

HIGHWAYS LIABILITY AND THE INVESTIGATION OF ROAD TRAFFIC ACCIDENTS

Paul Hillier phillier@trl.co.uk or hillierpt@hotmail.com
Principal Consultant (Highways), Investigations and Risk Management Group,TRL
Limited, Newcastle, NSW

Paper Summary

The presentation begins with an overview of the techniques of crash investigation and reconstruction, providing an indication of the level of scrutiny to which a road authority can be subject in the investigation of highway related personal injury claims.

The concept of highways liability is then introduced, with selected case studies being introduced to demonstrate particular highway features or road authority practices that cause concern or which can compromise the ability of the authority, their agents and contractors to raise a defence against civil claims for personal injury compensation.

The key concept of “prior knowledge” is then discussed, along with those interactions that affect the highways function, outlining how weaknesses between otherwise good design standards and systems of work can compromise road user safety and dramatically increase the vulnerability of the road authority.

The session closes with a brief insight into how highways related claims are investigated by expert witnesses and assessed by the Court.

Introduction

The abolition of non-feasance immunity in Australia appears to have led to greater numbers of highways liability claims being subject to in-depth, specialist investigation on behalf of road authorities, the insurance industry and the legal profession. This paper provides an overview of such investigations and introduces the key concept of road authority “prior knowledge” as a major consideration in such investigations. The paper concludes by explaining how claims reaching the Court are typically assessed.

Note: the terms “highway” and “road” has been used throughout this paper, but relate to carriageways, footways and cycleways, unless otherwise stated.

Road Traffic Accidents – Learning From An Everyday Occurrence

Road traffic accidents claim the lives of some 3/4 million people every year around the world and injure a further 23-24 million. However, this does enable road safety practitioners to conduct robust statistical analyses of common factors / trends and promote safety countermeasures. Indeed, TRL research has identified the relative contributions of the human, the vehicle and road environment.

The main findings of 2 major studies by TRL (the former shown in brackets) included:

- 2% (2½%) of accidents were caused by the road environment;
- 76% (65%) of accidents were caused by the road user;
- 3% (2½%) of accidents were caused by the vehicle.

However, this does not account for accidents caused by a combination of two or all three of the above contributors:

- 16% (24%) of accidents were caused by the road environment and the road user;
- 0.1% (0.25%) of accidents were caused by the road environment and the vehicle;
- 2% (4½%) of accidents were caused by the road user and the vehicle;
- 0.3% (1.75%) of accidents were caused by all three possible contributors.

The research shows that the road user is a contributor to 95% of all crashes, and therefore, most investigations will conclude that driver / road user error was a significant causative factor. However, the weight of the other factors and interactions in the context of the accident scenario, and particularly the highways component, must also be considered.

Similar, historical and recent international studies into accident causation have found consistent results. The past TRL research is currently being repeated. Early analysis, undertaken with around a year of the project left to run, has indicated that the headline contributory factors identified in previous studies are likely to remain valid today, although for different, contemporary, reasons.

In summary, the condition of the highway environment and / or the misperception of the road user of the layout presented to them are contributory factors in approximately one-fifth to one-quarter of all crashes.

Crash Reconstruction And Highways Liability

There are many complex techniques at the disposal of crash reconstructionists to allow determination of the circumstances of an incident, with the level and complexity of such

reconstructions often being eye-opening to both the public and those responsible for maintaining / managing the highway. The contribution of the highway condition / layout and the role of the road authority in a crash scenario is becoming increasingly subject to intense scrutiny.

Where such incidents occur in a country where a civil action can be brought against those organisations responsible for the management and maintenance of the highway (such as the UK, where general immunity was removed over 40 years ago, and most recently, Australia), such organisations are vulnerable to, and often liable for, any ensuing claims for damages.

