

# **‘Tips Of The Trade’ In Raising A Defence To Legal Proceedings Brought Against Road Authorities Where Low Skid Resistance Is Alleged To Be A Contributory Factor**

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## **ABSTRACT**

This paper will commence with a brief recap of how civil legal proceedings are instigated against road authorities (where legislation allows). It will then focus on the allegations typically made by claimants in such proceedings relating to a perceived failure of the road authority to take reasonable measures in ensuring a sound road surface condition at the time of an incident and how this alleged failure has contributed to the causation of the initial loss of control of the vehicle/s involved. Generic thoughts on the preparation of an effective defence, aimed at mitigating the results of (or totally defending) a claim are then introduced. ‘Tips of the trade’ in collating, forming and presenting such a defence follow, with these being based on TRL’s extensive experience in providing technical and litigation support and advice to road authorities around the globe. The paper closes by introducing a proactive strategy based on the undertaking of timely and thorough internal investigations of incidents that have occurred which could reasonably be expected to manifest themselves in legal proceedings in the future.

Note: whilst this paper specifically considers civil proceedings brought relating to surfacing related incidents, much of its content is equally applicable to criminal and coroner’s proceedings and incidents with causation factors that are not surfacing related. Much of the content of the paper is also relevant where litigation is not allowed by legislation and the road authority is committed to conducting internal investigations of such incidents and/or releasing details of their findings to the media.

## 1. INTRODUCTION

### **A Recap Of Highways Vulnerability And Liability**

In a number of countries around the world, the contribution of the road environment (and particularly its geometry and surface) in a crash scenario and the role of national, state and local road authorities in managing and maintaining the public road network have become subject to increasing scrutiny and test by public bodies (e.g. the Police and the Courts) and the commercial sector (e.g. legal and insurance professions).

In jurisdictions where road authorities have a general duty of care to the public, and civil action is allowable (such as in the Australian state of New South Wales), claimants may allege that the road network condition and the provisions on the road network (e.g. street furniture) were linked to the causation of the incident and/or any resulting personal injuries or loss. In such circumstances, the road authority inherits a generic vulnerability to, and often a liability for, any ensuing claims for damages.

The Courts do recognize, however, that it is unrealistic to expect the entire road network to be in perfect condition at all times, and that road authorities have limited resources (competing for funding with many other authority services). This enables road authorities to defend civil claims brought against them by demonstrating that reasonable measures were taken in managing and maintaining their road network. Most assessments of the term 'reasonable measures' are likely to include the need to develop and consistently implement sound strategies (in the case of this paper, a strategy to manage skid resistance), systems and policies based on sound engineering principles and pertinent best practice. The latter is important as it provides a good indicator of the coverage of a robust defence.

Notwithstanding the above, it is important to remember that civil legal proceedings instigated by a third party can imply a possible failing or error by the road authority, and importantly, ultimately indicates an injured and/or dissatisfied stakeholder (unless the claim received is obviously fraudulent). Therefore, when a road authority develops (and/or subsequently reviews) strategies, systems and policies, their objective must be to maximise the safety of the travelling public first and foremost, rather than being predominantly concerned with successfully fighting off all claims, however genuine (or otherwise) they may seem. This approach will provide road network users with the safest road network using the resources available, and will reduce the scope for incidents, which in turn reduces the opportunity for claims to arise. In short, the best way to prevent claims from being received is to prevent incidents from occurring on the network in the first place.

The best defences merely clarify the adoption and consistent achievability of relevant, unambiguous local strategies, systems, policies, standards and practices which have been set with due regard to the available resources. TRL has found that failure to meet over-ambitious policies and standards (albeit set with the best of intent) can dramatically increase the vulnerability of road authorities.



## 2. SURFACING RELATED CLAIMS AND CONSIDERATIONS IN THE CONDUCT OF THEIR DEFENCE

The intention to commence the vast majority of civil legal proceedings will most typically only become known to the road authority a number of months (or in some cases, years) after the incident in question. Indeed, this may be the first the authority (or a section/s within it) knows, or has heard, of the incident in question.

