



Kerbing compensation claims

Debbie Johns, APSE Principal Advisor for Highways, discusses how councils can ensure they are not paying out large sums for 'no win no fee' claims for injuries caused by trips and slips on public highways

With the proliferation of television adverts from 'no win no fee' firms urging people to seek compensation for accidents, councils have inevitably been at the sharp end of rises in third party liability claims for injuries caused by trips and slips on public highways.

No one doubts the responsibility local authorities have to ensure the safety of the public and Conditional Fee Arrangements (CFAs) – commonly known as no win no fee claims – can be useful in providing access to legal advice for those who might not otherwise be able to afford it.

But a survey by the Local Government Association and insurance firm Zurich Municipal in 2004 found that 87% of councils thought the introduction of CFAs had led to an increase in overall compensation claims. And a total of 68% of councils reported being subject to tenuous or fraudulent claims for compensation. Zurich Municipal estimates that compensation pay-outs are costing the public purse up to £250m annually. The cost is not just financial; a huge amount of employee time can be spent dealing with such cases and they can damage a council's reputation locally.

The good news is that authorities with responsibility for highways maintenance are bucking the trend for pay-outs for third party claims. The Association for Public Service Excellence (APSE) works with over 300 councils who deliver front-line services including highways maintenance and offers a benchmarking service called Performance Networks

to help improve the quality of such services. The latest Performance Networks statistics for 2003-6 reveal that 72% of authorities have shown a reduction in non-repudiated third party claims compared with 2002-05.

Similarly, the Association of Local Authority Risk Managers Survey 2007 offers evidence that, although there has been an increase in claims over the past ten years, the rise is slowing. Comparing 2007 figures to 2006, there has been a 58% reduction in London, one of 18% in the rest of England, and in Wales there has been a 19% reduction.

An APSE briefing on third party claims containing case studies dealt with by Forbes Solicitors describes instances where unnecessary pay-outs have been avoided. These shed light on ways in which councils are able to defend claims.

One of the case studies involved Blackburn with Darwen BC and shows how claims can be judged spurious. A man alleged he had sustained an injury because he tripped on a defect surrounding a manhole cover, which had been marked for repair, when attempting to cross the road. The claim was dismissed because there were discrepancies in his account of the route he had taken and how he had come to fall. The fact that he did not go and see his doctor about the injury until four weeks later when he had instructed a claims management company to pursue the claim also weakened his case. The judge said: 'His own account of the accident is so awful that I am simply not satisfied with a word of what he is saying.'

Another case study involving Bury MBC shows how the local authority beat a claim because the claimant's solicitor had failed to comply with CFA regulations. While liability was not in dispute, the council's solicitors showed that the claimant's solicitor had failed to comply with a section of the CFA Regulations 2000 relating to insurance issues.

Other cases demonstrate the importance of councils having effective inspection and risk procedures to defend claims robustly.

In legal cases, a judgment will be made as to what is reasonable in terms of inspections and it is essential to show this has been taken into account when defending claims. A claim against Hull City Council arose when a resident tripped and fractured a wrist. The

accident spot was subject to routine annual inspections, the injury occurred just four months after an inspection where the defect was not recorded and the case was defended under Section 58 of the Highways Act 1980. The judge originally found in favour of the claimant as annual inspection was considered too infrequent and ruled that six monthly inspections were appropriate. An appeal judge ruled in favour of the council as the last inspection had been within that six month period.

Two cases concerning manhole covers demonstrate the importance of risk assessment in defending claims.

One case found in favour of a claimant who had put her foot down a manhole cover on a busy street. Although the council had a monthly system of visual inspection in place and defended the case on the grounds that this was reasonable, the judgment was based on the level of risk of harm. The judge ruled that this was a busy thoroughfare and the risk was great due to the depth of the manhole cover and the presence of electric cables. The judge in this case thought periodic inspections to check the security of manhole covers were required.

But in another case involving a manhole cover, the judge ruled in favour of the council because the manhole cover was in a fairly remote rural location.

These case studies highlight some areas to be considered. Examining established principles of law can be helpful, but it must be remembered that decisions of courts can vary considerably. Key factors that commonly help in defending claims include; management of repairs to ensure that the highway remains safe and available for public use, training and development of staff and effective performance management systems. The better the systems, the better local authorities will be at defending themselves when such claims arise.

.Decisions to defend third party claims can be difficult and costly but this should not deter councils from properly considering whether a claim could be effectively defended. A proper risk analysis based on the merits of the case needs to take place with appropriate consideration of what it will mean to the council both in cost and reputation terms and even the prospect of deterring any spurious further claims.

