Highway Risk and Liability Claims

A practical guide to Appendix C of The UK Roads Board Report ‘Well Maintained Highways: Code of Practice for Highway Maintenance Management’

Second edition
July 2009
Highway risk and liability claims

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Chairman’s foreword

The Task Group brought together the UK Roads Board and the Institution of Civil Engineers Municipal Expert Panel with additional representatives from professions with an interest in highway liability claims. This included legal, local authority risk managers, Association of British Insurers, Association of Public Service Excellence, Government Departments and local authority representatives from across the United Kingdom.

At the time publication of the first edition of the guide in November 2005 it was acknowledged by the Task Group that it was essential to regularly update the Guidance contained in the Task Group Report.

The first edition has become the nationally recognised standard for guidance on dealing with highway liability claims and has resulted in a significant reduction in claims. The guide was summarised and incorporated as Appendix C in Well Maintained Highways Code of Practice for Highway Maintenance Management. It has also been the catalyst into the development of national Highway Inspector training scheme which is being developed by IHIE and CSS.

The first edition of the guide was summarised and incorporated into Manual for Streets, and the second edition with its development of the concept of Balanced Decisions has been reflected in the Scottish Government’s draft Designing Streets.

This second edition incorporates significant additional information including recent legal cases, increased web links, changes in legislation, details of the national highway inspector training scheme and a significant update on design, innovation and balanced decision making.

The second edition will continue to raise the profile of highway liability claims by giving examples of good practice to reduce the significant amount of public funds currently being spent on claims by maintaining a strong link with Well Maintained Highways.

It is essential that local authority politicians are aware of the importance of following the Well Maintained Highways approach – if maintenance is cut back to below code standards then liability cases will be harder to defend, and economies on highway maintenance will be lost in expenditure on lawyers, and compensation.

Ian Grierson
Leicestershire County Council
Chairman of UK Highway Liability Joint Task Group
July 2009

Edited by
Ian Grierson and Robert Huxford
1 Introduction


Purpose of the guide

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

Using the guide

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

Who produced the guide?

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

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

Jim Valentine - ICE
Andrew Murray – DRDNI – Roads Service
Edward Bunting - DfT
Chris Capps - CSS
Fiona Easton - ALARM
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Peppy Marshall Weightmans Solicitors
2 Background to Highways Claims and Risks

2.1 HIGHWAY OPPORTUNITY

Highways are a phenomenal benefit to the community: normal life would not be possible without them. It is important to remember this when considering highway risk and liability. The objective is to maximise the overall benefit to the community.

2.2 NORMAL USE OF THE HIGHWAY

Manual for Streets (Department for Transport 2007) stresses the role of highways as providing for both movement and place to varying degree. The objective of the Highway Authority is to obtain the maximum benefits for the community. It is a task that is wholly different to that of minimising risk.

2.2.1 The rights to use a highway

The freedom to come and go is one of the most basic of human rights, and is something that has developed over the centuries. Historically highways have been used for other activities also including games of football, public executions, markets and so forth. There was for a time a commonly held view that the public held only the right to pass and repass; however the position has been clarified through DPP v Jones 2000

“the public highway is 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 repass” Lord Chancellor, DPP v Jones 2000

Periodically there are new cases that explore the extremities of the rights: for example rollerblading is not a reasonable use of the footway, but playing leapfrog over bollards is; and a bollard should be safe to use for that purpose.

2.2.2 Highway Code

The use of the Highway is governed by the Highway Code. It may be used in evidence in court cases, and is also a guide to reasonable use.

Key guidance and instruction from the Highway Code includes:

- **General Advice**
  
  144

  **You MUST NOT**
  
  - drive dangerously
  - drive without due care and attention
  - drive without reasonable consideration for other road users

Adapt your driving to the appropriate type and condition of road you are on. In particular

- do not treat speed limits as a target. It is often not appropriate or safe to drive at the maximum speed limit

- take the road and traffic conditions into account. Be prepared for unexpected or difficult situations, for example, the road being blocked beyond a blind bend. Be prepared to adjust your speed as a precaution

- where there are junctions, be prepared for road users emerging

- in side roads and country lanes look out for unmarked junctions where nobody has priority

- be prepared to stop at traffic control systems, road works, pedestrian crossings or traffic lights as necessary

- try to anticipate what pedestrians and cyclists might do. If pedestrians, particularly children, are looking the other way, they may step out into the road without seeing you

**Driving in built-up areas**

Residential streets. You should drive slowly and carefully on streets where there are likely to be pedestrians, cyclists and parked cars. In some areas a 20 mph (32 km/h) maximum speed limit may be in force. Look out for

- vehicles emerging from junctions or driveways

- vehicles moving off

- car doors opening

- pedestrians

- children running out from between parked cars

- cyclists and motorcyclists
2.3 INCIDENTS ON THE HIGHWAY

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

Overall accidents on the roads / footways

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

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

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

“Research carried out in the preparation of Manual for Streets indicated that many of the criteria routinely applied in street design are based on questionable or outdated practice.”

Much practice in highways is based on before and after studies which are susceptible to “selection bias”. Evidence based design and safety practice is now being developed, using case-control studies, and fully randomised studies. Practitioners should be aware of the quality of the evidence on which practice is based and endeavour to make balanced decisions about highway design, maintenance and inspection that are in the overall interests of the community.

2.4 CLAIMS

Highways risks are just one of many risks that the local authority needs to manage. Other examples include arson, long-term claims for abuse of children in the local authority’s care, and so on. These have at times resulted in massive claims. Local authorities should not however become locked into a risk management mentality: their role is to seek out
advantage for the community, and this will necessarily involve some risks. A balance is needed.

2.4.1 Claims Statistics

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

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

2.4.2 Trends

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

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

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

A substantial claims industry has developed, and there have been concerns that this is diverting public funds from public services, not just in the highways and public realm sector but in other areas such as the National Health Service. However in recent years at least one major claims company has gone bankrupt and a firm of solicitors has been discredited.

2.4.3 Impact of claims on local authorities

Cost of handling a claim

| Cost of inspecting site of alleged incident and filing report | £200 |
| Claim Administration - Simple Claim | £300 - £1000 |
| Cost of Claim Going to Sheriff Court or County Court | £7,500 - £15,000 legal fees alone |
| Queen’s Counsel | £1,000-£4,000 per day |

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

2.4.4 Risk aversion

The fear of receiving a claim has caused some highway authorities to adopt an unnecessarily defensive position over what are quite reasonable innovations. This cannot be in the public interest.
2.5 GENERIC TYPES OF LIABILITY

2.5.1 Negligence

To prove negligence, an individual must establish that they were owed a Duty of Care. The breach of a duty of care that results in damage or loss or injury to a party. It may occur through doing something which a prudent or reasonable person would not do, or by omitting to do something a prudent or reasonable person would do. The consequence must be reasonably foreseeable. Higher standards of care may apply in the case of specialists.

2.5.2 Liability under statutory duties

There are two classes of statutory duty –

(a) Specific or private law duties - which are owed to individuals and over which an individual may take legal action if they suffer injury or loss – examples include the duty to maintain the highway under the Highways Act 1980.
   - Not conducting sufficiently regular inspections to ensure the safety of the highway
   - Not having identified a highway defect which was in the authority’s control within reasonable time
   - Not having identified a danger in the highway which was in the control of a third party such as a utility within reasonable time. Examples include an obstruction left in a lay-by, or a defect in an inspection cover
   - Not having remedied the defect within reasonable time.

(b) General or public law duties. These are general duties owed to society as a whole, sometimes described as target duties. Examples include the Duty to improve road safety under the Road Traffic Act 1988. The individual generally has no remedy in law for loss arising from the failure of a local authority to discharge one of these duties.

NB there are times when other organisations state that there is a duty when they actually mean they would like there to be a duty. However it is for Parliament and the courts to determine what is and is not a duty, and no-one else. (see Darby vs. National Trust (Court of Appeal))

2.5.3 Public Nuisance

An action without lawful cause or excuse which causes danger, injures health or damages property. For example, the dangerous obstruction of the highway by a parked vehicle.

2.5.4 Other terms

- **Malfeasance** - the negligent performance of a lawful action.
- **Non-feasance** - failure to perform an act required by law – e.g. not having maintained a highway.
### 2.5.5 Examples of main causes of highway liability claims

For definitive information, readers should consult the source judgements, and where appropriate take legal advice. It should be remembered that the courts have repeatedly asserted the responsibilities road users have for their own safety.

<table>
<thead>
<tr>
<th>Circumstances</th>
<th>Potential Consequences</th>
<th>How an authority could become liable</th>
</tr>
</thead>
</table>
| Trips/Rocking Slabs           | Damage to clothing, sprained ankles, broken wrists, arms. In rare cases death can result. In an elderly person complications can be serious. | • Inadequate frequency or quality of inspection  
• Inappropriate intervention level bearing in mind potential danger and use.  
• Inaction.                                                   |
| Potholes                      | Damage to tyres, wheels, tracking, suspension. Rarely, loss of control, and serious or fatal injury. Risk to cyclists/motorcyclists is potentially higher than vehicle users. Risk also applies to pedestrians walking in or crossing the road. | • Inadequate frequency or quality of inspection.  
• Inappropriate intervention level bearing in mind potential danger and use.  
• Inaction.                                                     |

### 2.5.6 Less frequent causes

<table>
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<tr>
<th>Circumstances</th>
<th>Potential Consequences</th>
<th>How an authority could become liable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obliterated markings at road junction</td>
<td>Collision if driver fails to take due care.</td>
<td>• Where the use of the road depends on the existence of the markings on which road users customarily depend and that are key to establishing a pattern of movement, temporary obliteration could in exceptional circumstances lead to the entrapment of road users and the authority being held partly responsible.</td>
</tr>
</tbody>
</table>
| Poor surface friction                  | Skidding. Serious injuries or fatalities owing to extreme deceleration from high speeds or crushing owing to sideways impact. | • Failure to act in the face of history of accidents.  
• Inadequate frequency of inspection.  
• Inappropriate intervention level.                                               |
| Aquaplaning                            | Aquaplaning tends to occur at speeds above 40 mph. Serious injuries or fatalities owing to extreme deceleration from high speeds or crushing owing to sideways impact. | • Failure to act in the face of knowledge about drainage problems.  
• Failure to act in a way proportionate to the flow and speed of traffic on the road.  
• Responsibility will be apportioned by courts – e.g. motorist going too fast for conditions, or having worn tyres. |
| Defect arising from utility apparatus | Accident related to missing or damaged iron-work, or pothole in surface surrounding apparatus | • New Roads and Street Works Act 1991 places a duty on utilities to maintain their apparatus  
• A highway authority will notify a utility of defects it finds during a routine inspection. (S81)  
• If the utility fails to respond there is a power under the Act for the Highway Authority to undertake repairs and recharge.  
• The Highway Authority is responsible for the surface surrounding the utility apparatus (outside the initial guarantee period) |
| Unexpected hazard in road, for example debris, plant, materials. | Collision | • Extent of liability depends on the type of road and the speed and volume of traffic, the appropriateness of the frequency of inspection and promptness of action once the danger is reported.  
• The road user has a responsibility for keeping a lookout for obstructions.  
• The party creating the obstruction has primary responsibility |
| Unsigned sharp bend | Skidding off bend. Serious injuries or fatalities owing to high speeds, potential for crush injuries owing to sideways impact, e.g. with tree or street furniture. | • The road user has a responsibility to take the road as they find it.  
• The vast majority of bends are obvious. The driver holds responsibility. There is no duty to provide information about the highway.  
• The authority could become partly liable by erecting a road sign in an exposed position where alternatives were available |
| Worn out sign warning of obvious hazard | Collision | • The road user has a responsibility to take the road as they find it.  
• The Gorringe v Calderdale MBC House of Lords 2004 ruling is that signs and markings are not part of the fabric of the highway, and consequently not covered by the duties under the Highway Act 1980. |
| Restricted visibility at a junction | Collision if drivers fail to take road as they find it | • Road users bear responsibility for their own safety. Unless the junction is new, it is unlikely the local authority will be liable. The claimant would have to show that the design departed unreasonably from national standards.  
• For obstructions on private land see Stovin v Wise |

| Defect in design – road user entrapped into danger | Miscellaneous | • Road users bear responsibility for their own safety. Courts will apportion responsibility. Claimant will have to establish that they were entrapped into danger. It is only in exceptional circumstances that individuals may be able to establish a breach of duty of care. See Gorringe v Calderdale. |
2.6 FACTORS THAT INFLUENCE CLAIMS TRENDS

The factors underlying these trends include:

**Maintenance backlog on local roads and footways** – Claim opportunities occur because roads and footways have deteriorated due to the historic lack of investment and subsequent maintenance backlog. Effective planned maintenance budget allocations can reduce maintenance-based claims to negligible levels.

**Media coverage of highway liability claims** – There has been extensive media coverage given to the citizen's right to claim from the highway authority in cases of accident and injury on public or publicly maintained property. Even though many of the claims are small in value, such as tripping on the footway leading to sprains, cuts and bruising; they are expensive to administer and process.

**High profile advertising** – Advertisements now appear in doctors’ surgeries and local newspapers, and on television, national and local radio.

**Media personalities** – Some figures have been putting their name to such advertisements.

**Growth in no-win no-fee companies** – The legal and claims profession have also increased their advertisements for claimants on a ‘No Win - No Fee’ basis, although recent spectacular failures in this area may temper future expansion.

**Open Government – freedom of information** – Open government raises public awareness of expected service delivery through publicised performance targets and monitoring of the quality of service delivery. The promotion of formalised complaints procedures by local authorities also contributes to raise the level of expectation and the commensurate disappointment in any perceived shortfall.

**Freedom of Information Act** – This is making public bodies far more accessible to individual members of the public. This Act gives the public a statutory right of access to non-personal information held by Highway Authorities i.e. information which does not relate to people. In other words, the Council can be asked for virtually any information and will be under a legal obligation to provide it.

**Level of awards being made** - There are no set financial compensation figures for the loss of a limb or other physical injuries suffered in road or other accidents for which a third party is proved to be at fault. Awards are usually agreed through out-of-court settlements decided by claims handlers and the injured person's lawyer, after studying previous awards by judges. The settlements can vary enormously depending on the age, state of health, family status and even hobbies of the individual concerned.

**Fraudulent claims** – surveys suggest that 1 in 7 people are prepared to make fraudulent claims on insurance policies. Local authorities are particularly vulnerable to people asserting that they have sustained injury or loss on the highway, as these events often have no independent witness. The local authority is in the difficult position of wishing to treat legitimate claimants fairly and courteously and yet deal appropriately with fraudsters.
3 The Law on Highway Liability

3.1 INTRODUCTION AND HISTORY OF HIGHWAYS LAW

3.1.1 Mending your ways

(a) From feudal service to fiscal systems

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

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

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

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

“repairable by the inhabitants at large”

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

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

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

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

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

Evidently the highways repairs often left something to be desired, if the following account from around 1800 is to be believed.
“Of all the cursed roads that ever disgraced this kingdom in the very ages of barbarism, none ever equalled that from Billericay to the King’s Head at Tilbury. It is for near 12 miles so narrow that a mouse cannot pass by any carriage. The ruts are of an incredible depth.”

Of the road to Wigan:

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

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

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

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

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

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

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

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

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

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

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

Since this time we have witnessed the arrival of the motorcar and new lifestyles that make full use of them: long distance commuting, out of town shopping centres, and families and friends separated by long distances. Highways have been forced to change from enabling short distance movement at walking pace, to carrying high-speed, short, medium and long
distance motor traffic. Most were never originally intended for high-speed motor vehicles. This is something that should be borne in mind when considering liability, and underlines the importance of the common law approach of motorists being obliged to “take roads as they find them”. Nevertheless in Sharpness New Docks v Attorney General heard in 1915 Lord Atkinson in his speech in the House of Lords said

“As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repairs of the highway alter to suit the change. No person really contests that principle.”

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

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

3.1.2 Now and the future

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

Other changing areas include:

3.1.3 Human Rights Act 1998

In Andrews v Reading Borough Council 2005 there is an example of a highway authority being obliged to pay compensation to a householder suffering increased noise as a result of a traffic management scheme.

3.1.4 Health and Safety Act at Work 1974

This will impact on highway authorities where a council employee is injured as a consequence of a failure of the local authority to discharge one of its duties.

3.1.5 The Disability Discrimination Act 2005

There is no clear case law to give guidance on the interpretation of the duty which is “to have regard to” the needs of disabled persons. Courts have in the past held that the highway must be made safe for the “normal run of driver”, and it has been accepted that highway authorities may make reasonable policies having regard to cost.

