



**Informing Progress - Shaping the Future**

## **FOIL Update 9<sup>th</sup> July 2026**



### **Potholes: A Deep Dive into Britain's Favourite Road Hazard**

Almost 50 delegates from insurers, law firms, and local authorities gathered recently for a FOIL event to examine one of the most persistent issues across Britain's road network: potholes. Kindly hosted by Kennedys at their Sheffield offices, the event brought together a panel of experts to explore the wide-ranging implications of the pothole crisis for the various stakeholders affected by it.

The session was introduced by Caroline Elson, Legal Director at Kennedys and a member of the FOIL Public Sector and Blue Light Sector Focus Team, who opened by outlining the work FOIL undertakes in representing those engaged in the defence of insurance-related claims and highlighting the organisation's role in facilitating regular events which offer members and non-members the opportunity to come together and discuss the burning issues affecting the sector.

With the condition of the UK's roads continuing to make headlines and generate significant claims activity, the panel's insights offered attendees some context in how the situation has developed to arrive at the current position, how local authorities are attempting to tackle the crisis, and how insurers and the courts are managing growing numbers of claims.

#### **Mike Hansford, Setting the Scene**

The session opened with Mike Hansford, Chief Executive of the Road Surface Treatments Association (RSTA) and former Head of Highways Maintenance at Dorset Council, who set

out the scale of the challenge facing the UK's road network and traced the path that has led to its current condition.

Mike began by reflecting on the extensive negative media coverage the pothole issue has attracted nationally, before turning to the National Audit Office's recent report, which highlighted worsening road conditions, a growing maintenance backlog, and significant gaps in the data available to local authorities. He noted that the Public Accounts Committee had gone so far as to brand the state of England's roads a "national embarrassment", a phrase that perhaps captures the mood of drivers across the country.

In highlighting how we have arrived at this point, Mike pointed to a combination of interconnected factors, including the performance of asphalt materials, a decline in preventative maintenance, the condition of highway drainage, and an over-reliance on temporary repairs.

An untreated asphalt road surface will naturally degrade over time as a result of ageing, trafficking, and oxidation caused by exposure to the elements, a process significantly accelerated by standing water and exposure to pollutants. On this basis, the lifespan of an asphalt surface can typically be expected to be between 10 and 15 years, but only where it receives appropriate maintenance during that period. Different surface substrates have distinct maintenance requirements, with the four main types of asphalt surface types used on roads in the UK being Asphalt Concrete (AC), Hot Rolled asphalt (HRA), Thin Surface Course Systems (TSCS), and Stone Mastic Asphalt (SMA), each having characteristics that affect their water-resistance and susceptibility to cracking, rutting, and fretting. Work remains in developing the specification of asphalt materials to deliver lower maintenance requirements and longer lifespans.

Reduced investment in preventative treatments has been a huge contributing factor in driving the current state of roads around the UK. Available data shows that while 7% of the network received preventative treatment in 1985, this had fallen to just 2% by 2024. Had surface dressing continued at 2012 levels, approximately 37,000 km of road would still be sealed today.

This decline has been compounded by reduced funding for drainage maintenance, which includes gully emptying, ditch clearance, rural side verging, and the upkeep of drainage assets such as manholes, soakaways, and catchpits, which has dropped by up to 60% in some areas. This has pushed local authorities into adopting a reactive approach, which is significantly less cost-effective, places greater strain on smaller budgets, accelerates road deterioration, and increases flood risk.

In terms of the mechanics of road failure, as untreated roads become brittle and crack, water penetrates the road's fabric and downward hydro pressures, combined with freeze-thaw cycles, lead to structural failure, which ultimately leads to potholes. This process is now formally linked to the condition categories set out in PAS2161, a UK national standard regulating how local highway authorities collect and report road condition data introduced

by the Department for Transport (DfT) and facilitated by the British Standards Institution (BSI).

Regarding solutions, an array of treatment options is available, depending on a road's existing condition. These range from penetrative and non-penetrative preservation and rejuvenation treatments for roads still in good condition, to surface dressing techniques such as encapsulation, which locks chippings into the surface to improve road resilience and aesthetics. Some of these treatments represent just a tenth of the costs involved in replacing the road surface. Alternatives include microsurfacing, including Cold Applied Ultra Thin Surfacing (CAUTS), a cost-effective, preventative maintenance treatment popular in Europe used to preserve and extend the lifespan of asphalt roads.

