1,000 and property claims under £10,000 in value. No legal costs are recoverable under this process.
- **Fast Track** – for claims valued between £1,000 and £25,000.
- **Multi Track** – for claims that have a potential to exceed £25,000.

4.5.3 **Important Note**. At the time of writing the Ministry of Justice is consulting on a number of reforms in England & Wales, including increasing the Small Claims Track limit for personal injury claims up to £5,000. HM Judiciary are also consulting on extending the Fixed Recoverable Costs Regime in Civil Litigation up to £250,000. This consultation is being led by Lord Justice Jackson.

4.5.4 Proceedings are commenced by service of a **Claim Form** and **Particulars of Claim**. These documents can be served directly on the Local Authority or nominated legal representatives.

4.5.5 **Scotland**
In Scotland, section 1 of the Roads (Scotland) Act 1984 requires roads authorities to maintain those roads entered onto the public register of roads. This is recognised as creating a relationship between the roads authority and road users, with the authority obliged to take reasonable care only to prevent road users from sustaining injury or damage.

4.5.6 A voluntary Pre-Action Protocol for personal injury claims came into effect on 1 January 2006 agreed between the Forum of Scottish Claims Managers (FSCM) and the Law Society of Scotland. There is no statutory basis for the protocol, it can only be entered into voluntarily and whilst there are no clear sanctions for failure to comply, this can be used as a basis to argue against full expenses being awarded in litigation.

4.5.7 The Scottish Civil Courts Review 2009 recommended the introduction of a compulsory protocol, and the Courts Reform (Scotland) Act 2014 gave the Court of Session power to make the necessary rules.

4.5.8 The Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016 came into force on 28 November 2016 requiring parties to comply with the compulsory protocol prior to commencing proceedings. The key points of the Protocol are: -

- It will apply to personal injury claims up to the value of £25,000 in local sheriff courts and in the All-Scotland Personal Injury Court.
- It is only applicable where the accident or other circumstance giving raise to the claim for damages occurred on or after 28 November 2016.
- It imposes a requirement on the pursuer (claimant) when rejecting an offer to issue a reasoned response explaining why it has been rejected.
- It creates an express power allowing the courts to make an award of expenses (costs) against a party which has failed to comply with the Protocol or unreasonably failed to accept a settlement offer made under the Protocol which is then lodged as a tender (Part 36 offer) following the commencement of proceedings.
- The claimant must send a Claim Form to the defender as soon as sufficient information is available to substantiate a claim. The Claim Form should contain a clear summary of the facts on which the claim is based, including allegations of negligence, breaches of common law or statutory duty and an indication of injuries suffered and financial loss incurred.
- The defender must acknowledge the Claim Form within 21 days of receipt.
- The defender has a maximum of three months from receipt of the Claim Form to investigate the merits of the claim. The defender must send a reply during that period stating whether liability is admitted or denied, giving reasons for any denial of liability, including any alternative version of events relied upon. The defender must confirm whether any admission made is intended to be a binding admission.
- If the defender denies liability, in whole or in part, they must disclose any documents which are relevant and proportionate to the issues in question at the same time as giving their decision on liability.

4.5.9 As in England and Wales, most claims are settled without need for litigation. Claims for up to £100,000 can be raised only in the local Sheriff Court, or the All Scotland Personal Injury Court in the event that there is a personal injury component. Claims for over £100,000 can be raised in the Sheriff Court or the Court of Session directly. The local Sheriff Courts and Court of Session have specific procedures which apply to personal injuries claims raised there. In the Sheriff Court, there are also three types of cause, depending on value: -

- **Small Claims Procedure** for property damage claims up to £3,000.
- **Summary Cause Procedure** for all personal injury claims up to £5,000, or property damage claims from £3,000 to £5,000
- **Ordinary Cause Procedure** for all claims over £5,000

4.5.10 Proceedings are commenced by serving a Summons or Writ, after it has been warranted by the Clerk of the appropriate court, on the local authority directly or any expressly appointed legal representative.

4.5.11 **Northern Ireland**
All public highways and roads in Northern Ireland are managed by a single road authority, the Department for Infrastructure. Claims against the Department are managed by its Claims Unit.

4.5.12 The rules governing claims are embodied in The Roads (NI) Order 1993. Article 8 imposes a statutory duty to maintain the 'surface' or 'fabric' of the road. It also provides for the citizens' right to claim for damage incurred as a result of the responsible Department's failure to maintain the road.