3.1.6 The Equality Act 2006

This set up series of Commissions tasked with promoting equality, and it is possible that in the longer term there will be requirements or targets for highway authorities that might for example cover women. Performance indicators cover this area.
3.1.7 Corporate Manslaughter and Homicide Act 2007

http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en_1

"An organisation will be guilty of the new offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a duty of care to the deceased. The organisation's conduct must have fallen far below what could have been reasonably expected. The Act does not create new duties – they are already owed in the civil law of negligence and the new offence is based on these. It does not apply to strategic decisions about the spending of public money. It would be the organisation itself that would face prosecution; the Act does not apply to individuals. Individuals can already be prosecuted for gross negligence manslaughter / culpable homicide and for health and safety offences. The Act does not change this and prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so."

http://www.justice.gov.uk/guidance/docs/manslaughterhomicideact07.pdf

The Common law position on Highways is that individuals are first and foremost responsible for their own safety. Local authorities should beware creating a trap for road users. The logic of this position is that it is the driver that introduces a potential hazard on to the highway, and they must drive in such a way so as to have regard to the safety of other road users such as pedestrians and cyclists. As such the likelihood of a local authority becoming liable is remote indeed.

Detailed guidance has been produced by the Institute of Directors and the Health & Safety Commission entitled “Leading Health & Safety at Work: - Leadership Actions for Directors and Board Members”. This includes examples of when Corporate Manslaughter can be considered when leadership in Health and safety falls short.

www.iod.com/hsguide
www.hse.gov.uk/leadership

Actions of Corporate Manslaughter against Highway Authorities may be considered by the Police in accordance with The Road Death Investigation Manual 2007 edition which is available to download free of charge from


3.1.8 Road Death Investigation Manual

It is recommended that fatalities on the highway are investigated by the police in accordance with the Road Death Investigation Manual 2007 edition. There are significant differences between the 2004 edition and the 2007 edition, and also in the interpretation of the law as the 2004 edition was written without the benefit of the clarity provided by Gorringe v Calderdale.

(a) Duties

The 2004 guidance stated that duties were absolute and obligatory. The Gorringe v Calderdale confirmed that the duty to maintain the highway is a qualified duty meaning to keep in repair the fabric of the highway, and that the duties relating to road safety and the Road Traffic Act 1988 are target duties only, and to be balanced against the other duties placed upon Highway Authorities by parliament.

(b) Powers

The 2004 edition stated:
“Powers can be exercised when deemed appropriate. However, if a power is exercised, e.g. by undertaking highways improvement then there is a duty to maintain the resultant works.”

By virtue of the ruling in Gorringe v Calderdale the duty to maintain applies only to the fabric of the highway — if the highway improvement is part of the fabric of the highway then there will be a duty to maintain, otherwise there may be no duty to maintain.

There is one further point of clarification:

(c) Road geometry

The 2004 guide pronounced

“This will ultimately have an effect on the perceptions and actions of a road user. Roads are required to be designed to national standards for alignment and visibility, although many of the more recent standards were not required to be retrospectively applied to existing roads. It is important therefore to consider provision against the appropriate standard of design during any investigation”

It is only Highways Agency roads that are required to be designed according to the Design Manual for Roads and Bridges, for all other roads the decision over the design and the methodology used have been and remain in the hands of Highway Authorities. (see 3.11)

The status of the Department for Transport’s guidance “Manual for Streets” is explicitly, guidance.

Police authorities should ensure that they are aware of the statement of the law in Gorringe v Calderdale, and are using the 2007 manual, and not the 2004 edition.

Issue has been taken by the RAC and others by the approach taken in the event of fatal accidents on the highway: that the investigations are there to identify whether any criminal act has taken place, rather than to obtain insight as to the causes of accidents so that future fatalities and injuries may be avoided. It is encouraging that the 2007 Manual states in the Foreword “the outcome of investigations can be used to learn lessons which may assist in the prevention of further deaths and serious injuries on the road.

3.1.3 Strict Liability on Motorists

In some European nations motorists are under strict liability for the safety of certain types of vulnerable road users. Strict liability can be imposed through statute law or the courts in certain situations. It involves a finding of liability in a civil action or guilt in a criminal action, even though there has been no fault on the part of the defendant.

The Highway Code requires motorists to take particular care in looking out for children in built up areas and to travel at an appropriate speed. In the case of Russell vs. Smith and Another 2003 EWHC, a motorist, Miss Smith collided with a young cyclist who had emerged into her path from a side road.

Failure to observe a provision of the Highway Code is something which a court can take into account when assessing liability, and does not involve fault on the part of the driver. The court judged that Miss Smith had failed to observe the provisions of the Highway Code that requires drivers to have regard to the safety of children in a residential area, and was held partly liable.

3.1.4 Compensation Act 2006 – see section 5 of this guide
3.2 PRIMARY SOURCES OF INFORMATION

It is statute law and legal precedent that matters, all other information is secondary to this.

3.2.1 Search engines

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

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

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

3.2.2 UK Courts

(a) Courts Service

http://www.courtservice.gov.uk

(b) Scottish Law Courts

www.scottishlaw.org.uk

(c) Northern Ireland

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

3.2.3 Guides


Highway Law, Sauvain S J. Sweet and Maxwell, 2006 ISBN 0 421 874902
### 3.2.4 Law reporting services

<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
<th>Website</th>
</tr>
</thead>
<tbody>
<tr>
<td>British and Irish Legal Information Institute</td>
<td>Access to Freely Available British and Irish Public Legal Information via a search engine.</td>
<td><a href="http://www.bailii.org">http://www.bailii.org</a></td>
</tr>
<tr>
<td>All England Law Reports, LexisNexis</td>
<td>A comprehensive listing of cases available on CD.</td>
<td><a href="http://www.lexisnexis.co.uk/">http://www.lexisnexis.co.uk/</a></td>
</tr>
<tr>
<td>Local Law UK, Sweet and Maxwell</td>
<td>A subscription service.</td>
<td><a href="http://www.localaw.co.uk/">http://www.localaw.co.uk/</a></td>
</tr>
<tr>
<td>The Incorporated Council of Law Reporting for England and Wales</td>
<td>Some summaries of cases are available free through the web and provide a quick and authoritative reference.</td>
<td><a href="http://www.lawreports.co.uk/">www.lawreports.co.uk/</a></td>
</tr>
<tr>
<td>Her Majesty’s Court Service</td>
<td>Free access to House of Lords, Privy Council and Supreme courts Costs Office judgments.</td>
<td><a href="http://www.hmcourts-service.gov.uk/cms/judgments.htm">http://www.hmcourts-service.gov.uk/cms/judgments.htm</a></td>
</tr>
</tbody>
</table>

### 3.2.5 Other sources

<table>
<thead>
<tr>
<th>Source</th>
<th>Website</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Day “Everyday news and links for UK law”</td>
<td><a href="http://www.legalday.co.uk">http://www.legalday.co.uk</a></td>
</tr>
<tr>
<td></td>
<td><a href="http://www.legalday.co.uk/current/themes/injury.htm">http://www.legalday.co.uk/current/themes/injury.htm</a></td>
</tr>
<tr>
<td>Green Lane Association</td>
<td><a href="http://www.glass-uk.org/">http://www.glass-uk.org/</a></td>
</tr>
</tbody>
</table>

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

- Local Authority Liability, Morrell and Foster Ed., Jordans, 2001 – ISBN 085 308 712 1
### 3.3 STATUTE AND PRECEDENT

#### 3.3.1 Duties, and Powers

##### (a) Statutory Duties

The duties placed on local authorities include:

<table>
<thead>
<tr>
<th>Duties</th>
<th>England and Wales</th>
<th>Scotland &amp; Northern Ireland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty to maintain the highway</td>
<td>Section 41(1) of the Highways Act in England and Wales.</td>
<td>Scotland Sections 1 and 2 of the Roads (Scotland) Act.</td>
</tr>
<tr>
<td></td>
<td>“Maintain” – has been interpreted in the courts narrowly as – “repair”</td>
<td><strong>Northern Ireland</strong></td>
</tr>
<tr>
<td></td>
<td>“The highway” has been interpreted by courts as the fabric of the highway, excluding signs and lines, but including inspection covers etc. The principle established in Reid v British Telecommunications plc Court of Appeal 26th June 1987 is that a Utility company can rely on inspections carried out by the highway authority.</td>
<td>Article 8 of the Roads (Northern Ireland) Order 1993.</td>
</tr>
<tr>
<td>Duty to remove snow and ice</td>
<td>Section 111 of the Railways and Transport Safety Act 2003 (This modifies Section 41 (1) (1a) of the Highways Act.</td>
<td><strong>Scotland</strong> Section 34 Roads (Scotland Act)</td>
</tr>
<tr>
<td></td>
<td>&quot;In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow and ice.&quot;</td>
<td>“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”</td>
</tr>
<tr>
<td></td>
<td><strong>Northern Ireland</strong> Roads Service Agency does not have a statutory duty to remove snow and ice. It has a discretionary power. Under Article 9 of the Roads (Northern Ireland) Order 1993 the Department: &quot;may take such steps as it considers reasonable and practicable to prevent snow and ice interfering with the safe passage of persons and vehicles using a road&quot;. Article 9 (3) provides a statutory defence for a failure to exercise this power and does not confer on any person a right to sue.</td>
<td><strong>Northern Ireland</strong> Article 9 (3) provides a statutory defence for a failure to exercise this power and does not confer on any person a right to sue.</td>
</tr>
</tbody>
</table>
### (b) Other Duties

<table>
<thead>
<tr>
<th>Duty to promote road safety</th>
<th>There have been cases brought on the grounds that a local authority owed a common law duty of care to exercise its duty under the Road Traffic Act 1988. Rarely have Courts accepted this line of argument. The highest courts such as in Gorringe v Calderdale or Stovin v Wise have held that the Act creates a general duty in the context of other duties and demands placed upon the authority, rather than a specific duty owed to an individual, that can be used to establish a duty of care. See 3.3.5 (a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty to secure expeditious movement of traffic</td>
<td>Under the Traffic Management Act 2004 there is a: Duty to secure expeditious movement of traffic (including pedestrians) Network management arrangements must: Identify things (including future occurrences) which are causing, or which have the potential to cause, road congestion or other disruption to the movement of traffic on their road network; and Consider any possible action that could be taken in response to (or in anticipation of) anything so identified; Determine specific policies or objectives in relation to different roads or classes of road in their road network;</td>
</tr>
</tbody>
</table>

### (c) Statutory Powers

The local authority has powers enshrined in law. The effect of the ruling of Stovin v Wise and Norfolk County Council 1994 & 1996 (see below) is that a local authority is not under a duty to exercise its powers. If the highway authority does choose to exercise a statutory power, and does so negligently, it can be held liable to pay damages in an action in tort.

#### 3.3.2 Establishing a claim under the statutory duties

<table>
<thead>
<tr>
<th>England &amp; Wales</th>
<th>Scotland</th>
<th>In highway maintenance cases, the Claimant must establish that:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 41(1) of the Highways Act in England and Wales</td>
<td>Sections 1 and 2 of the Roads (Scotland) Act.</td>
<td>The highway had not been properly maintained pursuant to the relevant statute. The failure to maintain or the danger was causitative of the material accident.</td>
</tr>
<tr>
<td>Common law duty of care</td>
<td>Common law duty of care</td>
<td>(See Stovin v Wise below) The claimant must establish that:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• it was irrational not to exercise the power</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss. It is likely to prove very difficult to establish liability.</td>
</tr>
<tr>
<td>Section 111 of the Railways and Transport Safety Act 2003 (This modifies Section 41 (1) (1a) of the Highways Act</td>
<td>Section 34 Roads (Scotland Act)</td>
<td>Snow and ice had not been removed pursuant to the relevant statute.</td>
</tr>
<tr>
<td>Article 8 Human Rights Act</td>
<td></td>
<td>That the right to family life or property has been affected by an action of the authority that was not in the overall interests of society.</td>
</tr>
</tbody>
</table>
3.3.3 Statute of Limitations

Personal Injury Claims
The claim must be presented in court within three years...

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

Damage Only Claims
The claim must be presented in court within six years.

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

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

3.3.4 The Highways Act 1980 (England & Wales)

(a) Sections 41 and 58

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

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

Section 58 - Special defence in action against a highway authority for damages for non-repair of highway.

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

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

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

(c) the state of repair in which a reasonable person would have expected to find the highway;

(d) whether the highway authority knew, or could 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, that warning notices of its condition had been displayed;

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

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

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

“Well Maintained Highways” gives examples of standards used by local authorities.

whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;

The highway authority must have efficient systems for inspecting highways, and enabling people to report defects.

where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, that warning notices of its condition had been displayed;

Use notices warning of inadequate highway condition where appropriate

3.3.5 Road Traffic Act 1988


Section 38 – Setting out the duty on the person to observe the Highway Code

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

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

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

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

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

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

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

(4) In this section ”local authority" means –
(a) in relation to England and Wales, the council of a county, metropolitan district or London borough or the Common Council of the City of London,

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

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

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

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

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

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

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

An earlier case is:

Larner v Solihull Metropolitan Borough Council 2001

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

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

3.3.6 Responsibilities of the driver

(a) Drivers are responsible for their own safety

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

Gorringe v Calderdale

The “overriding imperative is that those who drive on the public highways do so in a manner and at a speed which is safe having regard to such matters as the nature of the road, the weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety” (Lord Scott at para 76).
3.3.7 Responsibilities of the highway authority to maintain

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

(a) Meaning of the word “Maintain”

i) To put and keep in repair

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

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

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

ii) To be safe for use by the traffic using it

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

iii) To be safe for “the normal run of drivers”

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

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

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

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

The highway is the space between enclosures, including verges. But all parts of the highway are not the same – different uses and expectations apply.
The duty applies to the existing fabric of the highway. There is no duty to surface verges that are being over-run – this constitutes improvement not maintenance.

In *Alan Kind v Newcastle upon Tyne Council* [2001] EWHC Admin 616 the highway was defined as the space between enclosures, including verges. The court however held that there was no duty on the highway authority to improve the road. [http://www.bailii.org/ew/cases/EWHC/Admin/2001/616.html](http://www.bailii.org/ew/cases/EWHC/Admin/2001/616.html)

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

i) The crown court was correct in holding that not all of the highway need be kept in repair.

ii) The crown court was correct in finding that the effect of the justices’ order was to require the council to perform works of improvement rather than repair.

iii) The crown court was correct in considering the present day character of the highway when determining its state of repair.

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

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

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

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

Section 36 (2) (b) of the Highways Act 1980 says that “a highway constructed by a Council under the Housing Act 1985 shall become maintained at public expense. It is quite possible for a Council acting in its capacity as a housing authority to make it quite clear that it is constructing a private road, not highway, or a private path, not a public footpath. It can do this by erecting notices along the road or path saying “No Public Right of Way”.

However, the fact that a path must still be a “highway” i.e. its use is not restricted to a class of person was highlighted *Ley v Devon County Council* [2007] where Gulliksen was distinguished as in *Ley* there was no evidence of a public right of way over the path and it was considered private ground for residents only. [http://www.12kbw.co.uk/docs/Ley-case-commentary.pdf](http://www.12kbw.co.uk/docs/Ley-case-commentary.pdf)

3.3.8 Highways and danger

There have been two main approaches to the mitigation of danger on roads in the United Kingdom.

(a) Predictability, regulation, separation or engineering, education and enforcement

In the early 1930s there was something of a crisis in road use, with over 7000 people being killed each year, nearly all of them pedestrians or cyclists. The chances of a vehicle being involved in a fatal collision were one in three hundred per year. Problems were identified such as pedestrians stepping out into the road, cyclists being hit from behind in the dark, and
so on. The response was to increase regulation and segregation of traffic. A range of measures evolved including:

- Clear signage and linage,
- Standard road environment,
- Separation and segregation of road users,
- Provision of a safety margin for traffic manifest in the provision of generous road widths, gentle radius of curvature on bends, and ample visibility.
- Avoidance of cross-roads in new development, and instead the use of T junctions.
- A network design philosophy of preventing through traffic in residential areas by adopting hierarchical road systems; loop and cul de sac road layouts.

This approach originating in the 1930s and reflected in the Design Manual for Roads and Bridges, and the Design Bulletin 32 – Layout of residential roads and footpaths, and other documents, is based on the premise that providing drivers and other road users with clarity: clear instruction on what to do, and regulations to back this up engenders safety.

