

Law and policy

The statutory basis for winter service provision varies across the UK.

To consider the modern law relating to highways it is necessary to understand the historical perspective. Historically, the duty to maintain a highway passing through any district fell upon the inhabitants of that area. Such a duty having been imposed, it would have been too burdensome to impose civil liability in respect of a failure to maintain the highway. Nevertheless, with respect to a positive act that caused damage to the highway, such as the digging of an excavation, liability would attach. As the country became industrialised and motor transport developed, it became too onerous for the inhabitants of a district to bear the burden of having to repair the highway.

Over the course of about a century, statutory provisions were enacted to impose upon highway authorities the duty to maintain the highway, culminating in a series of Highways Acts, the latest of

which in England and Wales was enacted in 1980. Section 41 of the Highways Act 1980 imposes the familiar, absolute duty on the highway authority to maintain the highway, a breach of which may give rise to a private law claim for damages; maintenance is to be interpreted as including repair, by virtue of section 329(1) of the Act. To mitigate the effect of imposing an absolute duty of maintenance, Section 58 created a statutory defence whereby it is a defence in a private law claim for damages against the highway authority to prove that it had taken such care as was reasonably required to secure that the highway was not dangerous.

Similar clauses are reflected in the Scottish and Northern Irish legislation and courts across the UK are likely to reflect a similar approach to the duty.

Transient hazards

At one stage, it was considered that the duty imposed on highway authorities by section

41 was more extensive than the common law duty. However, this was rejected decisively in *Goodes v. East Sussex County Council* [2000] 1 W.L.R. 1356, in which the House of Lords held that a highway authority owed no duty to remove snow and ice which had accumulated on the highway.

Approving the dissenting judgment of Lord Denning M.R. in *Haydon v. Kent* [1978] Q.B. 343 (CA), Lord Hoffmann held that section 41 imposed an absolute duty to maintain the highway but as the duty was the same as the common law duty it extended only to maintaining the fabric of the highway and not the removal of transient hazards such as snow and ice. In October 2003, *Goodes* was effectively reversed by a statutory amendment to the Highways Act whereby a new section 41(1)(A) was introduced imposing a duty on a highway authority to ensure that 'so far as is reasonably practicable, safe passage along a highway is not endangered by snow

and ice'. It is important to recognise, however, that the statutory exception applies only in respect of snow and ice and no other transient hazards on the highway, in respect of which the reasoning in *Goodes* is still valid.

Therefore, it can be said that:

1. Section 41 of the Highways Act 1980 merely re-states the common law duty to maintain the highway but it imposes a private law remedy for breach, subject to the statutory defence. The duty under section 41 does not extend to transient hazards such as the accumulation of gravel. Section 41 (1)(A) does impose a duty, subject to reasonable practicability, to ensure that safe passage on a highway is not endangered by snow and ice. If a failure to maintain the highway leads to the existence of a transient hazard such as a flood caused by poorly maintained drains, then liability for a breach of section 41 can be established, subject to the statutory defence.
2. No common law duty arises

Winter Service provision

Nation	Legislation	Relevant clause
England and Wales	Highways Act 1980 Section 41(1)(A)	'To ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice'
Scotland	Roads (Scotland) Act 1984 Section 34	'A road authority shall take such steps as it considers reasonable to prevent snow and ice endangering the safe passage of pedestrians and vehicles over public roads.'
Northern Ireland	Roads (NI) Order 1993 SI 1993/3160 (NISI)	'To remove snow, soil, etc, which has fallen on a road.' Section 9 of the Order also enables the authority to 'take such action as it considers reasonable to prevent snow or ice interfering with the safe passage of persons and vehicles using the road'.

from failure to exercise the powers and duties conferred on a local authority.

3. Where a local authority elects to exercise a power or duty it will be liable for negligence committed in the execution of that power.

The statutory role of a highway authority

The question of 'reasonable practicability' referred to in the legislation will inevitably need to take account of a highway authority's own finite resources and extreme or unprecedented weather conditions. All these factors will go towards considering what a highway authority could have reasonably been expected to do in the circumstances.

It would be impossible for a highway authority to eliminate all risk of danger on highways during winter or to ensure a level of activity (snow clearing and gritting etc) that always offered the greatest level of protection.

In this regard, winter maintenance is somewhat different from wider highway maintenance, as in winter the courts have never challenged the concept of finite resources as part of reasonable policy.

Other sections of legislation refer and impose a duty upon highway authorities to remove any obstruction of the highway resulting from 'accumulation of snow or from the falling down of banks on the side of the highway, or from any other cause'.

The Traffic Management Act 2004 places a network management duty on all local traffic authorities in the United Kingdom to do all that is reasonably practicable to manage the network effectively to keep traffic moving. In meeting this duty, local traffic authorities should establish contingency plans for dealing promptly and effectively with unplanned events, such as unforeseen weather conditions, as far as is reasonably practicable.