Considering firstly the current situation in England (and Wales) where complex trends have emerged in highways liability since the introduction of the current Highways Act in 1980. The Act imposes on road authorities a statutory duty to maintain the highway, and in very simple terms, failure to fulfil this duty leaves the authority vulnerable to claims from members of the public 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, Section 58 of the same Act does allow a road authority to defend a claim if it can demonstrate that it had taken "reasonable" measures in maintaining the highway. This effectively recognises that authorities do not have unlimited resources and that keeping all highways in perfect condition at all times is unrealistic.

At the time of writing, road authorities in New South Wales do not have a specific / documented duty to maintain the highway, but do ultimately have a generic duty of care to the network user. It remains to be seen whether future State legislation will impose a more specific / defined duty on road authorities and an associated indicator of reasonableness (note: the author is aware that such an approach is being

considered in Victoria). However, it is heartening that the courts in New South Wales appear to have applied a pragmatic and robust approach thus far, recognising that the highway cannot be in pristine condition at all times and that the road departments of local councils have limited resources, fighting for funding against competing functions of the council.

In addition to their statutory duties, road authorities have certain powers to effect "improvements" to their network. Current English case law indicates that, a road authority is unlikely to be found liable for failing to exercise its powers, 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 road authority has been inconsistent in exercising their powers across its area. Unfortunately, it is also often not recognised by road authorities worldwide that once an "improvement" has been effected (through a power being exercised), that it is then reasonable to expect that "improvement" to be maintained to an adequate standard. Similarly, if a feature is actively promoted by a road authority, such as an urban cycleway network or a tourist route, then it is surely reasonable to expect an appropriate level of maintenance to be provided.

Claims Statistics

The following recent statistics summarise the claims situation in the UK:

- In the last 10 years there has been an eightfold increase in the number of claims being made against UK highway authorities;
- Recent estimates show the direct cost of claims rising by approximately 9% per annum;

- It is TRL's experience that, up to 80% of the total number of all claims received by local councils relate to highways and their maintenance; and
- 73% of carriageway claims relate to the presence of potholes and 85% of footway claims relate to the presence of uneven slabs.

It is a fact that road authorities are increasingly being seen as an "easy target" (being an arm of a larger organisation, perceived to have a sizeable budget and to be "all-seeing" / "all-knowing"). However, it is unusual for a road authority to be found 100% liable in any claim, with debate turning to the proportion, if any, of the total value of the claim to be apportioned to the authority. In addition, it is certainly not unusual for potential claims to be settled "early" before they become formalised into litigation (often at little, or no, cost to the authority and always without prejudice).

In its work, TRL has noticed two distinct categories of claim: "attrition" and "catastrophic". Attrition claims tend to be of relatively low value, but high volume (eg. slips, trips, falls, vehicle damage due to potholes). Catastrophic claims are usually high value and tend to result from "one-off" incidents.

Doing The Right Thing

The author has worked with numerous road authorities throughout the world to independently review and improve / refocus their highways management systems. However, to develop systems with the sole aim of defending claims is not advocated by TRL. A claim implies a possible failing or error and ultimately indicates an injured or dissatisfied customer (unless, of course, the claim is obviously fraudulent). Therefore, the message given by TRL is ultimately a simple one, in successfully fulfilling its duty to maintain or generic duty of care to the network user (as applicable) and by responsibly exercising its powers, a road authority will be making a significant contribution to the safety of the travelling public within its area, which will in turn reduce the scope for incidents and thus claims to arise in the first instance.

Claims all too often “find” the interface between two reasonable systems rather than hitting individual elements of a management system or plan, eg. a road scheme that has been designed by one section within the council, but cannot be appropriately maintained by its maintenance section, or a location where the team responsible for monitoring accident data has not found a significant pattern, but where road signs have been struck and have been replaced by the maintenance section without feeding this information back to the accident team. These examples highlight the importance of communications and information sharing between teams, sections and departments within organisations and their contractors (and often, sub-contractors).