(b) Risk compensation, personal responsibility

This second philosophy which embraces the concept of “risk compensation”. whereby the individual is assumed to adjust their behaviour in response to perceived changes in risk: underlies the approach in Manual for Streets in 2007, although there has been an awareness of risk compensation at least since the 1930s:

> “Many more accidents occur on the wider, and should be, safer roads than upon the so-called dangerous ones. I have in some cases, widened turns to render them safer, but more accidents have ensued owing to motorists taking the turns much faster.”

H T Chapman, County Surveyor of Kent
September 1932

In 1954 in the paper Road Design in relation to Traffic Movement and Road Safety Proceedings of the Institution of Municipal Engineers, the author R J Smeed reported on research that had found a relationship between increased carriageway width and increases in the average speed of traffic, and conversely reductions in radius of curvature of highways and reductions in speed of traffic, predating by some 50 years the findings of TRL 661 and the recommendations of Manual for Streets.

The evidence in TRL 661 points to drivers' speed is influenced by the road environment, in particular by carriageway width and forward visibility, but by other factors too. Given that speed is a key factor in increasing accident risk and the severity of injuries sustained in the event of a collision, it is then legitimate to narrow carriageway widths and reduce forward visibility in the knowledge that motorists will reduce their speed and present less of a danger to other road users. These are among the core recommendations of Manual for Street. Other measures that arise out of a risk compensation approach include:

- Narrow carriageways
- Tight corner radii at junctions
- Roads with central medians
- Removing signs
- Removing pedestrian guardrails
- Removing edge lining and centre lining
- Removing kerbs
- Removing formal crossings
- Changing the feel of the road to emphasis that it is a place, not a drive through
- Introducing measures to intrigue drivers
(c) **No duty on highway authority under the Highways Act to give warnings of obvious dangers. Road users not entitled to be forewarned of ordinary hazards of highway use.**

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

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

"A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (British Railways Board v Herrington [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2000] 1 AC 360)."

*Tomlinson v Congleton Borough Council* [2004] 1 AC 46, 85:

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

(d) **Highways Act duty to maintain does not cover the erection of traffic signs**

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

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

Lord Hoffman also stated in para 15 *Gorringe v Calderdale*:

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

(e) **Highway authority must not trap road users into danger**

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

"If a highway authority conducts itself so as to create a reasonable expectation about the state of the highway, it will be under a duty to ensure that it does not thereby create a trap for the careful motorist who drives in reliance upon such an expectation." Lord Hoffman *Gorringe v Calderdale* at para 43

(f) **Highway authority pre *Gorringe v Calderdale* partly liable if it neglects to repair stop lines upon which the circulation of traffic customarily and explicitly depends.**

There are two key cases which on the face of it present contradictory findings.
Bird v Pearce 1979 – missing white lines – highway authority found partly liable (but most probably would not be held liable today in view of the discussion in Gorringe v Calderdale 2004)

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

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

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

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

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

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

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

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

In the light of Gorringe, and other cases such as Lavin v Kent County Council and Larner v Solihull MBC it is likely that Bird v Pearce would be decided differently today and that the County Council would not have been held even partially liable for the accident.

Murray v Nicholls 1983 – missing white lines – driver liable

A second case is Murray v Nicholls 1983 SLT 194. Lord Rodger of Earlsferry gives an account in Gorringe v Calderdale at para 83. A car was driven without stopping out of Devon View Street in Airdrie into Victoria Place where it collided with another car. In consequence a driver was killed and the passengers injured. White lines had been painted at the junction by indicating that priority should be given to traffic in Victoria Place. The stop lines had been largely obliterated through road works by Strathclyde Regional Council some
months before the accident and they had not been repainted. There were no signs at the junction. Strathclyde had not had the lines repainted as soon as was reasonably practicable after the works were completed, nor had they erected warning signs. However in this case the action against the highway authority was not successful.

The judge, Lord Stott accepted that the previous existence of the white lines at the junction was sufficient to show that it was reasonably foreseeable that, in the absence of such an indication, a vehicle might be driven into Victoria Place without stopping. “I am not prepared to hold that the power given to a local authority to mark white lines on the roadway and erect warning signs implies a duty to do so at every crossing in a built-up area where there is a considerable volume of traffic” Lord Stott at 194-5 Murray v Nicholls

However it had not been claimed in court that the accident had been influenced by the loss of the stop lines and the pattern of traffic that had been created, as had been the case in Bird v Pearce. The claim was merely that the highway authority had failed to exercise their power to repaint the lines in circumstances where it was foreseeable that vehicles would collide. The court found that the junction was typical of those in urban areas, with restricted visibility, and that the creation of a duty to provide stop lines on such junctions was for Parliament, not for a court of law.

There is also specific reference in the Highway Code

146
Adapt your driving to the appropriate type and condition of road you are on. In particular

- in side roads and country lanes look out for unmarked junctions where nobody has priority

(g) Obstruction in carriageway – Street light left in position after carriageway widening

Davies v Carmarthenshire CC 1971
The Defendants had widened a road but left undisturbed a lamp-post so that it was a few feet out into the extended carriageway. The Plaintiff was travelling slowly, with the setting sun hampering her vision, when she struck the lamp-post. The local county court found entirely for her but on appeal she was apportioned 20% liability.

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

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

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

Stovin v Wise and Norfolk County Council 1994 & 1996 3 WLR 388
A car emerged from a side road into the path of a motorcyclist. The motorcyclist was seriously injured and left wheelchair bound for life. There had been a history of accidents at the site, and the site had been assessed two years prior to the accident by Council employees, who had recommended the removal of a bank on some adjoining privately owned land that was reducing sightlines. The land owner, British Rail was approached, but did not respond. No further action was taken.

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

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

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

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

(i) Highway only has to be safe for the traffic expected to use it

Jones V Rhondda Cynon Taff County Borough Council [2008] EWCA Civ 1497

Where a fireman was injured when walking onto the verge of a footpath into a very significant hole. The trial Judge found for the Highway Authority, holding that they had established a section 58 defence in that there was no real reason to expect traffic on this verge. However, when rejecting the Claimant's appeal the Court of Appeal held that there had also been no breach s.41 at all: the footpath was in an adequate state to satisfy the statutory duty and there was no need for the highway authority to maintain the verge in a better condition.

3.4 REASONABLE INSPECTION METHODS

3.4.1 Day v Suffolk County Council [2007] EWCA Civ 1436

In the case of Day v Suffolk County Council 2007 the judge held that a visual inspection by a single driver of a vehicle travelling at around 25 mph was unreliable; that the speed of 25mph was too fast. There is no official or evidence-based guidance on what constitutes an appropriate speed. There is a need for research in this area as to the ability of inspectors to identify and record defects in different areas at different speeds: inspection has to be carried out slowly enough for defects to be seen. The council's policies should include the method of inspection chosen as well as frequencies.

3.5 REASONABLE INSPECTION FREQUENCIES AND REPAIR STANDARDS AND THE HIERARCHY OF ROADS AND FOOTWAYS

A number of cases have confirmed the validity of setting the frequency of inspection in line with usage in general and the hierarchy defined in the Well Maintained Highways in particular. In Owen v City of Westminster 2004 QBD it was held that a routine monthly inspection of the footway in Oxford Street (prestige walking zone class 1a ) as recommended in the Code, was adequate.

http://www.5essexcourt.com/201/?form_198.replyids=156

However if a road or footpath has particular characteristics, making it more likely to deteriorate than other roads or footpaths in its category, then a more frequent level of inspection may be required”. See Jacobs v Hampshire County Council.
3.6 FAILURE TO REPAIR OR REPAIR PROMPTLY

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

3.6.1 Edge Deterioration – failure to respond to defect promptly

*Rider v Rider & Another 1973*

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

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

*Rogers v National Assembly for Wales 2004*

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

The road was resurfaced only two years before the accident had occurred. The highway authority wanted to carry out further tests as to why the skid resistance did not work. The judge held that the National Assembly of Wales might have made good a section 58 defence if it had led more evidence at a senior level as to why it thought necessary that more testing should take place before the road was resurfaced. The case supports the view of paragraph 3.14.2 that it is the highway authority which needs to prove that it has acted reasonably through the production of adequate documentation and evidence in order to succeed in a Section 58 defence.

3.6.3 Collapsing verges

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

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

*Burnside v Emerson cc 1968*

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

The pool of water was admitted by the second defendants' surveyor at the trial to be a danger to traffic and the existence of the pool was due to their failure to maintain the drainage system in a satisfactory condition. The highway authority was held liable, but the first defendant was also negligent in driving too fast. Blame was apportioned two-thirds to the driver and one-third to the highway authority.
The points to note here are that it was a main road, implying a level of service; it had been raining hard for some time, implying some duty on the drivers to adjust their manner of driving to the conditions.

The court of Appeal has recently emphatically approved Burnside v Emerson in the case of Mott MacDonald and others v Department of Transport (2006). The court held that the drainage system is part of the fabric of the highway and must be maintained as part of the Section 41 duty.

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

Tarrant v Rowlands cc 1979
The first defendant was driving his car at dusk at 40 mph along the A6 road when he ran into a pool of water on the road that he had not seen. He lost control of the steering and crashed head-on into a van driven by the plaintiff. There was evidence that water was usually found lying in that place on the road after a good deal of rain.

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

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

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

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

3.6.5 Failure to maintain highway drainage

Department of Transport, Environment & Regions v Mott MacDonald & Others 2006
The Department as Highway Authority sought to recover damages it had paid to road users in respect of accidents caused by allegedly defective highway drainage systems. The defendants were the various agents who carried out maintenance for the Department. They each took the point that S.41 Highways Act 1980 did not encompass a duty to maintain highways drains. The Court of Appeal concluded that the duty did extend to a drainage system that was of itself part of the highway. It further concluded “..the duty is not confined to the surface of the road; the surface is simply treated as one important part of what is to be maintained, which is the structure and fabric of the roadway”

3.6.6 Failure to increase drainage capacity

Bybrook Barn Centre v Kent County Council 2001
The Court Of Appeal considered a culvert that had been adequately constructed to accommodate a natural watercourse. Over time the capacity became inadequate due to factors outside of the Highway Authority's control including the construction of the M20 and a business park. As a result the claimant’s property flooded. The Highway Authority were found liable as all the claimant needed to prove was that there had been an interference with a natural watercourse and that flooding had resulted irrespective of the load having been increased by factors outside their control.

3.6.7 No duty to drain a highway as opposed to maintaining existing highway drainage

Jubin v Bridgend County Borough Council (2005)
An individual sustained injuries when they slipped on a road with no drainage system that had become covered with ice after heavy rain, and sought damages. The judge concluded that:

“Where a highway authority installs a drainage system so that it forms part of the fabric of the highway, it may be that the authority then has an obligation to maintain that system as part of the highway. However, particularly bearing in mind the scope of the duty has to be construed narrowly, on their natural construction, the words “to maintain…. the highway” do not convey a positive duty to install gullies and drains on every footway and carriageway where none is present.

“Section 41 does not impose an obligation on a highway authority to guarantee a highway without any hazards. “

“In ascertaining the scope of the Section 41 obligation upon highway authorities, it is important that the law should not impose unreasonably high standards which might divert resources from where they are more needed – a sensible balance must be struck between public and private interests.”

The judge referred to Section 100(1) of the Highways Act 1980 which states

The highway authority for a highway may, for the purpose of draining it or of otherwise preventing surface water from flowing on to it, do all or any of the following:
(a) construct or lay, in the highway or in land adjoining near to the highway, such drains as they consider necessary;....

The judge considered that if Section 41 imposed a duty to drain all highways then a power as granted in Section 100(1) would be irrelevant. The judge continued by stating that it was impermissible to convert the Section 100 power into a duty.

This case establishes that there is no duty to drain a highway as opposed to maintaining existing drainage.

### 3.7 CONDITION OF HIGHWAYS SURFACES: WHAT IS AND IS NOT DANGEROUS

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

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

*Mills v Barnsley MBC 1992*

The Plaintiff tripped when she caught her heel in a hole in an area of paving bricks. The corner had been broken off one of the paving bricks leaving a triangular shape 2 inches in width with a maximum depth of ¾ inches. The Plaintiff maintained that her heel had penetrated soft material at the base of the hole, which was part of it, giving a total depth of 1 inch. In the first instance the Plaintiff succeeded.

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

Lord Justice Steyen commented on this case “It is important that out tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from...
situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a reasonable balance or compromise between private and public interest. ....The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous."

Winterhalder v Leeds County Council
Mrs Winterhalder tripped on a 2.5 inch gap between kerbstones whilst walking in Potternewton Lane, Leeds. Her claim was dismissed at first instance in Leeds County Court. The Court of Appeal reiterated the principle in Mills v Barnsley that a court should beware imposing an over-onerous duty on a local authority and re-affirmed the principle that the duty is to remove hazards which might foreseeably be characterised as causing a danger to pedestrians. Swinton Thomas LJ stated

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

3.7.2 Size of Trips

Not ¾ inch
Meggs v Liverpool Corporation 1968 1 WLR 689
An individual fell on paving that had in places had sunk by ¾ inch or projected by ¼ inch. On appeal Lord Denning ruled for the Corporation. Thousands had used the footway successfully and knew of its condition, yet none had thought to report the footway as being dangerous. Lord Denning did not consider that the occasional ¾ inch irregularity made the footway dangerous or not reasonably safe.

Not ½ inch
Littler v Liverpool Corporation 1968
This case provided the famous “a highway is not to be criticised by the standards of a bowling green” quotation. Here an individual running along the footway had tripped on a slab protruding ½ inch. The judge took the view that the criterion was the foreseeability of danger in the eyes of a reasonable person.

Not 20mm
James v Preseli Pembrokeshire DC 1992 & Thomas v Preseli Pembrokeshire DC 1992
This case arose out of a tripping accident in Milford Haven in 1988 where Mrs James and Miss Thomas fell in the same area of paving within the space of a month. The defects on which the plaintiffs fell were between 10 and 20 mm. Initially one of the plaintiffs was successful in their action in court, and the highway authority successful in the other. For the appeal it was decided to hear both cases together. The Court of Appeal confirmed that the difference of level in question was not unreasonable and the existence as such did not impose a liability on the highway authority. The Court stressed that 25mm standard used by some highway authorities was a trigger point for maintenance; this was different to saying that it was a direct measure of danger.

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

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

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

3.7.3 Standards for carriageway vs. footway and footpath

(a) Pedestrian use of carriageway

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

Bird v Tower Hamlets London Borough Council (1969) 67 LGR 682
An individual stepping out of a van onto the carriageway hurt their ankle in a depression 3 inches deep left after a resurfacing operation. The authority’s engineer admitted slight danger to pedestrians. The judge ruled for the plaintiff stating that the highway authority should keep the carriageway safe for pedestrians, given that they were entitled to pass and repass along it.

Ford v Liverpool Corporation (1972) 117 SJ 167
A pedestrian, while crossing the road, fell on an inspection cover which had dropped by about one inch. The judge found for the highway authority, stating that pedestrians must expect to find some obstructions in the carriageway mentioning also cat’s eyes and pedestrian crossing studs.

(b) Verges

Thompson v Hampshire County Council [2004] EWCA (Civ) 1016
A pedestrian was walking in the dark along an “A” road on a verge, with a narrow beaten earth track, when she fell into a ditch. It was too dark to see where she was putting her feet, and she carried no torch. The Council were sued for breach of its statutory duty “to maintain the highway” under what is now section 41 of the Highways Act 1980. The court dismissed the claim, finding that the highway authority was not responsible, under its statutory duty to maintain the highway, for the highway’s layout.

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

See also Rider v Rider and Kind v Newcastle.

3.8 INDUSTRIAL DISPUTES

Bartlett versus Department of Transport 1984
The DoT had been unable to grit a road owing to industrial action over pay. The unions had threatened to suspend all gritting in the area were the DoT to bring in a private contractor to grit the trunk road. The DoT put up notices to warning drivers that the road had not been gritted. A driver was killed while overtaking and the DoT were sued.

The judge held that the DoT was not in breach of its duty to maintain:
the DoT had taken reasonable care by providing the notices, and seeking to divert traffic onto other routes.
the duty to maintain was owed to the public as a whole, and consequently the decision not to bring in a private contractor and hence risk the total suspension of gritting, was justified.
It was also considered that the driver had been driving too fast for the conditions, actions which would have made him 80% liable.
3.9 FAILURE TO INSPECT

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

*Griffiths v Liverpool Corporation 1966.*

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

3.10 ABSENCE OF INSPECTION RECORDS

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

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

3.11 DESIGN DEFECTS AND LIABILITY

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

"Streetscape and highway design have been rightly devolved to local authorities, other than on roads for which the Secretary of State is the highways authority, such as motorways, which are the responsibility of the Highways Agency." Gillian Merron Parliamentary Under-Secretary of State for Transport Hansard 2007.