4.5.13 Legal procedures operate under a separate set of rules to those applicable to England, Wales and Scotland with the main difference being that the Jackson Reforms do not apply.

4.5.14 Other differences include: -

- There is currently no Claims Portal;
- Time limits are not strictly enforced in the majority of circumstances;
- There is no requirement to exchange witness statements;
- There are no Part 36 offers; instead defendants can make a physical "payment into court";
- General damages tend to be higher; and
- Claimants' costs are significantly lower.

4.5.15 In Northern Ireland claims worth more than £30K will be heard in the High Court. Proceedings are commenced by the service of a 'writ'. The County Courts (Financial Limits) Order (NI) 2013 came into force on 25th February 2013 essentially raising jurisdiction financial limits. Damages claims worth up to £30K are heard in the County Court. Proceedings are commenced by the service of a 'civil bill'. There are three different levels at which a case may be heard in the County Court. These are: -

i. Small Claims Court/Arbitration - The Judge (usually a District Judge) hears cases with a value up to £3K excluding cases involving road traffic collisions, personal injuries and slander.
ii. District Judge - The District Judge hears claims involving personal injury, road traffic collisions and property claims up to £10K in value (increased from £3k on 5 September 2001 by the County Courts (Financial Limits) Order (Northern Ireland) 2001).
iii. County Court Judge - The County Court Judge has jurisdiction for claims worth between £10K and £30K

4.5.16 A County Court Pre-Action Protocol (PAP) for Personal Injury and Vehicle Damage Claims was introduced in 2013 in cases valued at up to £30,000. A similar protocol was already in place for High Court personal injury claims. In order to comply with the PAP: -

- The claimant must provide a clear and detailed pre-action letter of claim, which should include a summary of the facts, details of financial loss, personal injuries, recoverable benefits and a request for relevant documentation;
- The defendant is required to issue an acknowledgement within 21 days;
- The defendant must produce a detailed response within three months.
- This should include a decision on liability together with an explanation as to how the decision was reached and whether contributory negligence and/or the involvement of third parties are a factor; and
- The defendant must disclose all relevant documentation along with its response.

4.5.17 The letter of claim should enable the defendant to investigate the claim properly and make an assessment of liability before proceedings are issued, so as to avoid litigation and unnecessary legal costs.

4.5.18 The normal average timescale for a decision to be taken on a Personal Injury Claim is 6 months and 4 months for Vehicle Damage.

4.5.19 Legal Aid is available for eligible claimants to pursue their claims. The Access to Justice Review is currently considering removing money damages from the scope of legal aid and is reviewing other funding alternatives.

4.5.20 Claims are currently submitted to the Department's Claims Unit by post but a new online claims web-portal is being developed as part of a new Claims Management System.

4.5.21 The Department's Claims Unit successfully deals with over 90% of highway related claims in house and works closely with the Departmental Solicitor's Office, litigation Division of the Northern Ireland Civil Service, in those relatively few cases which are contested.

4.6 FRAUD

4.6.1 Statistical data published by the Association of British Insurers reveal that insurers uncover 350 insurance frauds worth £3.6 million every day.

4.6.2 Historically motor insurance frauds were the most common but the number of highways liability insurance frauds detected is increasing and potential costs run into many millions of pounds.

4.6.3 Highway Authorities are particularly vulnerable to fraudulent claims and Authorities should have a robust counter fraud policy with engagement across all key internal and external stakeholders.

4.6.4 On 23 March 2016 the Department for Communities & Local Government published their policy paper **Fighting Fraud & Corruption Locally - The Local Government Counter Fraud & Corruption Strategy 2016 - 2019** which forms part of their initiatives around local council transparency & accountability.

4.6.5 The guidance document sets out expectations and recommendations for local authorities in tacking fraud over the next 3 years. The main focus is Housing Benefit, identity fraud, payroll, grants, procurement etc, but insurance claims fraud is referenced under "emerging/increasing risks" with a specific reference to slips & falls.
The report can be found at www.gov.uk/government/publications/fighting-fraud-and-corruption-locally-2016-to-2019.

4.6.6 There is also a requirement for Local Authorities to provide claims data to the Cabinet Office through the **National Fraud Initiative (NFI)**. The NFI is an exercise that matches electronic data within and between public and private sector bodies to prevent and detect fraud.