TRL’s experience is that the key to successfully improving road user safety and mitigating the risk of claims is the setting of relevant, realistic, unambiguous highway management and maintenance policies and standards which can be consistently

and demonstrably achieved. Failure to consistently meet over-ambitious policies and standards (albeit set with the best of intent) is perhaps the least recognised, and most significant, failing of road authorities.

Investigations By Expert Witnesses And Claims Assessment By The Court

When an expert witness is commissioned to investigate an incident on behalf of the road authority itself, the insurance industry or legal profession, the expert will first consider the characteristics of the location and to determine its known (or failing that, likely) condition at the time of the accident. This is because the layout of a road, its associated facilities and features and its state of maintenance/repair (and the interactions between these factors) may all have been contributory to the occurrence and severity of the incident. During this early stage, a detailed site-visit will typically be undertaken and photographic and / or video evidence secured.

An in-depth investigation into the performance of the road authority will typically follow, seeking answers to the following questions:

- Were the policies, procedures and practices developed by the authority reasonable and well considered, when taking into account statutory duties and powers, non-statutory powers, and international, national and local best practice ?;
- Were the policies, procedures and practices developed (and documented) by the authority consistently implemented?
- Did the authority act reasonably in response to all of the pertinent information it had available at that time ?

To answer the above questions, it is necessary to secure very specific information from the road authority and it is usual for the expert to develop a detailed list of documents and information that should be sought and secured from, or within, the road authority and other agencies. Often the detail and scope of the information requested will seem daunting, but any aptly qualified specialist will also be able to provide a detailed explanation as to why the information has been requested. .

In TRL's experience, four distinct tiers or groups of documentation can be identified.

- **High level, general policy statements** – eg “The Council will actively support sustainable transport options and the safe movement of traffic through its area”. Such statements are typically contained within the road authority's transport plan or public service leaflets.
- **Specific local road management and maintenance policies and standards** – eg “the highway grass at visibility splays will be cut 2 times per year” or “any pothole reported by the public will be repaired within 48 hours of receipt”. In the UK, such information is typically contained within the authority's maintenance plans.
- **Road authority procedures** – eg “ visual condition survey results will be analysed within one month of receipt”; and **Programmes of work/prioritisation of work** – eg the application of policies set to develop a resurfacing, or Accident Investigation and Prevention remedial works programme. Such information is typically found in quality procedures, internal

memorandums, procedure files and manuals etc.

- **Works records** – eg works orders, invoices, work sheets, duty logs, diary entries, instructions to contractors/consultants;
Inspection records – eg inspection logs/print outs; and
Customer care records – eg call and correspondence logs.

Road authority contract documentation with maintaining agents and either term or specialist contractors may also be pertinent to all four of these tiers / groups of documentation.

Analysis of the information obtained from, or within, the road authority follows. A good expert will be able to offer the following useful options to the road authority: a preliminary verbal observation on the performance of the authority based on a preliminary assessment of the information; a letter of advice on the key network issues and the performance of the road authority; and ultimately a full, detailed technical report.

Expert witness investigations can be in-depth and in TRL's experience will typically cover the development of appropriate policy in as much detail as the authority's works/actions on the particular day of, or days leading up to, the incident being investigated.

In finally assessing the validity of a claim, an expert witness (and ultimately the Court, if the case progresses to that stage) will consider whether the road authority had adopted, and was implementing “reasonable” measures in maintaining the highway around the time of the accident. This nearly always involves active consideration of national (and more recently, international) best / good practice around the time of the date of the claim.

The following specific issues are also typically considered:

- was the part of the network where the incident took place foreseeably dangerous to the character of traffic that could have been reasonably expected to use it ?;
- was the character of that section of the network and its usage considered when the level of maintenance to be provided was determined (and documented in the form of policies / standards etc) ?;
- what information and data was available to the road authority as a whole entity (and not just one section or department within it !) concerning the specific defect allegedly causing the incident, and the condition of its network in general, around the time of the alleged incident and what was done with this information and data ? This is a vital concept known simply as **“prior knowledge”** and is discussed in more detail below; and
- if the incident involved an existing, known defect in the highway, were any notices (signs / barriers etc) provided to make that defect safe and to warn the travelling public in advance of permanent repairs ?