The legal representatives engaged by the person/party wishing to commencing proceedings will issue the road authority with a Statement of Claim, which names, and is sent to, all Defendants in the action. The purpose of the Statement of Claim is to set out the basis of the claim (including a brief description of the incident and where each of the parties comes in) and whether damages and/or costs are sought. In practice, road authorities are often named in highway related actions as a 2<sup>nd</sup> or 3<sup>rd</sup> Defendant, however tenuous their link through their actions and practices to the causation and severity of the particular incident may seem. This is because public authorities and their many departments have traditionally been seen as easy targets for litigation, perceived as having considerable resources at their disposal and 'all seeing and all knowing'. Public authorities are also assumed to have well developed (and even overly bureaucratic) systems of record keeping, so must possess copies of all documents relating to the incident, however tenuous they may be.

It is typical in motor vehicle related incidents to see in the Statement of Claim such wording as:

*"The Plaintiff (Claimant) suffered severe personal injuries, loss and damage as a result of the collision.*

*The collision was caused by the negligence of the Defendants, particulars where of are as follows....."*

The Statement of Claim will then list the particulars of negligence for each Defendant, which for a road authority's involvement in, for example, a surfacing related claim on a curve could include:

*(i) Failing to maintain the surface of the road so as to supply adequate friction for vehicles travelling in a Xbound direction;*

*(ii) Failing to warn of the reduced level of friction available at the point at which the vehicle lost traction;*

*(iii) Failing to reduce the speed limit in the area to reflect the inadequate frictional qualities of the surface of the road;*

*(iv) Failing to warn motorists of the risk of losing traction at the particular point at which the Plaintiff lost traction;*

*(v) Failing to post a lower speed advisory sign;*

- (vi) Failing to resurface the road;*
- (vii) Failing to super elevate the curve”*

It is certainly not unusual for the Statement of Claim to appear to be trying to have ‘a dollar each way’ on possible contributory factors in the incident, nor to seemingly sight certain issues (the classic ‘fishing expedition’...although this would never be admitted!).

It is the experience of the author that the road surface characteristics are nearly always brought into the proceedings, and often as the earliest points made in the listing (ie. as a focus). This is largely consistent with the complexity of the road-tyre and road user-road environment relationships that must be considered in a real life incident scenario/s.

Whilst it is important at this point to remember that the onus is on the claimant to prove, on the balance of probability, each particular of negligence, there is also merit in the road authority, as a defendant, to consider all of the particulars stated and consider covering these issues as an absolute minimum in their defence.

Particulars of Claim can be amended during proceedings (and are hence known as Amended Particulars of Claim), for example, following receipt of expert report, or during trial, such as when additional issues become apparent.

Where another road user or his/her insurance company is named as a Defendant in the action (eg. where a 2<sup>nd</sup> vehicle impacts with, or is impacted by, the claimant’s vehicle), particulars of negligence against the claimant (ie. his/her alleged contributory negligence) are often tabled. These particulars can include human issues (such as failure to take adequate provision for their own safety) or relate to vehicle related issues such as:

- “(i) Failing to properly maintain the vehicle and its tyres;*
- (ii) Failing to periodically inspect the vehicle and its tyres;*
- (iii) Failing to replace worn tyres on the vehicle;*
- (iv)Failing to maintain the vehicle and its tyres in a property and roadworthy condition”*

In some jurisdictions, the Defendants issue a formal Statement of Defence, which is effectively a counter statement to the claim made. It is also permissible during the early (pre-court house) conduct of case for the Defendant/s to seek further information on the Statement of Claim, by tabling a series of questions (known as interrogatories) which typically try and ascertain further facts regarding the incident that would assist in the defence or pinpoint certain items difficult to defend.

In determining the conduct of its defence (and particularly the extent of background and specific information it is going to release to the other parties regarding the history, condition and management of the location in question and its knowledge of the specific incident) the road authority has to consider the available options on an incident by incident basis. Having said this, it is not uncommon for information to be subpoenaed from the road authority earlier in proceedings by the other parties. Unless the road authority successfully argues that a request for a particular piece of information or document is unreasonable, then the item must be made available.

In addition to the above, the road authority (and/or the public authority it is part of) may have a published, overriding corporate policy on the release of data and information that should be followed. Such a corporate policy is likely to have already considered the organisation's response to any Freedom of Information legislation in that region, state or country.

Because of the complexity of, and interrelating concepts relating to, surfacing related incidents (eg. where it has been alleged that the skid resistance on a curve was inadequate and this caused an initial loss of control) the author considers that it is unreasonable to assume that the public, media and legal profession will possess any knowledge of the key technical concepts and/or be able to readily grasp them.