4.6.7 The common law continues to evolve around fraud and in Hayward v Zurich Insurance Company plc [2016] UKSC 48, the Supreme Court unanimously decided that where an insurer suspects fraud but has nevertheless chosen to settle a claim, it would be entitled to set aside the settlement under the tort of deceit if it subsequently discovers proof that it was in fact fraudulent.

4.7 CLAIMS MANAGEMENT INFORMATION

4.7.1 Claims management information can assist in the successful management of highways claims and support the risk based approach to highways asset management (Recommendation 18). Claims data can highlight where claims are arising on a Highway Authority's assets and are one of the factors that should be considered when formulating inspection and maintenance frequencies and planned maintenance work.

4.7.2 Close and frequent engagement with between Highways Departments, Local Authority Risk & Insurance Managers, Local Authority Claims Handlers and Insurers, is critical to the successful integration of claims management information and highways asset management.

SECTION FIVE
Training & Assessment of Competence

5.1 INTRODUCTION

5.1.1 Ensuring that the Highway Authority has adequately trained and experienced staff is key to the successful delivery of the Highways Service. WMHI is clear on the need to provide adequate guidance and training to relevant staff to enable the establishment and practical implementation of a risk-based approach.

5.1.2 The new code acknowledges that competence is especially important in the case of inspections and surveys, where the quality and treatment of data and decision making could have significant legal and financial consequences. It is therefore fundamental that Inspectors understand the concepts involved and have the skills to carry out dynamic on-site risk assessments in relation to potential safety defects. All highway authorities need to consider how they will answer this challenge and how they will demonstrate the competency of their Inspectors.

5.1.3 This section provides guidance on: -

- The training available and competence requirements of the various personnel involved in delivering the highway service.
- The importance of maintaining training plans & records to evidence the training provided.
- The need to periodically refresh and update training to ensure the continued competence of staff

5.2 COMPETENCE & ASSESSMENT

5.2.1 Competence is the combination of training, skills, experience and knowledge that a person has and their ability to apply these to a set of tasks correctly and consistently. The word "competence" should therefore be used with caution. A person who has passed a one-off assessment, should not automatically be referred to as *"competent"*. Assessment only provides evidence that someone was capable of demonstrating *"competence"* in a specific defined range of skills at the time of the assessment. So while Training and Assessment are critical to improving the competence of staff, Authorities must be aware that staff will still have different degrees of competence, which will improve over time, given the right experience and appropriate day to day management and supervision.

5.2.2 Best practice involves ensuring that Individual Training and Development Plans and Continuing Professional Development (CPD) opportunities are provided for all staff and reviewed on a regular basis.

5.3 TRAINING PLAN AND RECORDS

5.3.1 Authorities are encouraged to maintain a system of formal training records.
This should record and monitor the training and assessment of each individual involved in the Highways Service. Records should also be used to plan and record refresher training.

5.3.2 Where authorities contract out some or all of their highway service, suppliers should be required to maintain the same standards of training and assessment and maintain similar records.

5.3.3 Once staff training has been delivered, this should be tested/audited to ensure it is adequate and that any shortcomings or good practice influences future training plans.

5.4 TRAINING AND VOCATIONAL QUALIFICATIONS

5.4.1 Authorities should adopt and support relevant highway training and vocational qualifications which contribute towards establishing the competence of those involved in highway maintenance, having particular regard to the training and qualification of personnel engaged in highway inspection and survey tasks.

5.5 WHO REQUIRES TRAINING?

5.5.1 Training should be provided for all personnel at a level and frequency relevant to their involvement in the highway service.

5.5.2 The training needs of the following groups should be considered: -

5.5.3 **Policy and Decision Makers**
At the most senior level of management within an authority, those responsible for making decisions on policy and allocation of resources require an understanding of the legal, financial and reputational risks associated with responsibility for highway asset management. This may include certain of the Council's Executive Directors as well as Elected Members.