Local authorities are therefore regarded as competent to make their own decisions about highway design: they are not strictly bound to any national guidance or code.

There have been very few cases relating to alleged defects in design. A request went out to members of the CSS in 2008 for cases that had gone against the authority on the basis of design. There was no significant history. There was a small number of live cases that were tending to focus on trip hazards resulting from design. There is of course nothing stopping an individual making a claim for a design defect, however the instances seem rare and the chances of success remote.

3.11.1 Extremely limited sightlines – pre Manual for Streets case

*Kane v New Forest DC (No.1) Court of Appeal (Civil Division), 13 June 2001 3 ALL ER 914*

http://www.hmcourtservice.gov.uk/judgmentsfiles/j878/Kane%20v%20New%20Forest%20District%20Council.htm
This was an appeal against a decision that a claim against the Defendant in which a pedestrian was injured by a car after emerging from a footpath onto a main road had no real prospect of success. The court ruled that the claimant had good prospects for pursuing a claim against a planning authority which had failed to improve sightlines before the opening of the path where the highway authority had already stated that the sightlines were inadequate.

The Defendant (as planning authority) had entered into an agreement with a developer undertaking the development of a new housing estate, for the construction of a footpath with a further agreement dedicating a strip of land to be used by the highway authority to improve sight lines at the footpath's exit onto the road.

“On 1 March 1995 the appellant suffered grievous injuries when struck by a motor car whilst out walking in the New Forest. He had emerged from a footpath and was crossing the road opposite. The motor car came from his right and, says the appellant, the driver had no chance to avoid him: the footpath ended on the inside of a bend in the road and the trees and vegetation growing alongside the road reduced the oncoming driver's visibility to no more than some 10-15 metres.”

The Highway Authority had in 1984 stated that the footpath proposed as part of a new development was “totally unsuitable because of the lack of sightlines”.

The footpath had been opened before the improvements to the sightlines had taken place.

The court ruled that the Defendant (the planning authority) owed a duty to those who might have wanted to use the footpath to ensure that it was not opened until the sight line dangers were removed.

This case was unusual in that in effect the Highway authority was acting as an expert witness for the Claimant having asserted that the visibility was poor when the development was being designed in the 1980s. This at a time when DB32 provided the design philosophy and not Manual for Streets of 2007 which provides for restricted forward visibility as a means to slow traffic. However the modelling undertaken in TRL report 661 identified problems where reduced sightlines alone were being relied upon to reduce speeds where sightlines before junctions fell below 20 metres as drivers were tending not to reduce their speed sufficiently for the approach to be safe.

“The extent that drivers slow down as forward visibility reduces is insufficient to result in geometries with a forward visibility of less than 20 metre being safe. This modelling was based upon a tarmac surface and no parking on the link: both of which reduced link speed. Therefore a combination of speed reducing measures may further reduce speeds to permit lower forward visibilities. Page 21 TRL Report 661

The inference would be that for sightlines below 20 metres additional means should be used to slow the speed of traffic.

The case also points to the potential for a local authority’s defence being compromised by a Road Safety Audit where the auditors had failed to keep up to date with modern highway practice as contained in Manual for Streets and the latest research base. To add value, practicing Road Safety Auditors should be in the vanguard of evidence-based highway design and public realm management.

3.11.2 Tram rails laid proud of the road surface

Roe v Sheffield City Council (No.1) Court of Appeal (Civil Division), 17 January 2003

Local authority found liable for raised tram rails above road surface.
A car accident was caused by skidding on tram rails in the road raised above the level of the road surface by between 4 mm to 10 mm. Judgement confirmed this was in breach of section 25 of the Tramways Act 1870 as incorporated into the South Yorkshire Light Rail Transit Act 1988.

The 1988 Act required tramways to be laid and maintained so that the uppermost surface of the rail was "on a level with the surface of the road" with some tolerance permitted.

It was noted that whilst the 1988 Act imposed a duty on the Defendant to maintain the tramway, this did not displace the separate duty owed under section 41 of the Highways Act 1980.

### 3.11.3 No duty to provide or maintain road signs as part of duty to maintain.

*Gorringe v Calderdale MBC House of Lords, 1 April 2004*

The Defendant highway authority was not required to provide road signs or markings as part of their duty to maintain the fabric of the highway.

The Claimant claimed that the local authority had caused her accident by failing to give drivers’ proper warning of the dangers on that stretch of road. The Claimant argued that the absence of suitable road signs constituted a failure to maintain under section 41 the Highways Act 1980.

The appeal was dismissed, in that the provision of road signs or markings was quite different from keeping the highway in repair. The Claimant’s accident had not been caused by any defect in the state of repair of the road or a failure to maintain the road in breach of section 41 of the 1980 Act. (contrast with Bird v Pearce where the highway authority had actually brought about the removal of the road markings and so created a risk).

Drivers are responsible to take care for themselves irrespective a warning sign.

### 3.11.4 Barrier length – a question of guidance and local circumstance

*Great North Eastern Railway Ltd v Hart Queen’s Bench Division, 30 October 2003*

http://www.hmcourts-service.gov.uk/judgmentsfiles/j2015/hart.htm

The Defendant failed to establish that the length of a barrier erected in 1974 was negligently short in trying to secure a contribution from the Department of Transport.

Contribution was sought from Secretary of State on the basis that the roadside safety barriers were inadequate to prevent the Defendant’s car from leaving the motorway. The accident had been caused by the Defendant’s vehicle veering off the motorway onto the path of an oncoming train. The total length of the safety barrier in advance of the railway line was 62.7 metres, the minimum length prescribed by the Department of Transport being 30 metres.

The Defendant’s expert contended that the barrier ought to have been up to 100 metres long. The claim was dismissed, although a highway authority could owe a duty of care to those neighbouring the highway. Negligence would only be established if the length of the safety barrier was dangerously short. The decision as to an appropriate length for the safety barrier was site specific and having regard to the minimum standard.

### 3.11.5 Steep access

*Carpenter v Pembrokeshire CC Queen’s Bench Division, 01 October 2002*

An unusually steep access was not considered to be negligent design.
The Court was asked to determine whether the local authority had designed a new access to the Claimant’s bungalow negligently. The issues to be determined were whether the new driveway was dangerous and/or unusable, and if so, was this due to the Defendant’s negligence in the designing of it.

Judgment was given in favour of the Defendant. The driveway was neither dangerous nor unusable. Whilst the gradient of the driveway was greater than usually specified in certain guidance documents, the design of the access was a balancing exercise and using a gradient which was greater than normally accepted did not automatically point to a negligent design.

3.11.6 Unlit traffic island

*Baxter v Stockton on Tees Corp Court of Appeal, 23 June 1958*

Highway authority held not liable for the peculiar design of an unlit island since no positive act had been committed by them.

A motor-cyclist was fatally injured whilst riding along the highway at night and struck an unlit island which had been constructed in such a way that it projected into the highway. The island had been built in 1938 by the County Council under the Development and Road Improvement Funds Act 1909. In 1941 the Defendant corporation took over the highway together with the island.

The claim was dismissed. The corporation had themselves done no positive act in relation either the highway or the island, and since a highway authority was exempt from liability for nonfeasance, the claim failed.

3.11.7 Roundabout


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

The accident was entirely due to the motorcyclist ignoring the warning signs and approaching the roundabout too fast. However, the Court of appeal did also say the design of the angle of entry of the right hand lane to the roundabout was above what was recommended in the advice note and was “such as might entitle some persons to complain in some circumstances of a breach of duty owed to them not to be negligent in the design of a roundabout and is approaches.”

3.11.8 Road sign on dual carriageway bend

*Levine v Morris 1969*

A motorist lost control of his car in heavy rain on a bend on a dual carriageway, having just overtaken a vehicle. His car left the road and collided with the concrete column of a road sign, resulting in the death of the passenger Mr Levine. The court held the Department of Transport 25% liable, taking the view that it was foreseeable that accidents would happen on the bend, and that given that there were alternative sites that presented less risk, there was a duty to have considered them.
The road here was a dual carriageway. It does not follow that the case would have been won had the road been in an urban area where one might expect to find pedestrians on the outside of a bend, as well as the occasional column.

3.11.9 Licence restriction due to visibility

*Surrey CC v Williams (t/a Garden Materials Landscaping)* Court of Appeal (Civil Division), 28 March 2003

The local authority was unsuccessful in restricting a licence for additional tipper vehicle movements where poor sight lines were alleged.

The Defendant applied for the licence to use a site for overnight parking and agreed to conditions of entry and exit. The Claimant contended that the decision to grant the licence was perverse as the site was located on an unlit B road with no footpath and poor access visibility.

The appeal was dismissed. The sight line measurements set out in Design Bulletin 32 referred only to new developments and the commissioner was not therefore bound to apply them to the existing site. The decision was made following a site visit and the conditions did not reveal any perversity as they related to a site that had operated for 12 years prior to the current application which only added a further 4 vehicle movements per day.

3.12 ICE AND LOSS OF CONTROL

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

3.12.1 England and Wales

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

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

It is significant that the Section 111 modifies section 41 of the Highways Act, and the above duty should be read in that context. Of course this leaves open the interpretation of "reasonably practicable", and "endangered". This is different to the Scottish law (see below).

There are very few reported cases post the amendment. However of note is *Rhiannon Pace –v- The City and County of Swansea* 2007. The claimant’s vehicle hit a patch of ice on the carriageway causing her to skid and overturn her car at 9.45am. The authority had gritted at some point between midnight and 2am the night before with a spread rate of 10g/m2 as recommended in the Code of Practice for Maintenance Management 2001. This was considered sufficient to comply with the statutory duty. The judge also commented

“It is not practically possible to ensure on all parts of the network running surfaces are kept free from ice and snow, even on the treated parts of the network ….. there is a need to strike a balance between the right amount of salt and environmental and fiscal concerns” and “It is clearly impossible for any Highway Authority to limit all ice from appearing on the road. To place higher levels of salt on the road may decrease the danger, but would have a substantial environmental cost".
(a) **England and Wales position pre 2003**

*Penhaligon*

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

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

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

This case was decided between Haydon v Kent County Council (1978) and Goodes v East Sussex County Council (2000). The law at the time, therefore, was that salting and gritting should take place in icy conditions. The judge found that the decisions as to when salting and gritting should be carried out had to be left to the divisional surveyor and his experienced roadmen. They should have regard to the national guidelines but should reach their own judgement on the basis of local conditions. In that case it was raining on the previous afternoon and evening and it would have been useless to pre-salt the roads.

*Goodes v East Sussex County Council 2000*

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


### 3.12.2 Northern Ireland

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

### 3.12.3 Scotland

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

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

*Syme v Scottish Borders Council 2002*

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


It is important to understand the reasoning on this decision:
“While Scots law does not recognise the public law/private law dichotomy in the way which English law does for the purposes of determining, for example, what matters are amenable to judicial review, I, nevertheless, consider that the distinction drawn by Lord Browne-Wilkinson does have its counterpart in Scotland in that it is essential to recognise that the non-performance or misperformance of statutory duties, by public authorities, may be justiciable only by means of judicial review and by the application of the substantive law which has been developed in that field, as opposed to an ordinary action for damages based on statutory "fault" and it is essential not to confuse the two." Lord Clarke at para 6 Syme v. Scottish Borders Council 2002

### 3.13 UTILITIES: NEW ROADS AND STREETWORKS ACT 1991

#### 3.13.1 Nolan v Merseyside County Council and Northwest Water Authority 1982

This case is widely quoted as defining the proportion of equal liability between a utility and a highway authority in relation to claims resulting from defective utility apparatus.

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

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

This case was decided in 1982 under the Public Utilities and Street Works Act 1950, which has been superseded by the New Roads and Street Works Act 1991 and the Traffic Management Act 2004.

If defective utility apparatus is found during a safety inspection the Highway Authority shall notify the utility by serving a notice under Section 81 of the New Roads and Streetworks Act 1991.

Section 81 of the New Roads and Streetworks Act 1991 places a duty to maintain apparatus on the utility.

“(1) An undertaker having apparatus in the street shall secure that the apparatus is maintained to the reasonable satisfaction of—

(a) the street authority, as regards the safety and convenience of persons using the street (having regard, in particular, to the needs of people with a disability………….

(2) For this purpose maintenance means the carrying out of such works as are necessary to keep the apparatus in efficient working condition (including periodic renewal where appropriate):………

(3) If an undertaker fails to give a relevant authority the facilities required by this section—

(a) the street authority may in such cases as may be prescribed,………

execute such works as are needed to enable them to inspect the apparatus in question, including any necessary breaking up or opening of the street.

(4) If an undertaker fails to secure that apparatus is maintained to the reasonable satisfaction of a relevant authority in accordance with this section—
(a) the street authority may in such cases as may be prescribed execute any emergency works needed in consequence of the failure.

(7) Nothing in subsection (3) or (4) shall be construed as excluding any other means of securing compliance with the duties imposed by subsection (1).

A utility can use the Highway safety inspection as a defence against a claim from a third party (Reid v British Telecommunications plc).

3.13.2 Reid v British Telecommunications plc, unreported Court of Appeal 26th June 1987

A utility can rely upon a safety inspection by the highway authority as a defence against a claim from a third party.

British Telecom had placed a manhole cover over cabling on a pavement. The cover was protruding 12 millimetres at its leading edge above the surrounding area of pavement. The pavement was some 6 metres wide with shops along it, and the manhole cover was some 3 or 4 feet from a tree which stood by the side of the road. Mrs Reid allegedly fell on the 14th March 1981 when she tripped over the manhole cover. Following the incident the highway authority reported the defect to British Telecom who visited the site and arranged for the cover to be reset.

The footway had been inspected by the Highway Authority on a six monthly cycle, the last being 2 months before Mrs Reid tripped, when the alleged defect was neither observed nor reported.

British Telecom denied allegations of negligence, which were said to be the failure to maintain the cover and surrounding area, and failing to give a warning. The trial judge took the view that the defect was a “trap”, and that British Telecom had no organized system of inspection, instead relying on the local authority and members of the public to report defects; thus they were liable to the plaintiff.

They appealed, on a variety of points including the reliance of British Telecom on the local authority for inspection. Lord Justice Gibson said

“In my view there was nothing to suggest that British Telecom were at fault in relying upon six-monthly inspections by the highway authority, in the sense that the rate of deterioration of their equipment was such, or the capacity of highway inspectors to observe was such, that they could not reasonably rely upon being told of any defects in the course of those inspections. For my part I can see no great sense in having the highway authority inspect the flagstones around such a manhole cover and having British Telecom inspect the metal frame which supports it.

As against the plaintiff, however, if British Telecom choose to rely upon inspection by the highway authority -- there being of course no suggestion that they could sensibly dispense with all inspection -- British Telecom must be treated, as I see it, as knowing what they should know if the inspections are properly carried out by the highway authority at the proper intervals, which in this case appears to be six-monthly intervals. I would therefore hold that British Telecom must be treated as knowing with reference to this manhole cover what they would have known if they had themselves carried out the inspections which they were content for the highway authority to carry out, and that therefore they knew what they would have discovered if they had inspected it in March 1981 as the highway authority did.”


A Statutory utility cannot discharge liability for the reinstatement if it is shown to have not been completed to the specification under New Roads and Street Works Act 1991 71(1) 71(5)
The court considered an appeal related to two cases brought under sections 71(1) and (5) of the New Roads and Street Works Act

One alleged a failure to comply with the prescribed requirements as to the specification of materials to be used in reinstating the street.

The other alleged a failure to comply with the prescribed requirements as to the standards of workmanship to be observed in reinstating the street.

This case tested that an undertaker cannot discharge liability for the reinstatement if it is shown to have not been completed to the specification. The case hung on the basis that a reinstatement is not a reinstatement if it does not meet the specification. Therefore if at anytime subsequent to the purported completion it is shown that the specification was not met the undertaker is responsible for it. The act states that the utility is responsible for the maintenance of a reinstatement for a guarantee period of 2 years (3 years for excavations exceeding 3 metres deep). On completion of the guarantee period the responsibility for maintenance rests with the highway authority. It is generally accepted that once complete to the correct specification the guarantee period then starts.

### 3.13.4 Annette Atkins v Ealing London Borough Council [2006] EWHC 2515 (QB)

Failure to check integrity and stability of manhole cover during safety inspection in a busy shopping street.