The Code of Practice

To meet its various statutory



duties, a highway authority is likely to have regard to national code(s) of practice and other guidance issued by the Roads Liaison Group of the UK Roads Board, which are updated from time to time.

The Code of Practice for highway maintenance management: *Well-managed Highway Infrastructure* (WMHI) and other guidance issued by the Roads Liaison Group of the UK Roads Board gives the lead for winter service policy and operations. WMHI reflects many years of operational practice and current issues and problems, and is regarded as a benchmark by which authorities will be assessed by both the public and the courts should disputes occur.

Section 13 of WMHI relates to winter services and how authorities should undertake their legal duties, winter policies and procedures.

WMHI states: 'Given the scale of financial and other resources involved in delivering the winter service it is not reasonable either to: Provide the service on all parts of the network and ensure running surfaces are kept free of ice or snow at all times, even on the treated parts of the network.'

WMHI also says: 'Authorities should develop service standards for winter service which define the overall winter period, the core winter period, the level of resilience and treatment networks. These policies and service standards should be developed as far as reasonably possible with users and key stakeholders and should also be based on a risk assessment to define the scope of the service.'

There are given levels of response which should form part of the local policy and plan.

Section 5 of the Code of Practice refers to the policy framework for all highways services. Recommendation 6 in this section relates to risk management and states that authorities should adopt a risk management regime for all aspects of highway maintenance policy, investment

and operations including safety, service and condition inspections, setting levels of service, deciding priorities and programmes and procurement.

Risk management should be based upon evidence gathered about the highways network. In respect of winter services such risk management could influence other requirements set out in the Code of Practice, e.g. treatment time, and therefore needs to consider the authority's defined strategic objectives. A winter services risk assessment would have a clear rationale as to why lengths of the highway network were or were not included in

the treated network and the response arrangements.

Guidance published by the Institute of Highway Engineers is available to supply advice to authorities on the process of developing a risk-based approach.

Guidance published by the National Winter Service Research Group (NWSRG) is available to all practitioners and interested parties, as it is considered to constitute the best way of supplying national best practice guidance on these issues. These guidance documents supply further advice as to the desired content of an authority's Winter Service

Plan and set out a suggested format. Specifically, Section B7 of WMHI relates to winter services and how authorities should undertake their legal duties, winter policies and procedures within the context of a risk-based approach.

WMHI, in moving towards this new approach, is recognising that given the scale of financial and other resources available to local highway authorities involved in delivering the winter service it is not reasonable to provide the service on all parts of the network.

This has been accepted in the past, where many



authorities have a primary treatment network of 50% or less of the total road length and that treated network includes those areas where the outcomes of not carrying out the treatments would create the highest impact.

Therefore, in developing a risk-based approach to winter services, authorities may not see significant changes to the existing arrangements but they will need to establish a robust risk assessment of each location, or type of location and its priority against a reasonable level of resource or appropriate response

Risk is considered in terms

of likelihood or probability and impact or severity. Likelihood has been considered as that of having an injury on part of the untreated network as opposed to the treated network and makes extensive use of the collision analysis as well as other factors. Impact has been considered in terms of financial impact largely based on insurance claim data, (which recognises that more serious injuries would have a greater financial impact), reputation, and stakeholder and customer impacts.

Authorities undertaking a risk-based approach are more able to justify their standards

and arrangements, which will be heavily tested during a period of sustained severe weather. These principles are also transferable to other severe weather situations commonly faced these days and assist the civil contingency role for each organisation.

There are established levels of response which should form part of the local policy and plan:

1. Primary salting network

This receives the highest level of winter service and will be treated whenever snow, frost or ice is forecast, even for short periods overnight, to

mitigate the effects of this hazard. However, even at this level the highway can never be guaranteed to be free from a winter hazard.

2. Secondary salting network

This network extends the primary salting network in conditions where prolonged periods of ice and snow are expected, generally for a minimum of 24 hours. The treatment will be in advance of the freezing wherever possible.

3. Snow Plan

This will be implemented in part or all of the network when snow or ice is expected to cause widespread disruption to travel and seeks to restore a highway network on a priority basis starting with the primary and secondary networks but then extending into other parts of the highway based on need.

4. Resilience network

This is a network that will be treated as a minimal network when resources are scarce, for example salt, fuel or personnel.

5. Self-help

This is a network of locations where individuals or groups wish to treat parts of the highway in more extreme conditions to aid local mobility, in places which are locally important.

In addition to these levels there are other responses undertaken by the authority.

In severe winter weather situations, the authority will use care helplines to try to provide an appropriate response, particularly to the vulnerable, to ensure that basic needs can be met. This includes the requirements for medication and other essential concerns and will be in the form of a response that does not require a remote highway to be treated, for example engaging 4x4 transport volunteers.

Local communities are also encouraged to develop plans to ensure the elderly and vulnerable are adequately cared for in emergency situations.