5.5.4 Authorities should consider methods by which this information and understanding can be provided, for example through short briefing sessions. Information that relates specifically to highway liability and risk management includes: -

- Basic understanding of the authority's statutory duty to maintain the highway.
- The legal and financial liabilities that arise from this duty – including the current scale of financial loss from highway claims, the potential scale of loss in the event of a major accident and how the authority compares with others.
- Where outsourcing of services is being considered, an understanding of the significant issues that have arisen with risk transfer given the non-delegable nature of the duty and the scale of liabilities that attach to this service area

5.5.5 **Highway Asset Managers**
Detailed guidance on identifying and assessing competencies for asset management are provided within part C of the Highway Infrastructure Asset Management Guide, which references the Institute of Asset Management Competencies Framework (46) Further details are available here.

5.5.6 The competency requirements are listed under a broad range of headings which in addition to areas such as technical knowledge and delivery, also include strategic thinking and decision making and risk management.

5.5.7 Applying these competencies to the management of highway liability exposures it is recommended that highway asset managers be provided with a knowledge and understanding of: -

- How to apply the principles of strategic risk management to highway asset management, including an understanding of ISO 31000.
- The development and implementation of a risk based approach and potential for the approach taken to be challenged in legal proceedings.
- The authority's exposure to highway liabilities, the legal and financial implications of this exposure.
- The role of insurance and claims handling in managing highway liabilities and reducing the costs of highway claims

5.5.8 **Highway Engineers**
Highway Engineers are required to have a Civil Engineering Degree BEng (Hons) or Master's Degree MEng or sufficient experience to achieve Chartered or Incorporated Engineer status.

5.5.9 The competence of Highway Engineers to develop appropriate policies and procedures to support a Risk Based Approach may be challenged when claims are brought before a court, therefore specific training and support for Highway Engineers responsible for writing policies should be considered.

5.5.10 To support continuing professional development and to ensure that knowledge remains up to date Highway Engineers should consider membership of one or more appropriate professional bodies such as:

- Institute of Highway Engineers (IHE)
- Chartered Institution of Highways and Transportation (CIHT)
- Institution of Civil Engineers (ICE)

5.5.11 **Highway Inspectors**
WMHI acknowledges that competence is especially important in the case of inspections and surveys where the quality and treatment of data could have significant legal and financial implications.

5.5.12 The code recommends that highway Inspectors are trained, qualified and competent in the identification and assessment of defects.

5.5.13 The UK Roads Liaison Group Asset Management Board, with support from the Department for Transport, the Highway Inspectors Board, the Midlands Highway Alliance and the Midlands Service Improvement Group, has produced a revised Highway Inspector Competence Framework to outline the high-level requirements for this role, available on the **UKRLG website**.
The new framework has built on previous good practice established through the IHE framework, considers subsequent guidance such as Well-managed Highway Infrastructure, and provides scope for authorities to tailor their risk-based approach to highway inspections to align with local risk appetite and needs. It also includes a degree of flexibility through the inclusion of core competences and optional competences, which individual authorities can align to the scope of their locally-defined inspector role.
Highway Authorities should be able to demonstrate that their safety inspection team have been assessed against these competence requirements. Registration with the Highway Inspectors Board can contribute positively to risk management and defence of compensation or liability cases. For more details on the scheme, visit the IHE website.

5.5.14 Highway claims are fact-sensitive and when a claim is brought before a court the credibility afforded to the highway inspector in presenting his or her evidence is often a major factor in the outcome of the proceedings. With the introduction of the risk based approach, highway Inspectors may be challenged in court on their underlying competence to undertake a risk assessment and their ability to apply the policies and procedures of the highway authority.

5.5.15 Equally critical will be the quality of documentation maintained by the Inspectors to record the outcome of their inspections. In particular, in cases where the on-site assessment of a reported defect results in a decision to take no remedial action it is vitally important that the reason for the decision is recorded.

5.5.16 Given the increased focus on how Inspectors record and evidence their inspections, Authorities also need to give additional consideration to how they audit and review the inspection standards and records of inspections, in order to maintain a consistent approach across their network.

5.5.17 Continuing Professional Development, refresher training and 'calibration' of the application of any training is critical in maintaining a consistency of approach and interpretation of policies. The audit process may include Inspectors swopping areas to allow the comparison of like for like inspections. Any formal/informal training provided should be included in a documented audit process.
See also "**Refresher Training**" below.

5.5.18 Highway Inspectors can benefit from a wide range of accredited training, which depending on their exact role and experience.