Temporary reactive patching has become the approach adopted by many authorities, which provides a Section 58 defence against third party claims and enables Councils to operate within budgets and meet repair deadlines. However, this is a short-term remedy and false that does not address the root cause. The costs involved also point towards a false economy, with temporary repairs costing up to 30x that of a longer-term, planned repair when measured against a comparable area and timeframe.

The government is now mandating a move to longer-term repairs, with the DfT pledging a £7.3 billion capital funding package for local highway maintenance across England from 2026 to 2030, giving local highway authorities greater financial certainty to plan preventative maintenance. AI is also playing a growing role in road condition monitoring to help enable a more proactive, planned approach to patching.

With regard to end-of-life roads, which are those that have missed the window for preventative treatment and are often prohibitively expensive to resurface, in situ and ex situ cold recycling is an increasingly viable and sustainable solution, with some recycling techniques offering CO2 reductions of up to 70- 74% compared with traditional hot mix asphalt.

Mike closed his presentation with an update on the ongoing review of the Well-Managed Highway Infrastructure Code of Practice, noting the involvement of the risk, legal, and insurance sectors in shaping updated guidance on areas including carbon, AI, innovation, and network management. The original draft has passed through a consultation period and is not a rewrite, but a review of the existing Code and centred on the core pillars of safety, serviceability, sustainability, and customer service. Case studies and consultation opportunities remain open throughout the summer, and contributions highlighting good practice are encouraged from across the wider UK sector.

### **Adrian Runacres - Experiences of an Expert Witness**

The second presentation came from Adrian Runacres, an independent consultant specialising in incident investigation and risk management for the transport sector, who offered the audience a ground-level view of how pothole claims are investigated and tested

in practice. Adrian conducts forensic investigations into road traffic collisions and other incidents, and regularly provides expert testimony at tribunals, inquests, and trials.

Adrian began by addressing the simple question of what is a pothole? In the absence of a universally accepted definition, he offered his own working description: *“a sharply defined depression in a carriageway, footway, or cycleway, where the surfacing material has broken away and been removed by the action of traffic and weather”*. A pothole is different to a ‘dished depression’, which is caused by plastic deformation or subsidence and presents quite differently, with smooth, shallow-sloped edges and no material loss; this distinction matters when establishing liability, with Adrian highlighting that the majority of potential claims do not progress.

Potholes typically develop as a result of water ingress weakening the structural integrity of the surfacing material, which subsequently fails under the stress of passing traffic. The rate of pothole development varies a great deal depending on local circumstances, including traffic volume and type, the position of the defect within the carriageway, the condition of the surfacing and underlying construction, and prevailing weather conditions. All these factors go directly to the key evidential question of whether, and to what extent, a defect existed at the time of the last inspection.

As roads and paths are not flat, finding the level from which to measure a pothole can be tricky, but capturing several depths across a pothole and recording the maximum using a straight edge and tape measure is a good method. Size, however, is not necessarily key, and AI reconstruction analysis is often used in court to determine what constitutes a pothole and what does not.

The number of serious injury claims overwhelmingly involve cyclists, motorcyclists, and pedestrians, rather than cars, vans, or lorries, and causation must first be established. Potholes fall under Section 41 of the Highways Act 1980, and while the Section 58 defence remains available to highway authorities, the burden falls on the defendant authority to demonstrate that it had a reasonable system of inspection and maintenance in place, a burden not always easy to fulfil.

A reasonable system can be expected to follow national guidance, and any departure from this must be replaced with appropriate alternative processes. Ideally, policies should be approved by elected members after development through consultation with key stakeholders, and where possible they should broadly align with policies adopted by other UK authorities.

Adrian highlighted the challenges posed by the current Code of Practice, Well-Managed Highway Infrastructure (WMHI), published in October 2016 and currently under review, with a new version expected in autumn 2026. Unlike earlier guidance, the current Code avoids prescribing specific inspection frequencies or defect identification criteria in favour of a risk-based approach, an approach set to continue in the revised version.

This leaves insurers, lawyers, and the courts with two central questions when assessing what is reasonable: can the authority demonstrate that its policies and decisions were genuinely risk-based, and what would other authorities have done in the same circumstances? When answering these questions, which framework should be applied: ALARP, Bolam, or somewhere in between?