Whilst the above could be seen to place the road authority 'engineer' in a position of strength, it can often be a problem if the 'lay-person' mis- or over-interprets any available data (such the results from say a recent SCRIM survey), leading to dispute, and ultimately to on-going suspicion between the parties bringing the action and the road authority.

Accordingly, the author strongly recommends that the above be mitigated by:

- adopting an open approach and taking time to 'educate' the other parties in the workings of the local strategy, e.g. providing explanatory text relating to why a specific location was not subject to routine skid resistance testing, and/or
- ensuring that any data or information supplied is accompanied by unambiguous, explanatory notes showing how the data has been interpreted and used by the road authority. Notes on key concepts and issues can be prepared in advance and retained as a standard resource for use as required. Development and provision of an accurate chronology of actions, decisions and communications should also be considered.

To support the above points, it is the author's experience that perhaps the most frequently encountered misconception in skid resistance-related cases is in the application of Investigatory Levels (ILs), which are often incorrectly viewed as being a 'black and white' indicator of the safety of road surface. Taking time to explain the correct application of ILs and a typical overall objective with respect to the management of skid resistance, viz. comparing sites across an entire network rather than trying to provide definitive values at highly specific locations on the network, has been found to be helpful in nipping misinterpretation in the bud.

Being organized and providing data and information promptly when it is requested (and certainly within maximum document disclosure times in certain legislations) ultimately demonstrates efficiency, consideration and discipline in data storage & archiving and, most importantly, a will to co-operate in the proceedings ('we have nothing to hide, be it good or bad'). It is the author's experience that any perception of an obstructive or stubborn approach to the provision of data creates suspicion and mistrust, which can often be damaging in the long-term conduct of a claim or case.

Minimum document and data-retention periods are typically laid down by legislation. However, document and data-retention periods exceeding the minimum have found to be highly desirable, and wherever possible, indefinite retention of records and documentation should be sought. This allows a defence to be raised to claims relating to incidents occurring many years before proceedings are brought (often the case where the claim involves a minor).

As well as the obvious resource implications of archiving and storing potentially vast quantities of records, technological implications must be considered. In relatively short time-spans, the technology to store and access a particular format can become superseded. Ensuring that historical data can be accessed and retrieved years later is becoming increasingly important, and this may require re-formatting of data and/or the retention of old technology to allow such data to be read.

Returning specifically to surfacing related claims, the author has experience that assembling and providing skid resistance data in a readily understandable format (which is often in a visual as well as more standard tabular form) has been found to be beneficial. For example, the visual presentation of skid resistance data on a large-scale map using colour coding (eminently possible through GIS systems such as ArcView or similar) can be very effective. However, it is worth remembering that papers are often photocopied during the course of proceedings and any copies provided by the road authority should not be provided in black and white if the original is in colour. This point should also be stressed if copies are likely to be made by those being supplied the data. Alternatively, the original could be designed so that it can be copied effectively in black and white.

It is the author's experience that one of the most confusing aspects to the layperson in surfacing related claims appears to be road authority use of road section numbering and/or section chainages. The provision of explanatory notes or the adoption of a visual format can greatly assist.

As explained earlier in this section, the skid resistance of a road surface is unlikely to be the only focus of a post-crash investigation and any subsequent legal action. Associated data, e.g. crash statistics, or seal and resurfacing history for the location (including the rationale behind any surfacing operations), is likely to be required to enable a location character and chronology to be established.

**Appendix A** of this paper provides an indication of the extent of information the author would expect to be made available to him by a road authority

commissioning a thorough investigation of, and expert witness report on, a single vehicle loss of control incident on a rural curve. This has been provided to illustrate the need for a wide investigation and the portfolio of information and data that should ideally be routinely and readily available to a road authority and its legal representatives when internally investigating such an incident and ultimately formulating the conduct and content of the organisation's defence.

Hopefully the above paragraphs and provision of the Appendix to this paper clearly illustrates the importance of promptly gathering the network knowledge that is available (both used and unused!) for the period preceding the incident being considered. Significantly, this will help identify any data or information that could not reasonably have been considered by the authority's employees before the incident. For example, if a skid resistance test had been undertaken at a location a few weeks before an incident, the processed data is unlikely to have been available to the road authority at the time of that incident and, therefore, could not have been considered.