5.5.19 **Court Procedures**
Highway Inspectors should be offered training in preparing statements & evidence for court and presenting evidence in court

5.5.20 **Career Progression**
Technicians with a National Certificate, relevant NVQ3 or an equivalent level 3 qualification can take the standard Professional Review to gain Engineering Technician. For other Senior Highway Inspectors IHE will match the Highway Inspector competence definitions against the Engineering Council Statements of Competence and Commitments to aid progression under the Individual Route.

5.5.21 **IHE Highway Inspectors register**
Highway Inspectors who have attended an accredited IHE programme can be entered onto the National Register which is publicly available online. Registration is renewable after a maximum of five years, subject to a refresher course and assessment by an approved centre (see Refresher Training Guidance below).

5.5.22 **Claims Investigators**
Many Authorities with a significant claims experience employ a dedicated Claims Investigator(s). These individuals often come from a Highway Inspectors background. In addition to the knowledge and understanding of a Highway Inspector, a Claims Investigator should also receive formal and recognised training in the role to include: -

- appropriate questioning of the claimant/representative.
- ability to deal with aggressive claimants
- highway maintenance technical knowledge
- preparing for meetings with claimants/representatives
- awareness of claim processing timescales and court procedures responding accurately, clearly and with confidence when questioned in court
- report writing

5.5.23 Decisions on highway liability are fact sensitive, so recording a clear and comprehensive report of the facts is essential in order to support a timely and appropriate decision on liability. In cases where liability is denied, the quality of information gathered as part

of the investigation will often be crucial to a successful defence of the claim.

5.5.24 **Customer Service Advisors**

Consideration should be given to the training requirements of call centre and other staff who routinely receive calls from the public to report a highway defect or an incident or accident. Staff should understand: -

- The information required to respond to a report.
- Questions to ask the caller (prompt sheet is recommended).
- How and where to record and report the information.
- How to respond to situations which require emergency action.
- How to respond to a report of an injury or accident (sending a claim form is not always the response required).
- How to identify an emergency or report of a very dangerous defect questions to ask and information to record.
- How to deal with abusive callers

5.5.25 **Highway Maintenance Staff & Contractors**

Best practice involves ensuring all Highway Maintenance Staff & Contractors are properly trained and qualified. This can significantly contribute to the safety of network users and the cost effectiveness of maintenance carried out on the Highway Network.

- **New Roads & Street Works – SWQR Licence** - Full details can be found on the SWQR website.
- **City & Guilds 6033 Units 301 & 321 – NRASWA and Permit Compliance Inspections.** Further details can be downloaded here.

5.5.26 **Data Managers**

Those involved in data management need to have the knowledge and capability to specify and/ or undertake data collection and assess the quality of the information collected.

5.5.27 **UK Roads Liaison Group Asset Management Competence Framework**

The UK Roads Liaison Group Asset Management Board, with support from Transport for London and the Department for Transport, has produced an Asset Management Competence Framework to support authorities with the identification, development and evidence of competences required across the highway service. Guidance on the framework and an Excel based tool to help document and track competences are freely available on the UKRLG website.

5.6 REFRESHER TRAINING

5.6.1 Regular refresher training should be provided to all employees.

For Highway Safety Inspectors, both the IHE Highway Inspectors Board and City & Guilds recommend that training and assessment of Inspectors is undertaken at least every 5 years. However, more frequent training may be appropriate, for example if: -

- Inconsistent or incorrect application of standards is identified.
- Ability to defend claims is impeded by poor application of policy.
- Significant changes to highway law/recommended practice / policy.
- Significant changes to work practices such as introduction of new technology.

5.6.2 Special attention should also be given to employees who occasionally deputise for others, as their skills are likely to be underdeveloped and may need more frequent refresher training.

5.7 MONITORING EFFECTIVENESS

5.7.1 All authorities should monitor the quality and effectiveness of training provided and ensure their staff are competent to perform the job role required.

5.7.2 Methods adopted by some authorities to monitor the competence of their highway Inspectors and claims investigators include annual audits, spot checks by supervisors of routes inspected; rotation of routes covered by individual Inspectors; checks for significant differences in the number and types of defects identified; and practices, such as short briefings or training sessions, which aim to 'calibrate' or standardise the risk assessment of Inspectors to particular types of defects, are helpful considerations.

5.7.3 Consideration should also be given to training to assist succession planning to ensure long term sustainability of the service.

