



Learning from the Poms...

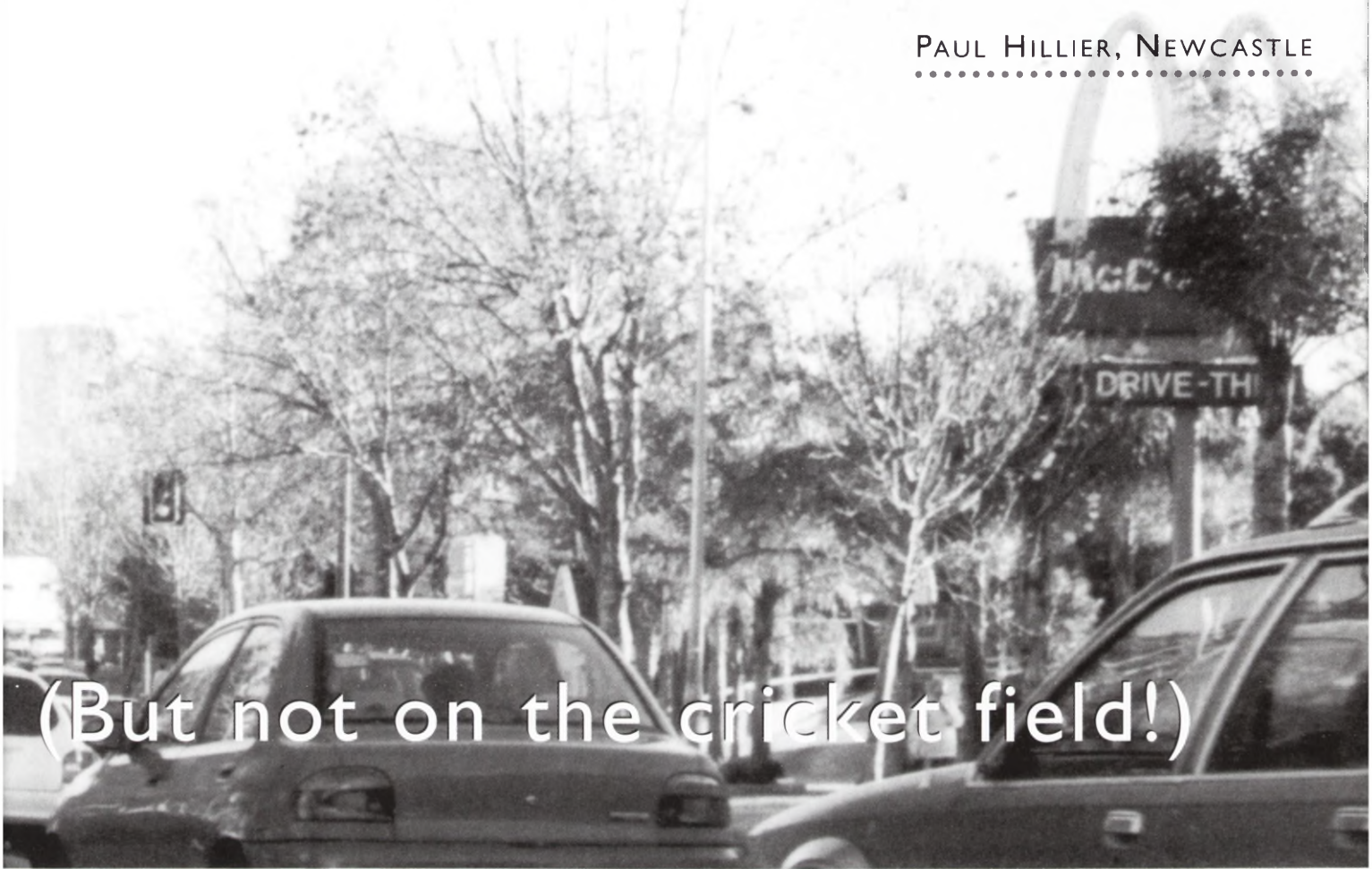
# An insight into highways

**This article examines the current highways liability situation in the UK and introduces areas where highway authorities are under increasing scrutiny. The article concludes by describing how sound, proactive risk management techniques have been successful at a local level in reducing vulnerability to claims and have also improved network user safety. Effective changes to highway management systems can typically take 2 years to identify, implement and refine,**

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**making the author believe that now is a time for Australian organisations to react and to consider the implications of the recent rulings, as well as trying to anticipate the further developments that may arise in the not too distant future.**



(But not on the cricket field!)