A woman succeeded in claiming damages from a highway authority for injuries she sustained when she stepped onto a manhole cover which tilted, causing her to fall into the manhole.

It was accepted that the tilting manhole cover made the highway dangerous and that it followed that the Council was in breach of its duty under s41 Highways Act 1980 to maintain the highway.

The manhole cover was inspected visually every month with a view to identifying any tripping risk. The stability of the cover was not inspected.

The judge suggested that had the highway authority presented evidence to suggest that there were so many manhole covers to check and that tilting manhole covers were so rare that it would be unreasonable for a highway authority to be expected to inspect them, then the highway authority might have been able to establish a successful defence under Section 58 of the Highways Act. That it had taken such care as in all the circumstances is reasonable to ensure that the highway is not dangerous.

The Court held that this was an insufficient system of inspection given the risk presented by a tilting manhole cover located in a busy shopping street; and that tilting covers were not so rare as not to require a system of inspection to check their integrity.

The contractor employed by the Council stated in court that it was reasonable to carry out close inspections.

The High Court held that the Council had not discharged its duty under s58 of the Highways Act 1980 by virtue of its failure to instigate a suitable system of inspection.

Had evidence to justify the local authorities position been called to justify the once per month visual inspection, then the case might have been decided differently.

In Harrison v Derby City Council (2008), the court of Appeal held that, it would be unreasonable and disproportionate to impose on a highway authority the duty to inspect the integrity of footways over cellars more frequently than as part of the six monthly inspect regime conducted by the highway authority in question given that cellar collapses occurred over cellar voids so rarely.

In Carol Harrison v Derby City Council 2008 The authority called evidence to justify the reasonableness of its system which did not have a different or enhanced regime for
Highway Risk and Liability Claims – Second Edition

Highways with cellar covers. In Harrison the Claimant had put her foot in a depression over 25mm deep and suffered injury. The depression was caused by the collapse of a cellar roof around a grating under the highway. It was conceded that the defect was actionable and the authority sought to rely upon the s 58 Defence alone. The authority had a system of inspection where footpaths were inspected every 6 months. The last inspection prior to the accident was 3 months earlier. The authority conceded it was aware of the risk of collapse over cellar voids. However, the Inspector’s evidence was that there were over 4000 actionable defects arising each year from causes other than collapsed cellar voids. The Court of Appeal decided that is was disproportionate to introduce a different inspection regime for areas over cellar voids where depressions occurred only rarely. There was sufficient care taken to provide the Authority with a s58 Defence.

Atkins might have been decided differently had evidence been called to justify the authority’s position of not inspecting each and every manhole cover.

3.14 DEFENDING AN ACTION

3.14.1 Statutory defence for repair and maintenance

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

Section 58 of the Highways Act 1980 (England and Wales)
Section 1 of the Roads Scotland Act 1984
Article 8 of the Roads (Northern Ireland) Order 1993 after Section 1 of the Roads (Scotland) Act 1984

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

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

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

Frances Balmer v Department of the Environment for Northern Ireland

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

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

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

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

"No system can ensure immediate discovery and repair of all hazards".
3.14.2 Providing evidence to justify the statutory defence

The highway authority will need to prove that it has acted reasonably through the production of adequate documentation and evidence (cf Akins v Ealing & Harrison v Derby at 3.12 above):

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

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

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

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

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

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

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

3.14.3 Claims of Substance

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

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

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

3.14.4 Statutory Defence and Risk Management

There are two fundamental risk management issues:

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

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

See “Well-maintained Highways Code of Practice for Highway Maintenance Management” Chapter 9 Inspection assessment and recording, page 90. The code of practice produced under the auspices of the UK’s Roads Board is generally looked to by Courts as the acceptable standard for road maintenance.
There may, however, be sound reasons for authorities departing from the Code’s guidance, but it is recommended that where this happens the deliberation process over the departure is formally recorded.

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

The standards should be subject to regular review.

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

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

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

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

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

The use of geographical information systems linking real time inspection data to background mapping systems should also be seriously considered. The function of maintaining the records and producing sound evidence to support the RMMS will be an important part of the job specification of the Senior Highways Officer.
4 Recommendations for Local Authorities

4.1 A STRATEGIC APPROACH TO MANAGING HIGHWAYS RISKS

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

4.1.1 The local authority’s wider responsibilities

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

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

<table>
<thead>
<tr>
<th>Objective for strategy</th>
<th>Balance maintenance costs, inspection costs, claims costs in a way that is in the long-term interests of the general public</th>
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<tbody>
<tr>
<td>Objectives for highways</td>
<td>Contribute to objectives of the Local Community Plan/Strategy, and the Local Transport Plan</td>
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<td></td>
<td>Provide safe, efficient convenient movement, at reasonable cost</td>
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<td>Provide attractive environment</td>
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<td>Assess and manage risks to the public</td>
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<td>Objectives for claims handling</td>
<td>Minimise public expenditure on claims</td>
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<td>Provide statutory defence</td>
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<td>Provide fair route to redress</td>
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<td>Block fraudulent claims</td>
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<tr>
<td>Risk management</td>
<td>Ensure roads and inspection policy, and winter maintenance policy meet above objectives</td>
</tr>
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<td></td>
<td>Assess risks to the local authority</td>
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<tr>
<td></td>
<td>Ensure existence of information system that enables identification of trends, clusters, and problems on the highway</td>
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The relative performance of authorities can be assessed by way of data benchmarking system and reference to key performance indicators. This system facilitates comparison of expenditure effectiveness, claim number trends and repudiation and average claim costs.
4.1.2 A system to provide a statutory defence

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

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

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

4.1.3 Providing a defence for new works

The claimant will need to demonstrate that the highway authority owed them a duty of care, and that, having observed their duty to take the road as they found it, and had regard for their safety and the safety of other road users; and had followed the provisions of the Highway Code, they were in some way trapped into danger that could not be foreseen by the normal run of road user.

A local authority may wish to provide evidence that:

- Designs were the product of balanced decisions that reflected the interests of community and the constraints of the time

  That designs reflected current practice or guidance, and this could include international practice where appropriate; or were based on research, or sound scientific and engineering principles, that had been properly and rationally applied.

It should be remembered that guidance provides guidelines, not tramlines: there will be instances where departures from guidance will be in the best interests of society, and necessary when innovations in highway design are being introduced and tested

Without innovation there will be no advancement in the practice of road engineering and public realm management, and the safety and broader interests of the public will suffer. Baseless fears over liability should not be used as excuse not to innovate.

It is commonly thought that responsibility can be avoided by copying guidance or designs. The decision to apply guidance is still a decision. Guidance most often deals with generalised situations, and often only one aspect. It is advisable that a capable designer produces the designs.

For further details see Section 5.

4.1.4 A system to manage risks

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

Highways defects, and the causes of highway incidents and claims should be analysed and those that are likely to lead to the greatest risk to the public and cost should be identified and dealt with first. This pro-active, needs-prioritisation approach will reduce potential claims exposure and lead eventually to lower insurance costs.
Local authority departments must cooperate in the introduction of risk assessment systems for all highways associated functions. Systems will need to identify areas of high claims experience and instigate lines of investigation to reduce the extent of potential claims. Simply sitting back and hoping the problem will go away, or not happen, is a recipe for disaster. There needs to be a “culture” change in most organisations for both members and officers if everyone is to be aware of risk management. It is likely to be difficult to demonstrate that criteria for highways management or design are objective, where they have been influenced by short term political needs.

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

**Schematic diagram of a risk management system in a highway authority**

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

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

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

- **Agreed adverse weather procedures** – that make clear what needs to be done and by whom to manage issues such as salting and flood response.

- **Hierarchy** – Policies and practices should be appropriate to circumstance. They can be based on a hierarchy of routes and locations that reflect use and importance. See “Well-maintained Highways” chapter 8 for further details.
Effective data collection and record keeping

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

Highways inspection staff who are trained and qualified

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

Effective communication and use of data

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

Corporate Approach

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

Inspection Regimes

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

Outsourcing of Safety Inspections

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

Where outsourcing is being considered it is very important that within the contract the contractor is very clear what defects information they are expected to collect and the frequencies the inspections that are to be carried out. Additionally it is important that there is a mechanism for amending both frequency of inspection and items collected.
If outsourcing has occurred, the highway authority may still receive claims because the insurance claim is still against the highway authority. They would then pass the insurance claim onto the contractor to settle. The contractor may however consider they have no liability and refute the claim. The claimant may decide to refer the claim back to the highway authority who, have no option but consider whether there is any liability. If there is, the quality of the contract becomes important.

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

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

(g) Repair Times

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

(h) Agent Authorities

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

This has the following advantages:

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

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

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

An example of a successful claims benchmarking scheme is:-
Midland Service Improvement Group (MSIG)

This Group was established in 1997 to deal with matters concerning Best Value, and Performance Management specifically within the Highways and Road Safety Disciplines. It consists of 11 Shire Authorities (Cheshire, Derbyshire, Lancashire, Leicestershire, Lincolnshire, Northamptonshire, Nottinghamshire, Shropshire, Staffordshire, Warwickshire, and Worcestershire), and two Unitary Authorities (Herefordshire and Rutland). Other Midlands authorities are involved in some of the task groups as invited, or requested. This group changed its name to Midlands’ Service Improvement Group (MSIG) in September 2003 to reflect better the work it does. In late 2006 MSIG expanded when the City Unitary Authorities of Derby City, Leicester City, Nottingham City, Stoke on Trent and Telford & Wrekin joined.
The MSIG covers matters concerning Best Value and Performance Management specifically within the Highways and Transportation disciplines. Sixteen Task Groups including Third Party Claims have been set up to benchmark in specific areas.

The Third Party Claims Task Group (TPCTG) has a diverse membership comprising Insurance, Claims & Risk officers together with Highways Maintenance and Policy officers.

The TPCTG aims to share best practice including documents, strive for a consistent approach to claims handling and maintenance issues which impact on claims, provide an opportunity for smaller authorities to share expertise of large authorities, provide the capability for data and process comparison.

i) Claims Benchmarking

The comparison of Claims statistics can be challenging as each authority’s data is collected and stored in different formats. In order to establish trend it is important to recognise that statistics can be quoted either in the year a claim was received or the year of the incident. Another unusual consequence is the ongoing nature of claims is that figures for previous years will change in future as claims are settled or closed off.

The TPCTG has developed two streams of data collection, general data and specific performance indicators.

ii) General Data

These statistics include; data on population, urban / rural split, length of carriageway inspected, frequency of inspections, details of insurance and claims handling service (internal or external), number of highway inspectors, highway inspector training requirements and usage of computerised inspection and customer enquiries recording systems among others. This data can be used either for comparison of specific individual matters or in conjunction with the performance indicators.

iii) TPCTG Performance indicators

The TPCTG has defined four specific performance indicators which are:-

PI1 Number of claims received in a single year irrespective of year of occurrence per 100 km carriageway inspected.

PI2 Total money actually paid out to third parties per 100 km carriageway inspected.

PI3 Actual number of claims settled with cost in a particular year per 100 km carriageway inspected.

SA5 Percentage of third party claims repudiation rate over previous three years.

4.1.5 Spreading the Risk

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

**Numbers of Claims:**

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

**Cost of Claims**

<table>
<thead>
<tr>
<th></th>
<th>Large Authority 1,000,000 persons</th>
<th>Small Unitary 100,000 persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minor claims</td>
<td>+/- 5%</td>
<td>+/- 500%</td>
</tr>
<tr>
<td>Major claims /£million</td>
<td>+/- 100%</td>
<td>+/- 10,000%</td>
</tr>
</tbody>
</table>

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

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

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

### 4.1.6 Liability

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

Such liabilities used to be covered almost entirely by Public Liability Insurance, with Councils bearing very small excesses, or no excess at all. Over recent years, however, the number and cost of public liability claims (particularly those against highway authorities) has risen to such an extent that insurers are increasingly reluctant to offer insurance cover, and when they do, it often involves the insured bearing high excesses on each and every claim, and/or a high aggregate excess before the insurer becomes involved in any claims payments.

As a consequence a small authority may bear the first £10,000 of each and every claim, and a large authority, perhaps the first £250,000 of each and every claim. It is therefore necessary for local authorities to provide internal funding for these losses. This funding is normally held centrally for all claims below the deductible. It is either top-sliced before department budget allocations take place, or each department is required to make a contribution out of its allocated budget. The latter option is increasingly preferred as it enables each department to be required to contribute according to its claims record and the risk it presents.

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

4.2.1 Leicestershire claims procedure

How claims are successfully processed by the Leicestershire County Council Insurance Team.

1. Call received in Customer Service Centre
2. Determine if it is a complaint or a request for compensation
3. If a claim, send out a standard Highways incident report form for completion
4. When received back, log details onto system and send a copy of claim form to appropriate Highways area office and original to the Insurance Section.
5. Insurance Section register as a claim and acknowledge claimant within 21 days if detailed letter of claim received.
6. Highway Inspector to complete technical report form to include dimensions of defect, and provide signed and dated photographs. Also documents in respect of standard disclosure in Highways tripping claims. Issue repair ticket if necessary.
7. Technical report form signed off by area team manager with an opinion added, if appropriate
8. Site visit carried out if required by Insurance section staff along with Highway Inspector. Statements obtained if required.
4.2.2  Birmingham claims procedure
Author – Lorraine Bennett, Birmingham City Council

(a)  The claims sequence

Receipt of incident report

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

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

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

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

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

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

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

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

Recording claims details

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

• claimant details (status, first name, last name, home address, correspondence address, contact numbers for home, work, fax, and e-mail address)
• claimant’s representative (company name, address, reference, contact name, contact numbers for work and fax, and e-mail address)
• date of birth
• employer
• occupation
• national insurance number
• incident date and 24 hour clock time
• incident location
• description of the alleged defect and the incident
  o the direction of travel
  o the point of fall or accident
• injuries
• damages (e.g. tyre, loss of earnings, travel expenses, private medical fees, lost promotion, etc.)
• weather conditions
• GP/hospital details and attendance
• original copies of estimates, quotations and repair receipts
• sketch and/or photographs having indicated thereon the location of the defect, direction of travel, houses, lamp columns, etc
• witness details
• date reported to the highway authority
• claim number allocated.

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

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

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

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

Initial site inspection

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

Formal/joint site inspection

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

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

It is recommended that the defect and location is photographed using a digital camera, and measured with an aid, e.g. measuring board or wooden block. The aid will give an indication of the scale of the defect and where possible should be included in the photographs. It is essential that short and long distance photographs are taken in order to show the defect at the right angle and level, and place the defect within the area. Photographs should record the claim number, date and time taken (the photographer’s name and claimant’s direction of travel can be included in the Highway Accident Investigation Report).
Nationally, repair criterion is subject to individual assessment by each Authority, but an appropriate level for investigation/intervention currently stands at 20mm (three quarters of an inch).

If a delay develops in setting up a joint site inspection, or in pin-pointing the defect, you must advise your Claims Administrators immediately. Time under CPR doesn’t start running until the exact spot is identified. For low value Damage Only claims, an Authority may choose to dispense with a joint site inspection if the incident location and defect can be identified with confidence.

(b) Highway authority claims processors (administration)

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

- above average verbal and written communication skills
- ability to ask “open” questions
- good listening skills
- good word processing and IT skills
- ability to deal with difficult and aggressive claimants
- able to read, comprehend and evaluate information
- able to make constructive comments to assist Claims Administrators and Litigation Solicitors
- basic knowledge of highway materials and terminology
- checking paid receipts are legitimate and the amount is appropriate for the damage being claimed
- ensuring claims are dealt with fairly and efficiently
- know where a variety of information is stored/located, e.g. Complaints Register
- productive claims enquiries are dependant upon the processor corresponding with the appropriate officer within the Authority and making sure the reply answers the enquiry, i.e. do you know who does what?
- aware of claim processing timescales and court procedures.

(c) Highway authority claims investigators (Incident location)

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

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

NB Gathering the right defence information is the key to successfully defending a court action.
(d) Preparing the highway accident investigation report

The claims investigator’s report should include:

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

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

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

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

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

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

(e) Claims administrators

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

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

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

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

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

It is recommended that statements are standardised for the following:

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

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

(g) Claims computer database

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

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

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

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

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

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

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

The Association of British Insurers – Fraud Initiative

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

Department for Work & Pensions (Compensation Recovery Unit)

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

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

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

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

4.2.3 The Claims assessor procedure

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

Receipt and acknowledgement of correspondence

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

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

Investigation

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

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

Settling a claim

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

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

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

Defending a claim

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

The Third Party/Solicitor may accept this or attempt to reach a compromise settlement but often, proceedings will be served on the Insured.
The proceedings are passed to the Insurance Company and they in turn, instruct a firm of Solicitors to represent the Insured.