5.8 NORTHERN IRELAND

5.8.1 As regards the management of processes the Department for Infrastructure's policy is drafted from within the organisation (through Senior Managers across various Directorates) and in that regard there is no mandatory requirement for the person developing the policy to be qualified to degree level. However, Departmental policy and procedure requires that policy developed in the organisation can only be signed off by the Director of Engineering (Authorising Officer). The Director of Engineering is head of profession within the Department and is responsible for the development, co-ordination, review and updating of standards, policies and procedures and this post is designated as one that is required to be a Chartered Engineer.

SECTION SIX
Information Management and Record Keeping

6.1 INTRODUCTION

6.1.2 This section provides guidance on information management and record keeping critical to highway liability management as well as highlighting factors relevant to data protection and freedom of information.

6.1.3 WMHI notes that the efficiency, accuracy and quality of information and records maintained by authorities will be crucial both to the effective management of the service and to the defence of claims against the authority for alleged failure to maintain. The management system will need to support compliance with standards of evidence provision.

WMHI RECOMMENDATION 8 – INFORMATION MANAGEMENT

Information to support a risk based approach to highway maintenance should be collected, managed and made available in ways that are sustainable, secure, meet any statutory obligations, and, where appropriate, facilitate transparency for network users.

6.2 RECORDS TO BE MAINTAINED

6.2.1 Highway claims are notoriously fact-sensitive and it is therefore important that detailed and accurate records are maintained in order to ensure efficient management of claims whilst protecting the authority from unjustified or fraudulent claims.

WMHI RECOMMENDATION 18 – MANAGEMENT SYSTEMS AND CLAIMS

Records should be kept of all activities, particularly safety and other inspections, including the time and nature of any response, and procedures established to ensure efficient management of claims whilst protecting the authority from unjustified or fraudulent claims.

6.2.2 Furthermore the risk based approached adopted by an authority needs to be founded on information and evidence that is sufficiently robust to enable decisions on levels of service to be taken and reviewed over time.

6.2.3 When making a claim against a Highway Authority a claimant may challenge processes and procedures adopted by the Authority and could refer to the relevant NCoP looking for any deviation. Where Highway Authorities choose to deviate from these recommendations a clear record of evidence and risk assessment will be needed to support this decision and provide an adequate defence.

6.2.4 Record keeping can be considered in several forms and it is for each Highway

Authority to determine what should be recorded with consideration given to retention periods. This should be balanced with legal requirements and the capacity to store data. With the introduction of more software based inspection applications the storage of records allows authorities to store and access data for many years. Records appear in many forms from contemporaneous notes, emails and letters to comments recorded by Inspectors on inspection software.

6.2.5 Inspection records are used when responding to claims made against Highway Authorities. The quality of these records should be carefully considered with clear advice and guidance given to those individuals undertaking inspections both safety and serviceability or when undertaking claim investigations. Comments should be clear and concise.

6.2.6 How long records should be retained for is a matter for each highway authority to determine taking into account any legal or statutory requirements. Highway claims are time finite and the limitation acts in England and Wales differ to those in Scotland and Northern Ireland.

6.2.7 In England, Section 58 of the Highways Act and in Northern Ireland, Article 8 of the Roads (NI) Order 1993 provide for a defence against action relating to an alleged failure to maintain on grounds that the authority has taken such care as in all the circumstances was reasonably required to secure that the part of the highway in question was not dangerous for the appropriate type of traffic.

6.2.8 Demonstrating this can be proven by record keeping. It is therefore important that when a highway has been inspected and no defects were found a record to that effect is kept, equally where defects are identified but no further action is required the rationale behind this decision should be recorded for future purposes.

6.2.9 In Scotland there is no direct equivalent and the defence is that all reasonable care has been taken although this does not appear in the statute.

6.2.10 A detailed record of routine maintenance including gully cleaning and minor repairs will add weight to an Authorities defence by showing it has a systematic system of maintenance clearly demonstrating an adequate maintenance programme.

6.2.11 Any additional inspections undertaken outside of the programmed safety inspections should be recorded and referenced to support the maintenance regime.

6.2.12 An efficient system should be maintained for logging and managing reports and complaints made by members of the public.

6.2.13 Documentation should also be maintained of an authorities adopted highway asset management policy and procedures, including executive level approval, for example, by way of minutes of relevant committee meetings.