Legal duties on local authorities relating to third party liability and public highways are enshrined within the Highways Act 1980 and the Roads (Scotland) Act 1984 as well as voluminous case law which often dictate how the courts will respond to claims and defences. Where the inspection and repair function is contracted out in some authorities, the duty contained in these laws cannot be delegated. Contracts therefore need to detail clearly where responsibilities lie in the event of a claim in every circumstance and councils need to ensure contractors comply with their obligations.

But curbing claims effectively goes beyond points of law. It is about proactive management. The establishment of a robust system of inspection and repair which covers the entire network is fundamental to the successful management of risk and ability to provide strong evidence to defend public claims. The updated Code of Practice for Highways Maintenance Management was published in July 2005 by the Roads Liaison Group and provides guidance on good practice, standards and performance monitoring. It recognises the different priorities, needs and resources of authorities and should be formally adopted by all authorities.

Records should be kept of all defects and careful notes of subsequent actions. Evidence presented in court should demonstrate the integrity of the system and be backed up by photographic evidence if possible. It is important to have a common approach to the way claims are handled. Fraudulent claims can also be weeded out by checking for serial claimants, relationship between claimants, atypical accidents and sharing information with other departments and authorities.

Some councils, including Bolton Council and Falkirk Council, have been successful in introducing holistic systems which address all these issues.

Case study Falkirk

Falkirk Council reports its inspection and repair regime to council committee. Its inspections are carried out from a moving vehicle by an inspector and driver at frequencies based on recommendations in the Code of Practice for Highways Maintenance Management. These are backed up by walked surveys in pedestrian areas and footpaths with a high use. Officers report to the council on the percentage of

inspections carried out on time as well as the percentage of defects repaired on time.

Raymond Smith, Roads Manager at Falkirk Council emphasises the importance of having this robust inspection and repair regime allied to good training of staff in curbing claims. The council tries to defend every claim where there is evidence to support its case.

He says: 'The presence of a rigorous system will in itself help to prevent frivolous or potentially fraudulent claims.'

He adds: 'Officers involved in the inspection maintenance and management of the highway network need to be skilled in the principles of risk management in the context of highway maintenance. They need to have an understanding of the Code of Practice and they need to be trained in developing methods to manage the cost of claims against the authority'.

'It can also be beneficial to have training in practices to successfully defend claims which may include witness training,' he adds.

Case study: Bolton

Bolton's highways and engineering delivery services department has been successful in reducing claims in partnership with other bodies. This approach is outlined in the case study below.

The rigorous approach taken in Bolton MBC has led to dramatic cuts in pay-outs for third party claims for injuries on public highways.

The highway services area within the environmental department for Bolton Council has seen the number of highway related claims reduce by 70% in the last five years. The total number of claims being received has been cut from 782 in 2001 to just 241 in 2006. Within this same period the number of claims successfully defended has risen from 40% to 75%. The service has a 95% success rate in defending claims taken to court.

The introduction of the council's own code of practice in relation to highway safety inspections in October 2000 has been a major contributing factor in reducing claim

numbers.

This was developed in conjunction with the council's claims handlers and external solicitors. It covers in detail; operational procedures, training, **resources** and budgeting, frequency of inspections for different areas, inspection methodology, guidance on locating, sizing and describing defects systematically, quality assurance for safety inspections and storage of computerised and hard copy data.

The local courts are very supportive of this document.

The success of this initiative involved adopting a team approach where all key parties were brought together under one manager and department, working in partnership with inspectorates, claims handlers, repair teams and the **council's legal advisors**.

The council has extended this initiative to other internal departments, including the council owned housing footpath stock and car parks within the borough, which has again proved to be very successful.

APSE's message

All of this will help reduce the amount councils are paying out for third party claims for trips and slips on public highways. This is not a case of trying to wriggle out of responsibilities but of being able to prioritise resources and manage risk to ensure better safety of all concerned.

APSE believes approaches to third party claims are not just about defending claims but ensuring safety regimes are in place to avoid them in the first place. All of the above factors can help ensure your authority is not subject to claims and safeguard public money which could be better used on improving the conditions of the roads.

Advice for cutting the cost of claims

- ✓ Have a robust system of inspection and repair in place for the whole network
- ✓ Determine the regularity and type of inspections within the context of risk for each location
- ✓ Defend where there is a good case, but remember this can be costly and time-

consuming

- ✓ Where inspection and repair is contracted out detail clearly where responsibility lies in the event of a claim
- ✓ Formally adopt the Roads Liaison Group Code of Practice for Highways Maintenance Management Well-Maintained Highways
- ✓ Keep clear records to defend claims and back them up with photographic evidence where possible
- ✓ Weed out fraudulent claims by checking for serial claimants, relationship between claimants, a-typical accidents and sharing information with other departments and authorities
- ✓ Ensure staff have been properly trained
- ✓ Remember it is not just about defending claims but ensuring safety regimes are in place to avoid them in the first place

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