It is important to close this section by encouraging open and effective communication between the legal representatives working on behalf of the road authority (who may be an in-house resource, but more commonly these days, an external, bought-in resource) and the road authority engineers. Only then can a thorough and considered defence be put forward. Any "skeletons in the cupboard" (such as known failure to effect a documented policy at the location of the incident in question, or missing documentation) must be notified to the legal representatives as soon as possible to allow them to consider the options for the future conduct of the litigation. One of the inevitabilities of litigation is that 'skeletons' unearthed during court proceedings are not treated lightly and can jeopardize the credibility of the whole defence. Not passing on relevant (or what might be considered irrelevant) information (be it good or bad) to the authority's legal representatives is certainly not recommended. The best approach is very definitely to work with the legal representatives and provide everything, letting the legal representative make 'the call' as to what evidence will be relied upon and supplied to the other party early in proceedings.



### 3. PROACTIVE STRATEGY

The previous section of this paper looked at the defence of legal proceedings once they had been notified to the road authority, ie. the proceedings relate to an historical incident, and possibly one of which the authority had no prior knowledge. However, this is by no means always the case, road authorities in general, and more specifically their front line employees, often become aware of incidents on their road network a short while after they have occurred, through a range of sources and methods (including proactive measures such as establishing incident investigation protocols / MoUs with their local Police force's traffic unit). The author believes it to be common sense that a percentage of these incidents will eventually manifest themselves in future civil proceedings. So, is there a way we can be proactive and collate and report useful background and specific information on incidents soon after they have occurred (with a thought to having to possibly prepare a formal defence some time in the future) and secondly, does such an approach offer us any tangible benefits??

The answer to both questions above is 'yes'. In preparing a formal record at the time (in the form of an engineering investigation and report or collation of a case file), the authority has the opportunity to ensure that third party investigations are thorough (and even that all relevant evidence is secured) and can reduce the risk of specific data and information becoming dispersed or lost in the future, as well as ensuring, as far as possible, that all considerations and decisions reached etc are backed by contemporaneous notes and the very documentation and information available to engineers at that time. Experience of exactly what to initially collate and aspects to cover will come in time, based on: a review of historical claims (and their Statements of Claim); attending more incident scenes; and discussions with the authority's legal representatives (which are strongly recommended). Additional information can be included as the investigation progresses and/or more information becomes available.

The proactive approach advocated is also beneficial in some legislatures due to the existence of a concept called "Legal Professional Privilege". In normal circumstances, documentary evidence that a party will ultimately reply upon in the court room has to be disclosed to (ie. made available to) all other parties within a set number of days before the commencement of proceedings in the court. However, legal professional privilege (where available) affords a party some flexibility (albeit strictly controlled) in what must be disclosed before proceedings in the court room begin. In very general terms, a document that has been prepared for the dominant purpose of assisting in the defence of anticipated, future litigation is said to be privileged and accordingly does not have to be served upon other parties in advance, eg. an internal report prepared on a the location of a recent incident because the authority thought (based on past experience) that the event may well lead to civil proceedings in the future is typically covered by the concept. It should be noted, however, that whilst the report in this situation is likely to be privileged, supporting documentation (which is predominantly for other purposes, such as routine skid resistance data) might not be. The take up of legal professional privilege can also be declined, for tactical reasons, eg. where the internal report produced actually strengthens the case of the defendant.

It cannot be stressed enough that the authority's legal representatives should initially be consulted if the road authority wishes to adopt a protocol that provides them with the potential advantages of legal professional privilege. In addition, once a protocol

has been effected, any incident specific 'calls' as to whether a document is subject to privilege or otherwise can only be made by the authority's legal representatives. The option is potentially a valuable one in certain cases, but must be used correctly and under tight control. The authority's legal representatives should also be able to provide a form of words to appear at the start of any documents prepared for the dominant purpose of litigation to separate these from documents prepared for other purposes.

The 'words of warning' closing the previous section of this paper also apply here. The preparation of a formal defence should start by the collation of all of the available facts (ie. both favourable and unfavourable) and there is, in the author's opinion and experience, little value in trying to 'hide' or 'disguise' information that is potentially unfavourable, as this often comes back to haunt the organisation if matters reach the court room. Honesty is the safest policy. Legal representatives acting for Claimants investigate cases just as fastidiously as those acting for a Defendant and their efforts should not be taken lightly, regardless of the fact that the former do not always initially have direct access to all available evidence/documentation.