6.2.14 Such documentation should also set out and record executive approval of the authorities risk based approached.

6.2.15 The competency of those responsible for establishing the authorities risk based approach and involved in safety inspections and defect risk assessment may be challenged during legal proceedings. It is therefore important that records are maintained of the information guidance and training provided to employees engaged in these activities.

6.3 INFORMATION ACCESS LEGISLATION

6.3.1 It is important, with reference to the Data Protection Act 1998, to ensure that any personal data retained is accurate, up to date, and processed only as permitted by the 1998 Act and in compliance with the data protection principles.

6.3.2 Personal data is information which identifies and relates to a living individual. Although generally consent is used as a justification for processing data, data can be disclosed even without consent where this is required by any rule of law or any court order, but can also be disclosed to establish, exercise or defend legal rights, or to obtain legal advice.

6.3.3 Appropriate technological and organisational safeguards should be in place to avoid accidental loss, destruction or damage of personal data.

6.3.4 The subject of the personal data is entitled, following procedures under Section 7 of the Act, to have that data communicated to him in an intelligible form. As personal data will include decisions relating to or expressions of opinion about that data subject, it is important to have that right of access in mind as records are compiled. However, even the subject of data is not entitled to insist on access to data for which legal professional privilege can be claimed.

6.3.5 Access to information which is not personal data can be achieved by use of the Freedom of Information Act 2000, or Freedom of Information (Scotland) Act 2002. Both give any person making a request to a public authority a general entitlement to receive that information, subject to certain exemptions.

6.3.6 Again, legal professional privilege is a valid basis on which to refuse such a request, and any request for personal data should be rejected, as such requests fall to be made under the 1998 Act.

6.3.7 However much of the information of interest to claimants in highways claims would fall within the definition of *"environmental information"* contained in the Environmental Information Regulations 2004 and the Environmental Information (Scotland) Regulations 2004. Under these Regulations, legal professional privilege is not a sufficient basis for an authority to refuse to release information, and instead refusal would only be justified if disclosure would adversely affect the ability of the authority to secure a fair trial, a much more difficult test to meet. These Regulations do, however, permit authorities to require payment of certain fees for release of information

SECTION SEVEN
Risk Ownership when Outsourcing Services

7.1 INTRODUCTION

7.1.2 Highways authorities have a non-delegable duty to maintain the public highway. The exposure to liability claims in the event of a failure to discharge this duty is significant and so it is important that careful and detailed consideration be given to how such risks will transfer when any aspect of the highway function is contracted out to an external service provider. In this section we: -

- Review some of the issues and problems relating to transfer of liability risk when services are outsourced.
- Provide a list of practical recommendations to help avoid conflict and uncertainty around risk ownership.
- Outline the items to agree with contractors and include within a claims management protocol.

7.2 ISSUES OF RISK OWNERSHIP WHEN SERVICES ARE OUTSOURCED

7.2.1 The outsourcing of highway maintenance and repair activities has been common practice for many decades. Contracts are usually let using standard forms of engineering term contracts, and these will usually include a clause which establishes an indemnity from the service provider for any liability arising from the contractor's failure to deliver services to the agreed timescale or quality standards.

7.2.2 Highways authorities have taken a variety of approaches when seeking to make recoveries from their contractors under such indemnity clauses. Some have vigorously pursued recoveries in all relevant cases whilst others have taken the view that as most often liability is conceded due to a failure of the highway inspection process and not the repair process there is no significant cost benefit pursuing a recovery from their contractor, the cost of which would only ultimately be reflected in an adjustment in the contract price.

7.2.3 However the landscape is changing. Austerity measures imposed on all public sector bodies has resulted in cuts to highway maintenance budgets and this, combined with a series of severe weather events, has resulted in a deterioration in many areas of the condition of the highway. As a result more claims are succeeding due to failures to repair and maintain, and this is resulting in a greater pressure to seek recoveries under indemnity clauses.

7.2.4 Perhaps more significantly, the same drive to find costs savings and efficiencies has led to more authorities exploring outsourcing alternatives with some authorities contracting out not only highway maintenance activities and winter service operations but also highway inspection and highway design functions. In such circumstances if a claim under the Highways Act succeeds because a Section 58 defence fails or is not available, it is most likely this will be due to a failure in the contractor's systems and processes. In effect control of the activities that in most cases provide a highway authority with a defence to its claims has been transferred, and so also should the liability associated with such claims.