# liability in the UK

The recent, well documented, “erosion” of non-feasance in Australia (through the High Court judgement handed down on the cases of *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*) will undoubtedly lead to initial uncertainty for highway authorities and the legal profession. It can be reasonably anticipated that three main camps will emerge:

1. Those deciding not to take immediate action until the situation is further clarified by legislation and/or

case law;

2. Those wanting to react promptly, but with no real appreciation of what action to take; and
3. Those undecided at this stage, but leaning further towards no action, given time passes without “incident”.

The generic immunity of highway authorities was withdrawn in the UK some 42 years ago<sup>1</sup> and complex, yet recognisable trends, have developed in the field of highways liability since the introduction of the current English *Highways Act* in 1980,<sup>2</sup> which continues

to place a statutory duty on highway authorities to, amongst other things, maintain the highway.

## Road Traffic Accidents – The Scale Of The Problem

Around the world, road traffic accidents claim the lives of some 750,000 people and injure a further 23 to 24 million people every year. Even with one of the lowest casualty rates in the world, 10 die and approximately 800 are injured each and every day on the roads of Great Britain.<sup>3</sup>





It all started some time ago: *Bridget Driscoll* (fourth from the left) was the first person to die in a road traffic accident in the UK in 1896, when she was struck by a motorcar. (The first driver killed in a road traffic accident was Henry Lingfield in 1898).

Although these figures are of concern and there are numerous initiatives to reduce the numbers of accidents and casualties, the sheer volume of incidents around the world does enable road safety practitioners to detect common factors and trends. This information then allows effective and well targeted countermeasures to be developed and implemented.

Research undertaken in the UK by TRL a number of years ago concluded that the road user is a contributor in 95% of crashes.<sup>4</sup> However, this statistic can disguise the fact that other factors play an important part in contributing to accident causation, as well as the severity of any injuries received. In particular, the role of the highway environment has been shown to be important in many cases, either in regard to the condition of the highway itself or because the road user has misjudged the highway layout presented to them. In such cases in the UK, those organisations responsible for managing and maintaining the highway are vulnerable to any ensuing claims for damages.

### **An Overview Of Highways Liability In The UK**

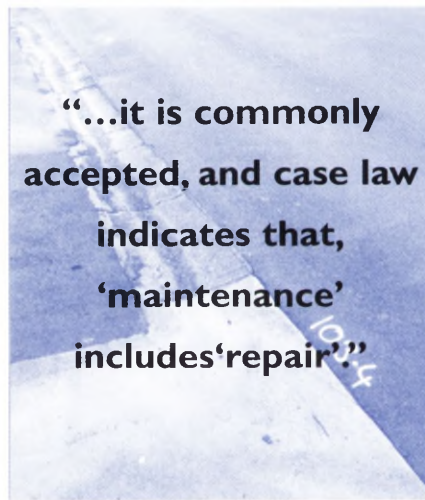
Experience indicates that, in the UK, highway authority liability resulting from road crashes arises in 4 separate ways: negligence; nuisance; statutory duty; and/or contract law. However, this text concentrates on statutory duty, as this has been recently estimated by Zurich Municipal Insurance as constituting 95% of highways liability claims in the UK.

The main **statutory duty** imposed

on English highway authorities is set out within Section 41 of *The Highways Act 1980*, which states:

*"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."*

No definition is given within the Act as to the precise meaning of the word "maintain" and this can be the subject of argument in certain cases. However, it is commonly accepted, and case law indicates that, "maintenance" includes "repair".