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

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

**Claims procedure**

1. **Claim form/Third Party**
   - Correspondence received

2. Correspondence acknowledged
   - Allegations, details of incident, injury and/or damage requested from Third Party/Solicitor

3. On receipt of the above, investigations are carried out. This is either done by correspondence/telephone but normally carried out by a Claims Inspector/Loss Adjuster

4. **Defend**
   - Advise third Party Solicitor that liability is denied
   - If denial of liability not accepted or compromise settlement not reached then Third Party/Solicitor will commence proceedings against the Insured

5. **Settle**
   - Request from Third Party Solicitor, copies of medical reports, and/or evidence of loss.
   - Once received, consider obtaining or own medical evidence
4.3 TRAINING

4.3.1 Properly trained people are essential

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

4.3.2 National Standards for Highway Safety Inspectors, Training Assessment and Registration IHIE / CSS Proposal

A steering group was set up by IHIE and CSS following the publication of the first edition of this guide. The group comprised of representatives from bodies interested in setting a national standard for Highway Inspector Training assessment and registration which included Highway Authorities with training schemes, Department for Transport, National Training bodies; City & Guilds, Lantra, Highway Agency, Transport Research Laboratory

The group identified a framework for the areas which should be considered and the standard to which each inspector should be trained under the scheme. The current schemes could be verified and incorporated into the scheme as long as they comply with the defined standards. The three schemes given as examples in 4.3.3 also comply with these standards.

The proposal, which is due to be implemented in autumn 2009, is as follows:

a) Highway Inspectors Training Assessment and Registration

Job Role of a Highway Safety Inspector
1. Conduct routine inspections of highway and pedestrian areas
2. Prepare and programme works
3. Investigate complaints, defects and accidents
4. Implement control measures
5. Inspect utility operations and issue notices
6. Collect, record and update information and Highway Maintenance Management Systems

Additional roles of a Highway Inspector
7. Contribute to local implementation of Traffic Management Act
8. Contribute to winter maintenance operations
9. Contribute to resolution of emergencies
10. Contribute to cyclic maintenance planning
11. Conduct safety inspections on motorways and all-purpose trunk roads

Note: Not all Inspectors will cover all of the above in their particular job role but it is assumed that the job description of those conducting safety inspections will include 1 to 6.
b) Training Requirements

Core Units

1) Highway Law and Administration

Highways Act
Road Traffic Acts (S.41 & S.58)
- Powers
- Permits and Licenses
Traffic Management Act
New Roads and Street Works Act
- Specification, Codes and Regualtions
Definition of a highway
- Hierarchy
- Inventory
- Traffic sensitive Streets

2) Codes of Practice

Well Maintained Highways: CoP for Highway Maintenance Management
Safety at Street Works and Road Works
Traffic Signs Manual: Chapter 8
Local Policies
- LTP
- HAMP
- Maintenance Strategy/Plan

3) Health & Safety Responsibilities

HASWA 1974
- Duty of Care

MHSW Regs.
- Risk assessment
- Hazard Recognition
- Control Measures

Safe Working Practices
- Manual handling
- Needles, sticks and sharps
- PPE
- PUWER and LOLER
- Local requirements (Method Statements)

4) Inspection

Local policies and procedures
- Inspection frequency

- Response times
- Repair processes

Record keeping
- Inspection record
- Data capture systems

5) Defect Recognition

Construction defects
- Types and causes

Non-construction defects
- Trees
- Spillages
- Obstructions

Risk
- Intervention levels
- Risk Matrix
- Measurement equipment and techniques

Liability for repair
- Referring action to other parties

Range

- Carriageway surface defects
- Footway and cycleway surface defects
- Kerb defects
- Ironwork defects
- Drainage
- Road markings
- Fences and vehicle restraint systems
- Trees and vegetation

6) Materials Recognition and Measurement

Highway Construction
- Carriageway
- Footway
- Cycleways
- Verges

Highway Elements
• Street Furniture
• Vehicle Restraint Systems
• Signs
• Lighting

Safety Defects
• Measuring tools and techniques
• Accurate measurement and records
• Terminology of measurement

Materials
• Identification
• Selection of correct material for repair
• Material usage (costs, wastage etc)
• Estimating quantities

7) NRSWA and Sector Schemes

Traffic Safety Awareness
• Safety equipment and PPE

Temporary Traffic Management

Additional units

8) Claims Investigation
Woolf Protocols
• Civil Procedures Rules 1998 for England and Wales, Scotland, or Northern Ireland

Special Defence
Accurate Records

9) Court Procedures
Giving evidence

10) Trees
Condition awareness

11) Structures
Condition awareness
Visual inspection
Testing

12) Lighting
Columns and lamps
Electrical connections

13) Road Marking and Studding
Traffic Signs Manual – Chapter 5
Condition/reflectivity

14) Temporary Traffic Management on High Speed Roads
Chapter 8
Sector Schemes 12A/B/C

15) Coarse and Detailed Visual Inspections
Routine Maintenance Inspections

Assessment

1) Knowledge
All training units undertaken must be followed by a knowledge check
• A multi-choice test
• Open Book test conditions

1) Knowledge
All training units undertaken must be followed by a knowledge check
• A multi-choice test
• Open Book test conditions

Note: Units 1 to 7 comprise the Core Units of training to be undertaken by all inspectors and are appropriate for those conducting Safety Inspections. Inspectors having a wider job role will undertake additional units as appropriate.
2) Competence Assessment

To be conducted by on-site observation.

The candidate will need to demonstrate the ability to conduct a site risk assessment and to implement appropriate control measures.

Site observation, decision making processes and recording of defects will have to be demonstrated.

Core Units 3, 4, 5 and 6 and Additional Units 10, 11, 12, 13, 14 and 15 require some degree of competence assessment.

Unit 7: practical competence may be demonstrated by a Supervisor qualification as specified by NRSWA or by a module 7 qualification from Sector Scheme 12D.

Unit 14: practical competence may be demonstrated by an appropriate Foreman/Supervisor qualification under Sector Schemes 12A, 12B or 12C.

Safety Inspection will include:

- Site classification
- Selection of measurement equipment
- Selection and use of safety equipment
- Identification of construction type
- Identification of highway elements
- Identification of safety defects
- Identification of signification
- Correct measurement and recording
- Identification of liability

Areas to be covered by a safety inspection:

- Carriageway surface defects
- Footway and cycleway surface defects
- Kerb defects
- Ironwork defects
- Drainage
- Road markings
- Fences and vehicle restraint systems
- Trees and vegetation

4.3.3 Examples of training include

(a) Birmingham City Council’s IMTAC

A comprehensive modular training programme specific to highway maintenance practitioners:

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

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

How is it verified?
Delegates understanding and competency is verified at the end of each module by an appropriate ‘end test’.
Delegates who successfully complete each module of the training course will be given a certificate of competence appropriate to the stage (or level) of their training.

What is the progression route?
Delegates will not be allowed to progress to stage 2 unless they have successfully completed stage 1.

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

**Stage 1 – Essential competencies**

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

**Stage 2 – Additional competencies**

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

**Stage 3 – Supervisory competencies**

Modules:
3.1 Corporate Policies
3.2 On Street Appraisals
3.3 Data Management

**(b) City & Guilds 6033 – highway inspection and monitoring qualification**
The Skills Training Centre wrote and operate the City & Guilds 6033 – Highway Inspection and Monitoring qualification and can also offer highway inspection technical and legal courses.
www.skillstrainingcentre.co.uk

**(c) Leicestershire LANTRA Award**
The Leicestershire County Council Highway Inspector Training Scheme has obtained the nationally recognised standard of the LANTRA Customised Award. The Highway Inspector scheme is in modular format to maximise flexibility and future expansion. The Scheme is nationally recognised in its own right and is also fully compatible with the proposed IHIE / CSS scheme detailed in 4.3.2.

**Who is it for?**
The aim of this course is to give good basic knowledge to new inspectors of all areas of Highways Maintenance and Inspection. For more experienced inspectors it will act as a useful refresher.

**How is it verified?**
Each candidate will be assessed throughout, understanding and competency is verified at the end of each module by an appropriate test.
Candidates who successfully complete each module of the course will be given a certificate of competence appropriate to the particular module.

Once the modules have been completed in full and the candidate is successful, the awarding body will issue a full certificate confirming competency in all areas.

1: **Highways Maintenance Policies. (1 Day)**  
Understanding County Councils Policies relating to Inspection, Duty of Care, Winter Maintenance, Adverse Weather Conditions, Public Rights of Way and Confirmation of the National Code.(Well Maintained Highways)

2: **Highways Maintenance Procedures. (1 Day)**  
Understanding how and why highway inspections are carried out. Have an in-depth working knowledge of the procedures in place and how to apply them. Safe Working Practices, taking ownership of highways issues, Operational Survey Techniques, Record Keeping.

3: **Customer Care. (1/2 Day)**  
Understanding and working with the Highway Management and hand held computer systems. Gaining an understanding of Highways Protocol, Highways Charter, Response Times, service standards, the needs of the highway user and disability issues relating to the highway.

4: **Highway Law. (1/2 Day)**  
Appreciation of highway law and an in-depth knowledge of the duties and powers contained within the 1980 highways Act.

5: **Material Recognition & Measurement. (1 Day)**  
Being able to visually recognise materials and kerbs used in the highway; identify which material would be best suitable to repair a defect. Understand the implications of material usage in terms of cost, maintenance, wastage etc.

Understanding the methods used to measure lengths and volumes, accurately measure and describe the repair required – be familiar with measuring equipment and understanding the terminology of measurement and estimation.

6: **Defect Recognition. (1 Day)**  
Understanding the criteria for defect intervention (working within the Leicestershire County Council policies). Be able to identify and describe defects, select the most suitable treatment and describe the location of the defect, working within the policy guidelines.

7: **Street works (NRSWA). (1 Day)**  
Understanding the Street Works act, including safe working practices on the highway, identifying dangerous signing, lighting and guarding, being able to apply the NRSWA.

8: **Claims Investigation and Court Procedures. (1/2 Day)**  
Provide knowledge and information on the claims process  
Ability to prepare records and evidence (photo's & information) has knowledge of recording systems and where information can be located, (Highway Management Systems) be familiar with court proceedings relating to claims.

9: **Tree Awareness. (1/2 Day)**  
Basic Tree Awareness, ability to identifying possible problems, recording information correctly and passing it on to the relevant department for further investigation.
4.4 FRAUD

4.4.1 Incidence and types of fraud
Surveys suggest that 1 in 7 individuals have no qualms about making fraudulent insurance claims, and highway liability claims have long been seen as a soft target by fraudulent claimants. Fraud arises by making claims that are:
- Fictitious
- Not in the circumstances alleged
- Exaggerated

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

4.4.2 Ways to manage fraudulent claims

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

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

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

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

Sharing of information outside the authority enabling cross referencing
- Sharing with other local authorities
- Sharing with other insurance organisations

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

4.4.3 Examples of fraudulent claims that have been discovered
Local authorities, as providers of a public service, are vulnerable to people who take advantage of what is a position of trust by submitting fraudulent claims. However a growing number of authorities is taking effective action to detect and prosecute fraudulent claimants. One of the obstacles is that with a range of different ways of funding claims there is no longer one central gateway or 'control' to identify the fraudster. There are many different agencies currently involved in claims handling, these include insurers, solicitors, dedicated claims handlers, loss adjusters and in-house claims staff. Proper sharing of information between organisations will reveal repeat claimants.

An increasing number of fraudulent claimants are being exposed. Would be fraudulent claimants are realising that their activities run a significant risk of fines and criminal convictions that can lead not merely to imprisonment but also to loss of jobs and careers.
There are two main prosecution methods of fraudsters being either

1. criminal prosecution for perjury, obtaining a pecuniary advantage by deception and perverting the course of justice or
2. civil prosecution for contempt of court.

Criminal proceedings usually require the Police or CPS to take matters on. Civil proceedings can be brought by the authority themselves. Authorities should encourage the Police to take an active role in defeating fraud by explaining to them the cost, both financial and personal. In the absence of Police support civil proceedings can be equally effective and carry a two year maximum prison sentence.

Examples of fraudulent activity include:

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

(b) **Falsely claimed injuries**
Here fraudulent claimants need to beware being reported by neighbours and members of the wider community who object to public funds in effect being stolen.

- A man who alleged he had fallen on grassland owned by a local authority was exposed by neighbours who knew the accident had taken place in his own garden when they saw reports of damages he had received from the council. He was forced to repay the compensation.
- An amateur footballer who received £11,000 for an alleged knee injury following a pavement trip was ordered to repay the damages with interest. A retrial was sought after reports of his goal scoring whilst playing in the Sunday league appeared in local papers. He was subsequently jailed. *(Hughes v Caerphilly CBC)*
- A man alleged to have tripped however investigation proved that he had been involved in a fight and suffered his injury as a result of the same. Contempt proceedings were brought resulting in a suspended prison sentence. *(Lazenby v Caerphilly CBC)*.
- The Claimant tripped on a defect in the highway and following some investigation settlement was agreed. Some 3 months later the Authority received an anonymous phone call claiming that the Claimant hadn’t sustained an injury in the manner in which he alleged but had in fact fallen down stairs. Judgement was obtained requiring the repayment of the damages and all the authority’s costs *(Duggan v City and County of Swansea)*.
- A man claimed he had tripped and broken his ankle on an uneven pavement in Peterborough in the early hours and made a claim against Peterborough City Council a week later. He had actually broken his ankle after falling over on private property while under the influence of alcohol. He was jailed for nine months *(Lewis v Peterborough City Council)*.

(c) **Falsely claimed defect**

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

(d) Optical illusions

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

4.5 LIABILITY CLAIMS ASSOCIATED WITH HIGHWAY TREES

4.5.1 Introduction

There are two issues of liability associated with highway trees:

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

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

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

See “Well-Maintained Highways – Code of Practice for Highway Maintenance Management”

9.6 Safety Inspection of Highway Trees
9.13 Service Inspection of Landscaped Areas and Trees
10.9 Condition of Landscaped Areas and Trees
5 Design, innovation and Balanced Decisions

The first edition of this guide stressed the importance that Highway authorities, in the pursuit of their own and government policies on issues such as sustainability, health and liveability, should seek to produce or procure street and public realm schemes which meet high standards of design and address issues such as encouraging walking, cycling and the needs of disabled users, as well as enhancing the environment. Since that time there have been a number of important publications including:

- Local Transport Note 01/08 Traffic Management and Streetscene (2008)
- Designing Streets (2009)

These reports have responded to calls to move UK street design practice in the direction of mainland European practice including Holland and Germany where pedestrian casualty rates and child pedestrian casualty rates have been lower.

In addition an initiative in Evidence Based Road Safety has been developed at the University of Plymouth, and the Public Realm Information and Advice Network has worked to develop the following guidance in order to draw together the advice given by different documents support practitioners involved in design and to give them confidence. It covers:

- Establishing a “golden thread” that ensures decisions reflect appropriate government and community objectives
- Making decisions that are balanced decisions
- Evidence based design and guidance

Work in the development of the first and second edition of the guide identified a series of problems and opportunities, to which this latest edition responds:

1. The observation made in the DfT’s Manual for Streets on questionable or updated practices; concerns over the quality of the evidence upon which guidance is based and in some instances, the absence of evidence; or where the conclusions and advice drawn is not correct, or not sustained by evidence or logic. – **Evidence based design and a better understanding of logical thinking.**

2. The worry some designers have of a grave risk of personal liability for the designs they produce; the growth of defensive design in response to a myth over the threat of litigation and liability, including a design conservatism and loss of opportunities to innovate and respond to changes in society and technology; design by precedent rather than first principles, design reduced to a mechanical exercise involving an inappropriate and rigid adherence to narrowly drawn codes, standards and guidance; team working damaged where individual specialists mistakenly believe that their own industry standards are obligatory and must take precedence over the policies of the council and the desires of the community; and the erosion of the role of the professional and Britain’s edge as a leader in the development of safe and attractive highway and public realm. – **an understanding of the law based on what is written, rather than what is rumoured**

3. Designs being created that reflect the perspective of one specialism, rather than those of all the specialisms that should be involved, with some being brought in only at the end of the design process, when it is too late for their skills to be used effectively, or where the perspective of specialism dominates a design to the exclusion of wider policy objectives by government and local authorities and to the detriment of the community being served. – **Balanced decisions and the use of a generic design processes advocated in Manual for Streets and LTN 01/08 to establish a “golden thread” that links high level policy with design and delivery.**
5.1 BALANCED DECISIONS AND THE GOLDEN THREAD

Balanced decision-making steps

<table>
<thead>
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<th>Vision</th>
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<tr>
<td>- Policy review</td>
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<td>- Context</td>
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<td>- Consultation</td>
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<tr>
<td>Objective/Purpose</td>
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<tr>
<td>Design - Balanced Decisions</td>
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<tr>
<td>Quality audit – design and decisions reviewed against objectives</td>
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</tbody>
</table>

Do it!