With respect to incidents on a road network and dealing with the media soon after they occur, the author recommends that road authorities defer as far as possible comment upon, or delay provision of, specific engineering information (such as skid resistance test data) regarding a location where an incident has occurred, until having first established the full details of, and contributory factors to, the crash. Skid resistance data can rarely be viewed or provided in isolation, and the concept that a crash is nearly always a true random, multi-factor event should always be stressed to the inquiring body.

## 4. DISCUSSION

This paper has provided information on the conduct of claims against road authorities where the road surface has been alleged to be a contributory factor in the incident in question. The road authority's available defence is to demonstrate that reasonable measures have been considered and taken in the management of road surface skid resistance (and other related technical issues). 'Tips of the trade' have been provided to assist road authorities in forming a robust and successful defence to such claims (where such efforts are warranted). The paper closed by introducing a proactive approach available in the internal investigation of surfacing related crashes soon after they occur, which can provide potential legal advantages in the conduct of any future claim received related to such incidents.

*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.*

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## Appendix A

Example showing the scope and detail of documentation that may be requested from the pertinent road authority by an expert witness undertaking an investigation of a single vehicle accident on a rural curve where the vehicle has left the carriageway, in determining the performance of the road authority in such a scenario (nb. this list should not be relied upon as being exhaustive):

- national Code of Practice for road maintenance and traffic sign and road marking provision in effect at the time of the incident;
- A copy of the road authority's Maintenance Plan in effect at the time of the incident, containing policies regarding: inspection frequencies; verge maintenance; verge rutting; sign maintenance; rural grass cutting etc (information to also include relevant details relating to the Plan's development and approval);
- Road authority documented policy and practice around the time of the incident regarding the provision of advance curve warning signs, chevrons, edge line markings, reflective road studs, and kerbing on its rural curves. Such policies are typically found within the authority's Signing Policy and / or Road Safety Plan. (information to include relevant details relating to the policy's development and approval);
- A copy of the road authority's Inspection Manual in effect at the time of the incident, containing inspection methodology; definitions of defects to be detected during routine inspections and guidance on the prioritisation of defects. (Note: this information may be contained either partially or in its entirety within the Maintenance Plan);
- Records of routine or special inspections undertaken at the location in the 3 years prior to the incident in question and the year following the incident;
- Details regarding the original design of the curve in question and any modifications to the original curve alignment or crossfall made at any time prior to the incident;
- Full details of any maintenance or road safety engineering works at the location prior to the incident; eg. resurfacing, provision of signs etc. Information to include works orders from the road authority to its works units or contractor (and confirmation of receipt); any contemporaneous notes made during the works; works supervisor logs and works record sheets; details of any monitoring/performance checks made on works effected etc;
- Full details of any remedial maintenance or road safety engineering works effected at the location after the incident in question (eg. additional provision of road markings, road signs, street lighting etc);
- The personal injury crash record for the curve in question and route it is a part of for the ten years prior to the incident and for the period post-incident (and if available, any records held relating to damage-only incidents at this location);
- Details of road marking and signage provision etc at "similar" curves on the route or in the locality;
- Details of any contacts, correspondence or complaints received by the road authority from the public and other organisation (including the Police) relating to: the condition of the road at the location; number of accidents; incidence of near-misses; the suitability of the route and the perception of the severity of the curve; poor edge delineation in poor visibility / dark

conditions; requests for reductions in speed limit / vehicle restrictions / curve realignment / reprofiling; incidences of surface contamination etc;

- Meteorological Office data on the prevailing weather conditions around the time of the incident for the location (If the incident is suspected to be weather related only). If the incident appears to be weather related, information regarding issues such as drainage maintenance, available moon light, sun glare, lighting up times; (and in some cases the mitigation or warning of frost, ice, snow or extreme heat, will be required);
- Results of any routine or special skid resistance measurements or tests undertaken by the road authority at the location in the 3 year period prior to, or immediately period following, the incident;
- Details of any road authority prior knowledge / experience of any surface contamination at the location (eg. mud, oil, dust etc); and
- Traffic count and traffic speed data for the curve