Put simply, failure to fulfil this **statutory duty** leaves English highway authorities vulnerable to highway liability claims from members of the public who are alleging that the failure to maintain is linked to the causation and / or severity of the accident and / or any resulting injuries or loss.

However, despite the apparent enormity of the statutory duty to maintain, it is not all gloom, as English highway authorities are also provided with a "special defence" in Section 58 of the Act. This introduces the concept of the highway authority being able to defend claims by being able to demonstrate that they have undertaken "reasonable" measures in maintaining the highway, i.e. it is recognised that highway authorities do not have unlimited resources and that it is impossible to keep all highways in perfect condition at all times.

Limited guidance on what constitutes "reasonable" measures is also given within Section 58 of the Act, where a number of key factors for the

highway authority to consider are introduced. These are discussed in further detail below.

In addition to its statutory duties, an English highway authority has certain powers to effect "improvements" to its network. Current English case law indicates that, a highway authority will not be found liable for failing to exercise its power, so long as the non-application is consistent across its area and there is "reasonable" justification. However, these are often not simple cases and problems often arise when a highway authority or agency is inconsistent in exercising their powers across its area of responsibility.

Once an "improvement" has been effected, the highway authority is then under a statutory duty to maintain that "improvement". A further consideration is that if an authority actively promotes a feature or facility, for example a new cycleway network around a city, then it is reasonable to expect an adequate level of maintenance for the facility and its expected traffic level.

### **Current Claims Situation In The UK**

In the last ten years, there has been an eightfold increase in the number of claims being made against UK highway authorities, with recent estimates showing the cost of claims rising by approximately 9% per annum.<sup>5</sup> The reasons for this may include:

- An increase in the public awareness of litigation (possibly attributable to proactive marketing by solicitors and claims handlers, including the introduction of conditional fees, that is "no win – no fee" arrangements);
- A rise in public expectation for local authority services (including highway maintenance), often driven by political factors;
- A deteriorating highway network (often as a direct result of reduced or under-funding in highway maintenance).

It is TRI's experience that the majority of all claims received by UK councils, often up to 80% of the total, are highways and highway maintenance related. This is obviously disproportionate to the



percentage of the total council budget spent on highway maintenance. Statistics produced by the Kindred Associations (a body of various UK local and unitary authorities) show that 73% of carriageway claims relate to the presence of potholes and 85% of footway claims relate to the presence of uneven slabs.<sup>6</sup> Notwithstanding this, TRL is noticing increasing numbers of drainage, surfacing, and safety fence related claims.

It is a fact that the UK highway authority is often seen as an “easy target”, as it is part of an organisation that is perceived to have a sizeable budget and to be “all-seeing” and “all-knowing”. Notwithstanding this, it is unusual for a UK highway authority to be found 100% liable in any claim. Much more commonly, the debate relates to the proportion, if any, of the total value of the claim that should be apportioned to the highway authority. In addition, a number of potential claims are settled “early” before they become formalised into litigation (often at little or no cost to the authority and always without prejudice). Figures produced by Zurich Municipal Insurance state that local councils openly reject approximately 70% of all new claims received.

The recent review of the UK’s civil legal system<sup>7</sup> (known as the Woolf Reforms) has reduced the extent of verbal evidence heard, in preference of documentary evidence, and has also reduced the length of time available to authorities to provide the necessary documentary evidence to defend a claim. This has placed significant pressure on authorities to ensure that their systems and actions are suitably and comprehensively documented and that such documentation can be swiftly and efficiently retrieved. Under Woolf, efficient claim/case management is proving increasingly vital so that claims do not have to be compromised simply by failing to adequately respond to notification of the claim.

The Woolf Reforms did lead to an initial reduction in the number of claims being received by highway authorities (in the author’s experience possibly by as much as 60% in some areas of the UK), but this initial fluctuation can be



The condition and maintenance of sites such as this link road in Wallsend, NSW (above) and this pedestrian facility in Lambton, NSW (below) may come under increased scrutiny in the near future.