Notes:

Golden Thread – the aim is to align the design and the decisions made with national policy, the strategy and objectives of the council, and needs and wants of stakeholders.

Vision – both Manual for Streets, LTN 01/08 and Design Streets stress the importance of having an overall vision. This will often be about regeneration and job creation, improving health or inclusion, and sustainability. But the vision and the objectives and design that flow out of it will also be informed by an understanding of the character the place and its purpose:

Policy review – this is about being aware of the policies that affect an area, in their full breadth, including the council’s corporate and community plans.

Context – this is about the setting of the site in question; how the area functions in terms of movement and place; how and why has the area has developed? How the place is used now and the basis of the economy. What makes an area distinctive, including local materials or styles, and landscape? Where/what are the key buildings, open spaces, destinations etc? Who uses it and how, who doesn’t use it and why?

Consultation – the vision of members of a community as to how they would like to see their area develop can be valuable contribution, and there will be instances where continued involvement of the community will be important.

Objectives and purpose – the objectives and purpose describes precisely what effect the scheme is required to produce in contributing towards the overall vision. In new development this can be included in the Design and Access statement.

Design / Decisions – this is where the flair of the professionals involved come to the fore. It is they who are in command of the full information about the site, and it is they who should make decisions rather than subordinating their judgement to guidance which inevitably will not have been prepared with that particular site in mind. Designs should be worked up where possible using simple 3D illustrations to help people visualise what is being entertained.

Quality Audit – there are a number of different types of audit that can be undertaken. The most important at the design stage is to assess whether the design is true to the vision and has fulfilled the objectives and purpose. Where safety audits are undertaken they are one consideration that go to making a balanced decision.

It is important not to become bogged down in a bureaucracy of self-justification. These steps should be kept as concise and productive as possible.
5.1.1 **What is a balanced decision?**

The term *balanced decision* describes decisions where a reasonable and reasoned attempt is made to cover the full range of interests involved in highways and the public realm. It is not an absolute definition: something that is either right or wrong; it is a matter of degree.

The legislation is rich with phases such as “have regard to”, “so far as may be reasonably practicable”, “having regard to their other obligations, policies and objectives”, and “may”. Rarely does a piece of legislation lay down an exact course of action over which there is no discretion. It leaves people to make balanced decisions. Even in the case of the Traffic Signs Regulations and General Directions, while they specify the precise nature and design required of lines and signs if they are to have legal effect, the decision to introduce a sign or line in the first place is often at the discretion of the decision maker. There is both an opportunity and a responsibility for all practitioners to use their judgement in order to do their best for the communities on whose behalf they are working, and, it is to be hoped, help advance the practice of highways and the public realm.

The list below draws from many different sources that suggest a flavour of balanced decisions.

*A balanced decision may be:*

- **Reasoned, rational, logical** – (Bolitho v City and Hackney Health Authority 1997)
- **Balanced:**
  - Takes into account relevant design considerations (CDM regulations 2007)
  - Considers those issues which should be taken into account and excludes those issues which should not be taken into account. (Wednesbury unreasonableness)

**Balances movement and place**

**Movement:**
- Reflecting the Hierarchy of users (from Manual for Streets)

<table>
<thead>
<tr>
<th>Consider first</th>
<th>Consider last</th>
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<tbody>
<tr>
<td>Pedestrians</td>
<td>Public transport users</td>
</tr>
<tr>
<td>Cyclists</td>
<td>Specialist service vehicles — e.g. emergency services, waste etc</td>
</tr>
<tr>
<td></td>
<td>Other motor traffic</td>
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and the particular needs of women, people with disabilities, and children

**Place**
- Reflecting the objectives of urban design (from By Design)

<table>
<thead>
<tr>
<th>Diversity</th>
<th>Adaptability</th>
<th>Legibility</th>
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<tbody>
<tr>
<td>Ease of movement</td>
<td>Quality of the public realm</td>
<td></td>
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<tr>
<td>Character</td>
<td>Continuity and enclosure</td>
<td></td>
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</tbody>
</table>

**Balances risk and opportunity**

**Balances capital cost and long-term maintenance, and other**

**Supports sustainability** – balancing the needs of the present generation with those of future generations

- **Sustainable on the evidence;**
- **Moral** – reflects accepted moral standards
- **Legal** – interprets law or legal procedure correctly
- **Has regard to duties**
Acknowledges the difference between **general duties** that place broad targets on a local authority and **private law duties** that create a justiciable duty of care.

Examples include:

- Disability Discrimination Act 2005 – a general duty to have due regard to the need to eliminate unlawful discrimination against, and promote equality of opportunity of, disabled persons, balanced against consideration of substantial extra cost for such provisions or actions and, the protection of rights and freedoms or safety of other persons

- Traffic Management Act 2004 – a general duty on traffic authorities to manage their road network with a view to achieving, so far as may be reasonably practicable having regard to their other obligations, policies and objectives, the following objectives, including
  - securing the expeditious movement of traffic
  - identifying and considering actions in response to causes of congestion and disruption of traffic (traffic including pedestrians)

- Roads Scotland Act / Highways Act - duty to repair the fabric of the highway; duty to assert rights to use highway

  - **Has regard to rights**
    Examples include: Human Rights Act – right to family life and property; Common law rights to use the Highway both for movement and for any other purpose that does not amount to a public or private nuisance (DPP v Jones 1999)

  - **Avoids foreseeable risks to individuals involved in or affected by the act of construction or maintenance**: (so far as is reasonably practicable, taking due account of other relevant design considerations) (CDM regulations 2007) (NB The CDM Regulations 2007 do not apply to the subsequent use of a public road)

  - **Avoids trapping people into danger**. (Common law – Gorringe v Calderdale)

**And is POSITIVE**

It would be regrettable if the decisions of a local authority or designer place above the interests of serving the public, the desire to avoid an exaggerated risk of being successfully sued, especially where the legal basis for any action and a claims record is minimal or absent.

All principal local authorities in England and Wales have the power to do anything they consider likely to promote the economic, social and environmental well-being of their area unless explicitly prohibited elsewhere in legislation, having regard to regard to their Sustainable Community Strategy. (Local Government Act 2000)

**Democratic decisions carry additional weight**

Issues of priority in the allocation of resources are there to be resolved by the democratic process, national and local, rather than by the courts. (Southwark London Borough Council v Mills (1999) HL)
5.1.2 Policy review

Detailed below are examples of the range of different legislation, policies and guidance that bear on highways and the public realm.

**EU level:**
- Human Rights > Human Rights Act
- Air Quality > Air Quality Management Zones etc
- Environmental Noise Regulations
- Public Procurement

**National Level**

*Common Law*
- Responsibilities of the road user
- Responsibilities of the Highway authority
- Understanding of duty of care

*Acts and regulations e.g.*
- Crime and Disorder Acts
- Disability Discrimination Acts
- Highways Act
- Road Traffic Acts
- Traffic Management Act
- Traffic Signs Regulations and general directions

*Local Government Acts*
- Best Value Duty
- Power of Well-being

*Environmental legislation such as the Code of Practice on Litter and Refuse*

*Sustainable Development Act*

*Highway Code*

**Government policy**
- Strategies
  - Health
  - Economic Development
  - Sustainable Development
- White papers
- Planning Policies
- Planning Policy Statements (around 10 of direct relevance)

**Government guidance**
- Circulars/Advice Notes
- Inclusive Mobility – a Guide on Best Practice on Access to Pedestrian and Transport Infrastructure DfT

**National organisations**
- Audit Commission Performance indicators

**At a regional level**
- Regional transport plan
- Flood risk management plans
- Landscape character assessment

**At a local council level**
- corporate plan
- sustainable community plan
- local transport plan
- local development framework
- travel to school plans

**At a neighbourhood level**
- conservation area
- urban character assessment
- travel to work plans
- design statements
- masterplans
- design codes

**Other guidance**
- There is a range of other guidance, often relating to specific aspects, uses or users of highways and the public realm including;
  - Royal Society for the Protection of Accidents
  - Institution of Highway Incorporated Engineers
  - Institution of Highways and Transportation
  - English Heritage
  - Commission for Architecture and the Built Environment
  - Homes and Communities Academy (formerly English Partnerships)
  - Environment Agency
  - And many others

A competent professional should be aware of the broad policy framework in which they, and other members of the design team, work.
5.2 THE EVIDENCE BASE – EVIDENCE BASED DESIGN

“Research carried out in the preparation of Manual for Streets indicated that many of the criteria routinely applied in street design across the UK are based on questionable or outdated practice.”

All criteria are questionable and should be questioned, along with guidance, practice and policy. Failure to do so allows what were once sound principles to degenerate into a doctrine that is out of step with changes in legislation, technology or public need. In order to make decisions that are in the best overall interest of society, practitioners need support from guidance that is up to date and where possible based on robust science and evidence. The medical profession has developed a system for rating research through the evidence based medicine movement. This system can be adapted and applied to the research that informs practice in highways and the public realm.

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<th>IV</th>
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<td>Individual opinion</td>
<td>Specialist opinion</td>
<td>Expert opinion</td>
<td>Case-control studies</td>
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- **IV** – Expert committee reports, opinions and experience of respected authorities
- **III** – Well-designed non-experimental descriptive studies, case-control studies, or case series
- **II** – Well-designed quasi-experimental study
- **IIa** – Well-designed controlled study without randomisation
- **IIb** – Randomised controlled trial
- **Ia** – Several randomised controlled trials
- **Ib** – Well-designed controlled study without randomisation

**Controlled trials** – are where the study is carefully designed to eliminate distortions such as selection bias and regression to the mean, experimental bias; and where there is a clear understanding of statistical significance.

**Case-control studies** – are where sites are chosen, some of which are given an experimental treatment (a speed camera for example) and left untreated. A comparison is made between measurements of the sites with the treatment and those without. A randomised case-control study is where the sites are randomly selected.

**Expert opinion / guidance** – which addresses itself to the full range of functions, uses and users of highways and the public realm, the task faced by local authorities,

**Specialist opinion / guidance** - which addresses a specific aspect of the public realm, such as traffic signals, lighting or a specific user group, such as women, motorcyclists, or people who are blind.

Both expert and specialist guidance should represent a responsible, reasonable and respectable body of opinion.

Practitioners should give greatest weight to guidance that is based on sound research, and less to that based on poorly constructed studies or drawn to reflect only a narrow opinion.

5.2.1 Where local professional judgement should take precedence over guidance and standards

There have been concerns expressed over designers slavishly adhering to guidance. Local Transport Note 01/08 specifically advises:
Regulations and technical standards have a key role in the delivery of good design, but, if used as a starting point, they may serve to compromise the achievement of wider objectives. A standards-based template view of road junction design, for example, is inappropriate.  

“In reality, highway and planning authorities may exercise considerable discretion in developing and applying their own local policies and standards.”

“Designers are expected to use their professional judgement when designing schemes, and should not be over-reliant on guidance.”

“Available guidance is just that, guidance, and cannot be expected to cover the precise conditions and circumstances applying at the site under examination.”

The authors of guidance, however accomplished, will not be cognizant of the site and situation in question. It would be neither reasonable or rational to presume that anyone could produce an optimal design in abstract. The informed judgement of trained professionals on-site, should logically take precedence over guidance.

5.2.2 Limitations to research include:

Reliability of the source data - As detailed earlier in the guide, the casualties reported in STATS 19 are subject to systematic under-reporting and miscoding, the statistics do not always coincide with the hospital data, and the data on accident causation is an initial opinion.

Statistical variation – accidents are infrequent and sometimes random events and observations of many sites over a long period of time may be required to draw statistically significant inferences. Nonetheless there is a tradition of carrying out three years before-three years after monitoring of accident records, which, unless the sample sizes are large, may prove little.

Regression to the mean / selection bias – the failure to acknowledge the random nature of events has featured in poorly designed research where safety measures have been applied to sites with an accident record. Sites are chosen because they have an accident record, safety measures are applied, and often the accident rate goes down, possibly due to the safety measure, but also possibly due to random variation. An example has been the data from speed camera sites: speed camera sites were chosen on the basis of there being a record of accidents (some of which may have been chance occurrences); a controlled experiment would have identified potential sites and randomly allocated speed cameras to some, recording the results.

Experimental bias – where people look for results that confirm their beliefs or hypotheses. A more robust approach is to set out to disprove a hypothesis.

Conclusions not sustained by evidence - sometimes mistakes are made in drawing conclusions from research, sometimes there is bias involved, in others instances the mechanical process of summarising research can turn qualified conclusions into statements of fact by omitting reference to the qualifications and uncertainties. This is a particular trap in the subsequent reporting of conclusions in other documents or press releases.

5.2.3 Defects and limitations with guidance and standards

The decision may refer to guidance, or a body of expert opinion, but that body of opinion must be logical, reasonable, have addressed itself to the comparative risks and benefits, and have reached defensible conclusions. (derived from Bolan and Bolitho)
Guidance lacking completeness – where guidance only addresses single issues. Whereas a body of specialists might come to one set of conclusions regarding their particular area and possibly quite logically; but a body of experts, who have in mind the full range of responsibilities, duties and constraints placed upon local authorities, authorities might come to a different set of conclusions. Practitioners in the field are then confronted with the challenge of using a library of specialist guidance which may not have addressed itself to the full breadth of real-world issues. Local authorities do not have the luxury of being able to provide highways for single users. Compromises have to be struck and decisions made that recognise the limited resources of the local authority and its broader responsibilities in the pursuance of the better overall interest of society. The courts have recognised this time and time again.

Quality – some guidance tends to be overlong, repetitive and contain relatively little useful information. This makes the job of the practitioner much more difficult.

Poor research basis – such as the use of case studies with no controls, poorly designed studies, before and after studies, and so on. This type of research may offer little to support meaningful conclusions. Sometimes guidance references research that is no more than a series of opinions. In doing so the guidance assumes a status that is not justified.

Conflicts of interest – where the authors or publishers of guidance stand to gain from the implementation of its recommendations, or where the guidance is more about campaigning.

Bias – where research used to support guidance and the conclusions drawn have from the outset sought to argue a particular case.

Illogical conclusions – where the conclusions are not sustained by the evidence or science available. There can be a tendency to fail to transmit the qualifications made when researchers make inferences and draw conclusions, so that tentative findings are subsequently reported as fact.

Misunderstandings over the law

Errors in summarising law and precedent – it is easy for an author unwittingly to change the meaning. And this guide is no exception. It is best to obtain direct quotes from law and precedent and to understand the context in which they were made.

Not being up to date in latest law and precedents – examples have included

- Lawyers citing the Nolan precedent, not appreciating that the case was determined under the Public Utilities and Streetworks Act, and that the current legislation which replaced it, that is the New Roads and Streetworks Act, provides different responsibilities;
- Guidance documents and opinions on highway law that do not reflect the Gorringe v Calderdale case, for example claiming that local authorities are at risk of litigation under the Road Traffic Act 1988, when the door was effectively closed by the case.
- Tomlinson v Congleton, a tragic case relating to occupiers liability, involving disabling injuries sustained by a young man who while on a visit to a municipal park and former sand pit, ran into a lake and then dived forward, hitting his head on the shelving sandy bottom. A number of local authorities were advised by consultants that the case had gone against Congleton and that actions (that fall under the description of defensive design and management) were needed to avoid the local authority being exposed to liability, when in fact the case had been won by the Congleton at the House of Lords some years earlier and the responsibilities of the individual for their own safety had been reiterated. There was nothing inherently out of repair with a sandy beach.

Wrongly claimed duties - it is for Parliament and the Courts to decide on duties and no one else. Sometimes guidance will claim accidentally claim there is a legal duty when it there is nothing more than a moral duty.
Claiming there is a legal requirement to comply with a standard when no such requirement exists – this is a common problem

Confusing guidance with regulation

Appeals to fear – there have been instances where guidance and reports have statements backed with further warnings that unless their recommendations are observed the local authority could be liable, but based on an incorrect understanding of the law. In the interests of stemming the spectre of liability and defensive design, authors of technical guidance should either avoid offering an opinion, or ensure that their advice is robust by indicating clearly how a local authority could become liable and the likelihood, basing this on reference to precedent and legislation, rather than making unsupported and possibly speculative statements.