7.2.5 The extent of the liability exposure associated with this risk transfer should not be underestimated. For some very large highway authorities the annual average cost of compensation for claims can be more than £500,000 and there is always the potential for an accident that results in catastrophic injuries where the claim can cost millions of pounds to settle.

7.2.6 In recent years there have been a number of cases where this significant transfer of risk from highway authority to contractor has become problematic. Disputes around risk ownership have resulted in the parties becoming embroiled in expensive and time consuming legal action whilst claims remain unresolved, the ensuing costs eradicating the planned savings the highway authority originally envisaged when it outsourced the function.

7.3 PRACTICAL RECOMMENDATIONS TO AVOID THE PROBLEMS OF RISK TRANSFER

7.3.1 At the time the contract is let the Council as the client must be very clear on the extent of the liabilities being transferred, making full and clear disclosure of information on: -

- Anticipated claim numbers, cost of claims and current claim repudiation rates.
- Current condition of the asset.

7.3.2 The procurement exercise must include the views and experience of insurance managers within both the client authority and contract organisation. This will ensure a better understanding of the scale and type of insurance arrangements and indemnity levels required.

7.3.3 Contractors must factor in to the bid price the information on the condition of the asset, the extent of the liabilities being transferred and indemnities required.

7.3.4 The scale of cultural change and importance of pro-active management of the transition period at the start of a new contract should be recognised by both client and contractor. Plans should be made to smooth the transfer of people into the new arrangement and allow for the introduction of new methods of working and innovation.

7.3.5 Frequent communication and consultation between client and contractor is essential. Formal communication protocols should be established from the outset of the contract and include: -

- Regular review meetings at which defined performance outcomes relevant to claims defensibility are monitored and discussed.
- Data on new claims notified and progress with significant open claims reviewed.
- Timely consultation on anticipated changes to funding and the likely effect on service delivery and liability outcomes.

7.3.6 The development in consultation with the contractor of an agreed protocol on the handling of third party claims is essential. Experience has shown that standard contract terms are usually wholly inadequate to deal with the detail required.

7.3.7 The claims management protocol should set out the following: -

- Roles and responsibilities (including for first notification and response to claims).
- Risk ownership for the various types of highway incidents / accidents.
- Claims handling philosophy (eg reserving, economic settlements).
- Claims handling process (eg approach to investigations, financial authority levels etc (process to be followed, including the interface with the low value claims portal (where relevant).
- Data information sharing, ownership and access to records.
- Communication and reporting arrangements.
- Litigation process and arrangements.
- Dispute resolution arrangements.
- Post contract legacy arrangements (including responsibility for legacy claims and access to witnesses and records following cessation of the contract)

7.3.8 The aim is to ensure that third party claims are handled in a timely and fair manner and to help both the highway authority and their chosen contractor work in partnership from the outset to identify address and resolve such issues that can be expected to arise whenever a significant transfer of risk takes place. The outcome will be a working relationship that benefits both parties through improved more efficient processes, significantly reduced costs and the provision of a better service to the public.

7.4 OUTSOURCING ARRANGEMENTS IN NORTHERN IRELAND

7.4.1 The Department for Infrastructure has sole responsibility for the public road network in Northern Ireland. However, the Department has outsourced design, build, management and operational responsibility for key parts of the strategic road network to private management companies. Under the terms of the related contracts the private management companies indemnify the Department from any public liability claims pertaining to the parts of the network they cover. This arrangement works well and the Department is rarely joined in legal proceedings relating to parts of the network for which the private management companies have responsibility.

7.4.2 On other parts of the network the Department contracts third parties to undertake a range of activities, such as road design, maintenance operations and road works. Under the terms of those contracts, the contractors indemnify the Department from public liability claims relating to their works. The majority of the claims referred to contractors relate to failed or late repairs but despite the existence of this indemnity provision within the contracts, the Department is often retained in legal proceedings until late in the life of the claim. In terms of performance under the contract, where it believes it has sufficient evidence against a contractor to pursue a claim, the Department will vigorously pursue a case to hearing if the contractor refuses to honour the terms of the contract.

7.3.3 Unlike in GB, the Department does not specifically outsource highway inspection arrangements. However, the private management companies that have management and operational responsibility for keys parts of the strategic road network carry out this function on the parts of the network for which they have responsibility. Departmental staff carry out highway inspections on all other parts of the road network.

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