**“Once an “improvement” has been effected, the highway authority is then under a statutory duty to maintain that “improvement”.”**

attributed to solicitors familiarising themselves with the new rules. The number of claims is rising again (often sharply) as familiarisation increases. Such a familiarisation period could also be expected if liability claims became allowable or increased in a country where a general “immunity” and/or a national compensation scheme were previously in place.

Two distinct categories of claim have become apparent; which are referred to by the author as “attrition” and “catastrophic”. Attrition claims tend to be of relatively low value, but

high volume (e.g. slips, trips, falls, vehicle damage due to potholes, vehicle damage resulting from gritting or surface chipping operations, etc). Catastrophic claims are usually high value (often in excess of five-figure sterling and increasingly into seven figures) and tend to result from “one-off” incidents.

#### **Helping Highway Authorities To Improve**

It is vital to note that, working with highway authorities in the UK (and throughout the world) is not just about ►



mitigating claims and this cannot be the prime driver for reviewing and improving systems. A claim implies a possible failing or error and ultimately indicates an injured/dissatisfied customer (unless, of course, the claim is obviously fraudulent). The message given to English highway authorities is ultimately a simple one, in successfully fulfilling its statutory duty to maintain the highway network (and by exercising its powers), the highway authority will be making a significant contribution to the safety of the travelling public within its area.

**“As a by-product, such procedures should automatically lead to a reduction in accidents and minimise the opportunity for claims to arise in the first instance.”**



If a highway authority has sound policies and efficient and effective management systems capable of meeting policy objectives, and then applies those systems consistently and retains the documentation to prove all of these aspects, then it will have considerably reduced its vulnerability to claims. As a by-product, such procedures should automatically lead to a reduction in accidents and minimise the opportunity for claims to arise in the first instance.

It is the author's experience that claims often target/"find" the interface between two reasonable systems rather than individual elements of a management system or plan. Examples of this include: the improvement scheme that complies with all current design standards, but ultimately proves to be difficult or, in the worst case, impossible to maintain; or the site with no accident record, but where road signs keep getting struck and replaced at the same location. Communications and information sharing between teams, sections and departments within the local authority and their contractors (and often, sub-contractors) take on vital importance in such circumstances and it is crucial that management systems cover these aspects as comprehensively as they cover technical issues.

The key element of successfully mitigating the risk of claims and improving user safety is setting relevant, unambiguous highway management and maintenance policies and standards which can be consistently and demonstrably achieved. The current UK experience is that it is better for a highway authority to consistently meet policies and standards that are realistic (and appropriate to the level of funding available), rather than to fail to meet over-ambitious policies and standards (albeit set with the best of intent).

In assessing the validity of a claim in the UK, the Court will determine whether a highway authority has adopted, and is implementing "reasonable" measures in maintaining the highway, considering national (and more recently, international) best practice around the time of the date of the claim. In addition, as previously stated, the special defence contained within Section 58 of England's *Highways Act 1980* effectively provides some indication of what constitutes "reasonable" measures in maintaining the highway. Paraphrasing:

- (i) The overall aim is to ensure that no part of the network maintainable at the public expense is foreseeably dangerous to the character of traffic that can be reasonably expected to use it;
- (ii) The condition of a section of the

network and the level of maintenance provided is dependant upon the character of the section and its usage (i.e. the concept of an appropriate maintenance hierarchy is established);

- (iii) The highway authority should secure knowledge of the state of its network (i.e. introducing the concept of inspections and surveys of the highway and appropriate use of traffic data captured for other purposes and the wide range of sources of "prior knowledge");
- (iv) Where an immediate permanent repair cannot be effected, warning notices (signs/barriers, etc) are required (i.e. the concepts of making defects safe or placing warning signs for the travelling public in advance of permanent repairs are introduced).

In the opinion of the author, the above is neither unreasonable, nor difficult to comprehend, and ultimately reflects what should already be recognised as the key building blocks of a sound highway management system, regardless of nation or legislative framework.