“Prior Knowledge” And Its Use

As previously stated, there is often an expectation that the road authority should know everything about its network at all times and all about the risks and dangers present on that network. Fortunately for road authorities, legislators in the UK and now the High Court in Australia have applied “reasonableness” and introduced the need to assess whether the authority knew, or could have been reasonably expected to know, of the existence of a defect or danger that has subsequently contributed to an accident, and is now the subject of a claim and further investigation. This is a concept which TRL tend to refer to as “prior knowledge”.

It is considered that four specific aspects of “prior knowledge” require further comment:

- TRL often find that road authorities fail to embrace or utilise the many signs of “near-misses” on the network, eg. the maintenance section will repair a sign struck by vehicles on 3 or 4 separate occasions (in damage-only accidents), but does not feed this information back to the road safety engineering section of the organisation (and / or in enough time) for them to recommend a cost effective alternative siting that may prevent a future injury or even fatal accident at the same site;
- The legislation of very few countries specifically imposes a duty on the road authority to conduct routine, visual inspections of its network. However, TRL believe that the thorough development and consistent, disciplined implementation of a robust, well-documented, routine inspection system is crucial, and is perhaps the prime source of a road authority’s “prior knowledge”. The system must be backed up by the responsible and consistent use of the information obtained and complemented by a reliable, robust system of record-keeping;
- TRL has recently found that pressures on road authority funding levels have led to some authorities failing to record all defects found because the officer undertaking the inspection believes or perceives that the defect has little chance of repair under the current funding regime (or in the worst case, that officer is ordered not to record such defects). This inevitably introduces subjectivity across a network and all too often is the sign of a downward spiral from which it is very difficult to recover;

- Road authorities can undertake a number of site-specific or mass-action measures to mitigate, or warn of, risk or danger on their network (eg. road warning signs, additional road markings, safety fences etc). However, it is TRL's experience that, an authority will only consider and introduce such measures after first assessing the extent and severity of the risk / danger present, using hard data at its disposal, such as accident statistics. Therefore, the crux of a large number of investigations, where lack of provision has been alleged, is not just the "prior knowledge" which has been assessed, but importantly, the extent of available "prior knowledge" that was not recognised and / or acted upon.

Conclusion

This paper has discussed how road authorities are becoming under increasing scrutiny as a result of highways related claims, before

overviewing a number of the issues typically considered in assessing the performance of the authority in crash scenarios and introducing the vital concept of "prior knowledge". Investigating the performance of a road authority with respect to road maintenance and provision, as a component of the determination of the causative factors of a crash, is a specialised field. Accordingly, it is suggested that road authorities consider seeking advice from experienced, independent specialists (such as TRL) at an early stage in any claim investigation to ensure that it is efficiently and effectively focused and that the authority obtains an objective, early assessment of whether it is likely to be able to mount a robust defence.

Whilst every effort has been made to ensure that the material presented in this paper is relevant, accurate and up-to-date, the author cannot accept any liability for any error or omission.

© TRL Limited, November 2002

Author Biography

Paul Hillier BEng(Hons) IEng AMICE MIHT

Paul specialises in accident investigations; highway management; highways liability and corporate risk management matters. He has recently been involved with the development of the new national highway maintenance code of good practice in the UK. Paul resides in Newcastle, New South Wales, where he is responsible for managing TRL's Australasian concern and providing technical input to commissions for local councils, state highway authorities and bodies such as Austroads.

Paul Hillier can be contacted on - Tel: (02) 49658377; Fax: (02) 49658352; Mobile: 0416 120478

E-mail: phillier@trl.co.uk or hillierpt@hotmail.com