5.3 TEAM WORKING AND THE BALANCED DECISION

Achieving a balanced decision generally involves a number of people with different professional backgrounds. Manual for Streets and LTN 01/08 advise on forming a joint team from the outset. If specialists are excluded from these early stages and only brought in towards the end, the opportunities to produced balanced decisions will inevitably be reduced.

Using the balanced decision making approach with people allied to the common vision, objectives and purpose should greatly help harmonious and productive team working. But there are instances where practitioners abandon collective decision making and team working, and instead fall back to their particular professional silo and resort to logical fallacies in an attempt to hold sway or gain power and influence within the team.

**Appeal to authority**

*Trust me, I’m a specialist.*

A specialist’s opinion should not be taken as an absolute. They should be prepared to justify their opinion.

*We have to do this, it says so in this …Act, Regulations, Guidance, Code…*  
People have a tendency to interpret guidance as regulation; refer to the source and understand its true status and the flexibility it affords.

**Special pleading**

*Prove this new approach will work*  
Special pleading is where we wittingly or unwittingly use double standards. An example would be the unquestioning acceptance of traditional highway practice as opposed to a highly circumspect approach to novel highway engineering. New and old practice should be judged on the same basis.

**Appeal to fear**

“If we did this and someone was injured and then the council might be held liable;”

“If someone died we could be investigated for a corporate manslaughter action.”

It is a regrettable fact that there is the potential for people to die in most highways, but the primary responsibility lies with the road user and the driver. The highway authority is not under any obligation to take that responsibility upon itself.

The courts (such as in Tomlinson v Congleton) stress this point, that while death is a serious matter, this is a wholly different concept to a serious risk of dying

**Appeal to emotion**

*Does someone have to die before action is taken?*

*Someone could die*

*A child could be killed*

*This is discriminatory*
In the interests of making balanced decisions, it is important that specialists avoid taking entrenched positions. They should ensure their opinions are sustainable on evidence and based on sound reasoning, and maintain an open mind to the interests and aspirations of other specialists and the community at large.

5.4 QUALITY AND SAFETY AUDITS

Local authorities are expected to be under considerable resource pressures over future years, and will be seeking to ensure value for money is obtained from all parts of the highways and public realm service. The commissioning of audits should be a considered response to the needs of the situation. Audit needs to demonstrate that it adds value to the process, is cost effective and proportionate to the work being undertaken.

There might be a number of reasons why or why not to undertake audits.

- As a thinking aid – making sure things have been taken into account
- As a means of feeding cutting edge practice into mainstream practice
- As a quality check

It is to be hoped that in the majority of instances properly trained practitioners who are in command of latest practice should have sufficient skills and knowledge to address the issues without the need for a range of supplementary advisers; this is especially the case where there is a multi-disciplinary design team. Which is the better answer to the question: “Have we thought about disability issues? ” “Yes we have paid for an access audit; or “Yes, our design team is fully up-to-date in inclusive design.”?

Where practitioners have limited skills or knowledge, where there are new approaches to be incorporated into or where there is tension between elements of a design team then an audit can help.

As Manual for Streets states, auditing should not be a tick box exercise. (MfS 3.7.3) The providers of audit services should be able to provide up to date evidence (as detailed above) of the added value that they can bring to design and decision making. If they are unable to do this, the highway authority should feel under no pressure, moral or otherwise, to use their services.

There are two broad categories of audit that could be undertaken.

1. Audit against the vision, objectives and purpose – MfS Quality Audit.

   This is the approach recommended in Manual for Streets. It is about answering the question, does the proposed design fulfil the vision? and does it achieve the objectives and purpose? The audit can be undertaken by the designer, or design team, or perhaps someone from outside. This type of audit strengthens the balanced decision approach, serving both as a thinking aid, and as a genuine check on the quality of the design.

2. Audit against external guidance, or norms, or the use of an external Audit system

   These break down into two separate types

   (a) Normative audits – where a design is compared with an external “norm”: a notion of good design or good practice, for example a guidance document, or a body of professional opinion

   It is essential that the “norm”, the body of knowledge against which the scheme is being assessed should represent current best practice rather than old practice, should have acknowledged the broad responsibilities faced by local authorities, and should be science and evidence based.
The statement in LTN 01/08 should be borne in mind

“Designers are expected to use their professional judgement when designing schemes, and should not be over-reliant on guidance.”

LTN 01/08 3.2.3

Normative audits should not displace professional decision-making.

(b) Reminder audits – where the purpose is help people ensure that they have taken appropriate issues into consideration. Community consultation in effect assumes this role. By ensuring that the needs and ideas of stakeholders are recognised into the design process.

5.4.1 Safety Audits

Road safety auditing began around thirty years ago as a means of feeding back cutting edge knowledge on road safety into mainstream highway design. Some 25 years later, Manual for Streets contained qualifications regarding some more recent activity:

“There can also be a tendency for auditors to encourage designs that achieve safety by segregating vulnerable road users from road traffic. Such designs can perform poorly in terms of streetscape quality, pedestrian amenity and security and, in some circumstances, can actually reduce safety levels.” MfS 3.7.11

These situations may have arisen where an individual auditor had not kept up to date with latest thinking and research on road safety. The value of the road safety audit is lost if all it achieves is a critique of a 21st century design against what was considered to be best practice in the 1980s. Where a safety auditor has a genuine interest in and knowledge of the latest research and innovations in road and street design and the wider duties placed on local authorities then they can perform an especially valuable role.

Road Safety Audits are not mandatory on residential streets. Where they are used they should aid design and not replace it.

The procedures set out in DMRB are a formal requirement only for trunk roads. Manual for Streets 3.7.5

Road Safety Audits are not mandatory for local highway authorities. MfS 3.7.6

Manual for Streets goes on in 3.7.12 to advise of the value of RSAs including an assessment of the relative significance of any potential safety problems.

In order to mesh with the Balanced Decision approach, it is most helpful if the Road Safety Audit contains measured statements where the risk is assessed. The IHT Road Safety Audit Guidelines contains helpful guidance here on Risk Assessment.

Where a road safety audit is undertaken on roads that fall under the scope of Manual for Streets or Designing Streets, the Highway Authority should require that Auditors have a sound understanding of the principles and research involved. It is important that in the interests of the development of highway engineering that they play that role that was first envisaged, in bringing cutting-edge understanding of safety into mainstream highway engineering and public realm practice.

5.4.2 Modified road safety audit

The road safety audit as described in the DMRB standard is optimised for vehicle-based environments. Highway authorities may wish to consider following a modified procedure if they intended to seek a safety audit on a scheme in the complex environment of a street.
The key is to ensure the road safety audit is open, robust and objective so that its recommendations can easily be balanced by other design objectives.

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

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

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

(a) Risk Assessments/Risk Factor

The first edition of this guide that recommended that a Safety Audit should embody the approach adopted in “Well Maintained Highways – a code of practice on highway maintenance management”, for assessing the likelihood of risk and the expected severity. The IHT 2008 Guidance on Road Safety Audit guidance includes a section on Risk Assessment.

Risk Assessment / Risk Factor

<table>
<thead>
<tr>
<th>Severity</th>
<th>Frequency</th>
<th>Frequent</th>
<th>Probable</th>
<th>Occasional</th>
<th>Remote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Catastrophic</td>
<td>Very High</td>
<td>High</td>
<td>High</td>
<td>Medium</td>
<td></td>
</tr>
<tr>
<td>Critical</td>
<td>High</td>
<td>High</td>
<td>Medium</td>
<td>Medium</td>
<td></td>
</tr>
<tr>
<td>Marginal</td>
<td>High</td>
<td>Medium</td>
<td>Medium</td>
<td>Low</td>
<td></td>
</tr>
<tr>
<td>Negligible</td>
<td>Medium</td>
<td>Medium</td>
<td>Low</td>
<td>Low</td>
<td></td>
</tr>
</tbody>
</table>

It should be within the capabilities of a competent road safety auditor to provide some quantification of the risk, and the reasoning why the recommendation is made.

This approach gives the designer a clear indication as to the importance of particular issues and problems raised, and an auditable trail.

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

<table>
<thead>
<tr>
<th>Severity</th>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very High</td>
<td>Recommendation must be heeded unless redesign avoids problem</td>
</tr>
<tr>
<td>High</td>
<td>Implementation of recommendation strongly recommended unless redesign avoids problem</td>
</tr>
<tr>
<td>Medium</td>
<td>Implementation of recommendation discretionary</td>
</tr>
<tr>
<td>Low</td>
<td>Implementation of recommendation not critical to reasonable safety</td>
</tr>
</tbody>
</table>

(b) Quantification

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

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

5.5 INNOVATION, LIABILITY AND DEFENSIVE DESIGN

Over the past twenty to thirty years there have been significant innovations in highway and public realm design. Some people take the view that the change has been progressive and others, that the change has been slow. While the primary role of the local authority is to serve the public, some commentators have observed that risk avoidance seems to weigh highly.

“In my view, regulation and safety standards in this country are not designed on the basis of evidence as to road user conduct and what is needed to reduce risk given observable behaviour and events. They are designed rather as abstract engineering exercises with the principal purpose of making it harder for road accident victims to bring successful litigation against highway authorities (and engineers).”

Councillor Daniel Moylan 2003

In an era where there are significant levels of fraudulent claims, together with companies that specialise in compensation claims, and talk of corporate manslaughter, it is entirely understandable that professionals and politicians in local authorities might seek refuge in defensive design, adhering only to that which has been done in the past. This is both unfortunate and unnecessary. Firstly the concern over liability is misplaced. The survey work conducted for this second edition report finds that the claims that are made against local authorities are almost exclusively to do with highways maintenance. Design related claims are extremely rare, and successful claims rarer still. And secondly, this strategy of defensive design has hampered innovation, improvement and necessary change, being both against the spirit of Best Value and the interests of the public.

A defensive design mentality can lead to guidance being treated as regulation, and standards to be regarded as compulsory. Manual for Streets stresses the freedom of designers to innovate.

- Some designers treat guidance as hard and fast rules, in the mistaken assumption that to do otherwise would be illegal or counter to policy, concerned that they would incur liability in the event of damage or injury. (Manual for Streets 2.5.1 & 2.6.1)

It can lead to highway authorities not fulfilling the role and opportunity given to them by Government to develop highway design.

- The Department for Transport does not set design standards – these are set by the relevant highway authority. (Manual for Streets 1.4.1)

There have been instances where the Design Manual for Roads and Bridges has been used as default guidance for the design of streets, even though the approach may lead to higher vehicle speeds that expose pedestrian and cyclists to greater risk of death or serious injury in the event of a collision. Manual for Streets states:

- The Design Manual for Road and Bridges is not an appropriate design standard for most streets, particularly in lightly trafficked and mixed use streets. (Manual for Streets 1.4.4)
• It is strongly recommended that local authorities review their standards and guidance to embrace the principles of Manual for Streets. (Manual for Streets 1.4.1)

5.5.1 Reconciling the approaches in Manual for Streets with that in Design Manual for Roads and Bridges

Even with the publication of Manual for Streets, there are practitioners who are uneasy about its recommendations. It is important that practitioners are convinced by the science, the statistics and the supporting evidence, and do not feel brow-beaten into following a doctrine.

The Design Manual for Roads and Bridges follows in a tradition that dates back to at least the 1930s where safety is sought by reducing the demands on road users, and trying to design out conflict, such as by:

- increasing visibility,
- improving sight lines, and allowing generous stopping sight distances,
- providing gentle radius of curvature, and broad carriageways.
- segregating of pedestrians and vehicular traffic
- avoiding of complex vehicle movements by using staggered T junctions as oppose to cross-roads
- discouraging of through traffic by the use of loop and cul-de-sac street patterns

Speed of impact is the dominant factor in determining the severity of injuries in a collision; this is well established by evidence and physics. In terms of causation increased speed is predicted by physics to increase the likelihood of a collision by reducing the time available for a driver to react, and increasing the distance necessary to bring a vehicle to a halt. The Department for Transport has empirical data.

The research report TRL 661 which was used to inform Manual for Streets, found that drivers choice of speed was influenced forward visibility and carriageway width. These relationships had been observed by Smeed in the 1950s, and by Chapman in the 1930s, and no doubt by many other engineers at the period. The Manual for Streets and Designing Streets focuses on measures that lead to the driver to drive at a lower speed: following on from conclusive evidence that speed of impact in a collision largely determines the severity of injuries suffered.

Manual for Streets encourages

- aiming at a design speed of 20 mph or less by introducing narrower carriageways and shorter sightlines, with an evidence base provided in TRL report 661.
- encouraging the mixing of traffic and pedestrians to improve permeability and natural surveillance
- the introduction of cross-roads, with the addition of small or mini roundabouts where necessary.
- the avoidance of guardrails (which LTN 01/09 has subsequently gone on to describe as having no statistically significant impact on safety)

Core to the philosophy of Manual for Streets is the implicit acknowledgement of the concept of “Risk Compensation”. The notion that people take more care when they perceive themselves to be in danger. The relationship found between driver’s speed choice, and carriageway width and sightlines is an example. And here lies the difficulty that some people may have: that a street environment that might be considered less safe by the conventions of the DMRB is safer in practice owing to the reduced vehicle speeds.

This guide hopes to encourage Highway Authorities to take a far more robust stance in developing innovative highway designs that have the interest of the public at their heart. Rather than being held back by some vague fear of liability or prosecution.
5.6 A REMINDER ABOUT THE BASIS FOR LIABILITY

The law is neither foolish nor arbitrary. In allowing people freedoms it confers upon them responsibilities for safety. Three principles that have been established by Court judgements are worth bearing in mind:

| 1. road users are responsible for their own safety and have a duty to take the road as they find it. | The first principle treats the road user as an intelligent being, able and expected to exercise their own judgment. It is not necessary for the design of a scheme to take that independence of judgment out of the hands of the road user. |
| 2. a highway authority should avoid trapping reasonable road users into danger, for example by introducing hidden danger. | This principle is self evident. |
| 3. a highway authority should not act irrationally. | On this third principle, where a highway authority has made Balanced Decisions, it would be difficult to claim that it had acted irrationally. |

There have been very few successful claims against local authorities on the basis of design. And it seems likely that it would take an exceptional degree of negligence to trap a reasonable user into danger.

5.6.1 Watching for defensive design

Look out for “appeals to fear”
– if we did this we could be sued
– we could be liable for corporate manslaughter

The questions to ask are
1. Under what circumstances could the council be successfully sued, and how likely would that be? – What would be the basis in law for the claimant mounting an action
2. Under what circumstances would the council become liable for corporate manslaughter
3. Are we making a Balanced Decision that reflects the interests of society and reflects national and local policy, or one that is more about guarding some possible risk of litigation?

(a) Legal opinion

There are instances where decision makers have received legal advice on the lines of:

In the event of an accident occurring the council could be sued, and might become liable for damages.

If a fatality occurred an action of corporate manslaughter could be brought.

This is a type of generic legal advice is a statement of the obvious. It is essentially saying that there is a legal system which enables one party to bring a legal action against another. It gives the decision maker no useful information on which to make a balanced decision, and under some circumstances may be again be an appeal to fear, where the person giving the advice is attempting to sway a decision, or trying to avoid committing themselves and taking responsibility for advice given.
Highway authorities should ensure their legal advisers give measured advice that is relevant to the circumstances at hand, and is backed by evidence. Mindful that a court will judge each case on its own merits:

- Whether there are circumstances in which a local authority could become liable.
- The likelihood of winning or losing a case and the likely extent of that liability.
- The circumstances in which a local authority might face an action of corporate manslaughter, and the likelihood of success.

Legal advice made available to councils will often be accessible on the web. Legal advisers should ensure they are up to date with current precedents and legislation. It is understandable that errors will occur from time to time, and it is important that legal advice should be challenged and justified to ensure that errors are identified and corrected.

The law should not be regarded by design professionals as a black art, that is arbitrary and inconsistent. It is important that designers feel that they know where they stand.

### 5.6.2 On the role of public authorities and the public good

There are precedents that support the role of public authorities in pursuing the public good:

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

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

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

Finally there are the provisions of the Compensation Act, 2006:

S1. A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

This is Parliamentary backing for those who would wish to take an approach where risks are balanced with "desirable activity". Highway authorities should be able to make a strong
case that “desirable activity” includes the design and creation of highways and the public realm that follow the broader policy set by Government, local authorities and the vision for the continuing improvement of social, economic and environmental wellbeing.