#### **Key Messages From The UK That Can Be Applied Anywhere In The World**

The author firmly believes that the following messages from the UK can be related and applied to other countries:

- There is potential in every organisation to review and improve operational systems;
- The public perception of a local council as a whole (i.e. all of its services) is often influenced directly by the condition of the highway;
- When new national or international codes of practice and standards are published, their content must be considered. Where it is decided not to adopt recommendations, etc, it is considered essential that this is documented and the reasons for the non-adoption documented;
- A disciplined, robust, highway inspection system is considered to be a (if not, *the*) key component of a well-structured highway maintenance system. The information

obtained from systematic inspections can then be used in an informed manner, to ensure that it makes a real contribution to network safety.

- Systems for the archiving and storage of highway management and maintenance records are vital and must be reliable, robust, sustainable and well considered;
- Real ownership and widespread communication of policies, standards and strategies developed is required, throughout an organisation's structure and beyond, to stakeholders;
- Consistent implementation of unambiguous, consistently achievable policies, standards and strategies is the best approach. In the UK, inconsistency of implementation and failure to document why approved policies have not been implemented is one of the major weaknesses commonly found to compromise liability claims. However, it is not just about claims, ask the question "what is the point of having a policy when it cannot be achieved?";
- If seeking to ensure that network user safety is the aim of the highways organisation (and in the author's opinion it should be!), then it is prudent to re-visit policy objectives and ask the question "do we actually know which of our services or work types primarily contribute to network user safety?";
- Manage public and stakeholder consultation wisely and be aware of its power and disadvantages;
- Do not wait for things to go wrong, be proactive. It is a sad fact that UK highway authorities typically wait for trends in claims to emerge in their particular area before reacting by effecting appropriate changes to their own systems. This is considered to be a reactive and insular approach, relying upon the occurrence of a consistent number of accidents and incidents and ultimately accepting that a number of dissatisfied customers will always exist. However, there is a more informed view, through identifying current,

and predicted future, national and international trends, so enabling a far more proactive approach to be devised. It has been seen first hand by the author that, adopting such an approach has also led to improvements in network user safety and operational efficiency.

### Conclusion

Despite the fact that accidents are obviously bad news for those immediately affected and those concerned with the management and maintenance of the highway (regardless of the legislative framework in which they occur), there is always the potential to learn from a negative occurrence. The investigation of individual incidents (and in the UK, the defence of claims) will often see authorities identifying and becoming aware of systems or policies which are either inconsistent or which ignore available information. Mitigating against these factors can help to target scarce resources and ultimately improve network user safety. However, the authors believe that extending to a more pro-active, practical risk management approach can ultimately be more beneficial.

The author believes that the recent High Court rulings in Australia must be seen by highways organisations as an opportunity and catalyst for review, rather than a threat, and undoubtedly provide an opportunity to stop and ask

fundamental questions relating to service provision. Although the poms seem to have currently lost their cricketing ability, they remain at the forefront of highways liability concepts and, at this time, any insights from the UK into the possible future trends in highways liability in Australia must surely be viewed with interest. ■

### Footnotes:

- <sup>1</sup> *The Highways Act*, HMSO, London, UK, 1959
- <sup>2</sup> *The Highways Act*, HMSO, London, UK, 1980
- <sup>3</sup> Road Statistics Great Britain, produced annually by the Department of Transport, Environment and The Regions (DETR), UK
- <sup>4</sup> "Interacting Roles of Road Environment, Vehicle and Road User in Accidents". Fifth International Conference of the International Association for Accident and Traffic Medicine. BE Sabey and GC Staughton, Transport and Road Research Laboratory (1975) and "The known risks we run; the highway". Transport and Road Research Laboratory Supplementary Report 567. BE Sabey and H Taylor, Transport and Road Research Laboratory (1980).
- <sup>5</sup> Kindred Associations reports: Highways Liability – The Issues, 1995 and 1999, UK
- <sup>6</sup> op cit
- <sup>7</sup> *Civil Procedure Rules 1998* (Statutory Instrument No. 3132 L.17 - Lord Chancellor's Department). HMSO, London, UK, 1998.

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