

Updated highway risk and liability guide set to appear

The guide to best practice in the management of highway liability risk exposures has been revised and will be published early in 2017.

Early 2017 will see the new edition of the Highway Risk & Liability Guide published, which updates the current edition that was released in 2009.

This document aims to provide a reference source and practical guidance on best practice in the management of highway liability risk exposures. In particular it will consider how to apply the principles of risk management and a risk based approach to highway liability claims exposure.

The update is intended to be a practical reference document that serves as a source of tactical, operational and reference guidance for both new and more experienced managers.

Risks arising from claims exposure have escalated in recent years, as highway maintenance expenditure has come under pressure through budget reductions and the associated claims process has undergone extensive reform.

It has been estimated that over 35,000 highways related claims are submitted in the UK each year. The potential value of



ALASTAIR LLOYD

↑ Claims associated with poor highway condition have risen in recent years

these claims – and the associated legal costs – runs into many millions of pounds.

Some form of liability insurance will almost always be purchased to cover this exposure. But most highway authorities will be retaining much of the liability risk in house via large policy deductibles and aggregate stop losses (designed to cap

the loss paid by a highway authority to a specific amount).

The financial burden of these claims can directly impact upon operational budgets. In addition to claims costs the administrative handling of these matters will also absorb precious resources.

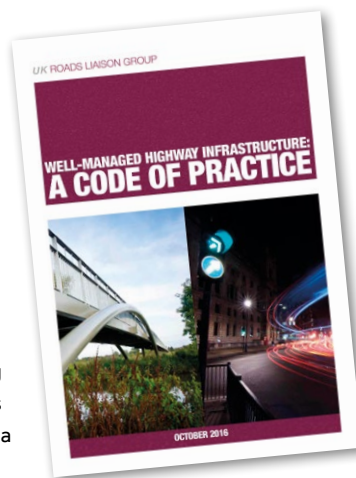
Infrastructure code welcomed by Minister Andrew Jones

Transport Undersecretary of State Andrew Jones has welcomed the UKRLG's new Code of Practice 'Well-managed Highway Infrastructure'.

He said: "The continuing importance of asset management ties closely with wider sector guidance.

"I am pleased to see the launch of the new Code of Practice. It will replace the existing Codes of Practice on highways, structures and lighting and follows a two year review.

"The review of existing guidance has provided an opportunity not only to update advice to reflect the latest developments in the maintenance sector but also to bring a fundamental change in the way highway infrastructure is managed in the United Kingdom, through the adoption of a risk based approach," he added.



Andrew Jones went on to say that the new Code "reflects the maturity of the sector", strengthening the links between risk, resilience and good asset management; and ultimately allowing authorities to provide a more tailored service to meet local requirements and priorities.

The new code, published on the UKRLG website, also reinforces the great progress made in recent years on asset management, including through the Highways Maintenance Efficiency Programme.

He added: "It will have a big role in ensuring highway infrastructure assets are kept in the best possible state and that authorities can maintain them as effectively and efficiently as possible."

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One to one with Colette Dark from the guide's steering group

Here, Justin Ward (JW) discusses the revised Highway Risk & Liability Guide with Colette Dark (CD), who chaired the steering group which looked after the update. Colette (pictured) is an independent risk management specialist and was formerly a director at the claims management firm Gallagher Bassett.

JW: What are the main changes in this update to the 'Highway Risk & Liability Guide'?



CD: The big change is the introduction of a risk based approach; there are no minimum standards being set. It is written for authorities to look at their processes and systems.

Based on the risks it is up to the authority to come up with the standards that they should be following. It is a much more sophisticated way of doing things and that will have implications for dealing with liability claims.

JW: The risk based approach means we are dealing with investigatory levels not intervention levels: can you explain?

CD: You are now no longer going out and simply looking for defects that meet certain criteria. Instead you are now looking at defects that meet the investigation level and then coming to a decision based on a site assessment of the level of risk presented by the defect as to whether you are going to intervene. This represents a different way of looking at the situation.

JW: Will competencies of the highway inspector be critical to the risk based approach?

CD: We think this will be one of the main factors in managing your liability risk. Investment in trained and competent highway inspectors is critical. The highway inspector is often key to the outcome of a claim investigation, particularly one that might go to court.

Often the outcome of the claim will depend on the quality of the evidence provided by the highway inspector. There is a real cost benefit in investing in people who are able and robust enough to represent the authority.

JW: And documentation is very important?

CD: Highway claims are very 'fact' sensitive; it is all down to what records are available. Going forward the change will be the need for clear documentation to support and demonstrate the underlying approach to the risk based approach.



↑ Damaged footways present both a trip hazard for pedestrians and a financial liability for authorities

JW: What else has changed since 2009?

CD: One of the key changes is that service delivery models have shifted. What we have seen is a bigger shift to more and more highway authority functions being outsourced to third party contractors; and for some authorities that means practically outsourcing the entire function from maintenance, highway inspection and design services.

JW: What are the issues for risk ownership when outsourcing?

CD: From a liability point of view it is a non delegable statutory duty. This means that even where a highway authority arranges for a contractor to do work on the highway the underlying duty and responsibility remains with the highway authority.

Clauses will be included in the contract that require the contractor to indemnify the authority against claims for injury or damage that might arise from some failure in a contractor's work or performance. But in the event that a dispute arises with the contractor over the circumstances or ownership of the risk the highway authority has no option but to deal with the claim.

There is a special defence, known as Section 58, which provides against action relating to an alleged failure to maintain on the grounds that the authority has taken such care to secure that the part of the highway in question was not dangerous for the appropriate type of traffic.

But if a contractor is actually performing the entire service on your behalf you have effectively outsourced your entire Section 58 defence. There can be consequences to that unless you have thought about how you are going to deal with the third party claims that will inevitably arise when you are managing the highway network.

JW: Has this been a problem?

CD: I saw this while working for my former employer providing claims management services. Problems arise with some authorities where the procurement exercise has gone ahead to outsource the highways function and no thought was given during that procurement for what happens to the third party liability.

It is only when the claims start to roll in that adversarial positions are taken between the authority and the contractor and before you know it, a war has broken out.

That can be avoided but people have to know what they are doing when they enter into these contracts, both on the highway side and on the contractor side. Communication and a commitment to collaborative working is key. The new guide outlines some of the problems you might come across but also what we see as the solutions.

JW: Where should highway authorities start?

CD: The first thing is to actually know where you stand in the rankings of whether you are good, bad, or indifferent at managing liability risks. That is a fairly easy thing to measure because you can do it by 'claim defensibility rates'.

That is how many of the highways claims you can defend without compensation being paid to the claimant, basically because you can demonstrate good systems of highway maintenance and cannot be considered at fault for any injury or damage suffered. The best authorities can defend 85% to 90% of their claims.

JW: What other benefits derive from a risk based approach to managing risk?

CD: Road users can benefit too; it is not all about defending your liability position. The new risk based approach should also help authorities embrace innovation.