When authorities translate this risk-based approach into practice, they must understand the profile of vulnerable road users, active travel initiatives, and promoted routes, such as the National Cycle Network, when setting inspection and defect criteria. Any changes to traffic volume or use should be reflected in inspection cycles and all relevant departments made aware to ensure appropriate levels of maintenance are in place.

At present, there is considerable inconsistency in how defect risk assessments are carried out across the country. Some are supported by software and emerging AI-based video analysis, though many authorities still rely primarily on inspector training and judgement. Additionally, individual risk assessments are often not recorded, with only defects deemed to warrant remedial action captured and retained on file. These inconsistencies between how authorities approach risk assessments can create issues in the event of a claim.

Some authorities do produce documentation for inspectors to aid in the characterisation of defects, and while these can introduce consistency between inspectors within an authority, they do not safeguard consistency between authorities. Insurers and software developers therefore continue to call for greater standardisation in the guidance available to help in litigation and product development.

The RAC Foundation's December 2018 report on council defect intervention times and pothole sizes illustrated just how widely intervention criteria vary between authorities across the UK. A risk-based approach must be consistent in terms of the risk to the public, as the same hazard poses the same risk, but at present the criteria on which it is assessed differ. The outcomes of claims are therefore likely to be inconsistent, given the challenges this creates for authorities and courts to benchmark what is reasonable and appropriate.

Many authorities have changed their intervention criteria since the introduction of the WMHI and continue to review and update these as networks and usage evolve. It is important, however, for authorities to document changes, including the rationale behind their introduction.

### **David Taylor, The Legal Framework**

The final presentation of the session came from David Taylor, Barrister at St John's Buildings Chambers, who shared a detailed examination of the legal landscape surrounding pothole claims along with some practical guidance for insurers and local authorities navigating it.

The figures surrounding potholes are striking: the AA reported that it had been called to 617,000 individual incidents of pothole-related damage to vehicles in 2025, with 96% of drivers surveyed identifying potholes as their primary concern when driving. While these

figures largely mirror those reported in the previous year, increasing use of short-term, temporary repairs, driven by cost pressures, is placing growing strain on inspection systems that were never designed to cope with such rapid deterioration.

In addition, increased extreme weather conditions are causing potential latency issues in road surfaces and structures, with different road materials having different failure rates. The approach adopted in the UK of using temporary repairs is a false economy and is in contrast with the more proactive approach of early replacement adopted by several European countries. However, the £7.3 billion funding from the DfT alone will be insufficient to initiate a wholesale shift from reactive repair to advance resurfacing.

The current economic climate will, however, make it extremely difficult to secure additional funding elsewhere, something the courts have shown limited sympathy for when considering the Section 58 defence. The likelihood is, in the wider context of under-funded public services, the state of the UK's roads will continue to deteriorate, with policy decisions at national level often creating challenges at local level.

As a reminder of the statutory framework applicable to potholes, which will be applied by the court, the duty to maintain the highway under Section 41 of the Highways Act 1980 rests with the highway authority for the area. The subsequent introduction of Section 41A following *Goodes v East Sussex* extended the duty to cover safe passage in snowy and icy conditions. While Section 41 does not guarantee a highway will be entirely safe, it must be kept in a state of repair that renders it reasonably passable without danger, with the standard expected varying according to the type and level of use.

The Section 58 'no negligence' defence remains available to authorities, but only where they can demonstrate that all reasonable care was taken to ensure the relevant stretch of highway was not dangerous. The characteristics of the UK's roads are changing, as are how users are interacting with them, introducing new hazards and changing the interpretation of what is reasonable or unreasonable in terms of their repair.

Looking ahead, the Highways Act 1980 (Amendment) Bill, a private member's bill, would replace the current reasonableness test with a duty to take "*all possible steps*" to prevent danger, potentially narrowing the scope of the special defence considerably. However, the bill's slow progress through Parliament, with further readings not expected before 2027, coupled with a Westminster Hall debate on rural road conditions in March 2026 and changes to street works inspection cycles, may provide some relief for authorities and enable some costs to be offset. Furthermore, access to increased central funding comes with the responsibility to publish progress annually or face seeing 25% of any uplift withheld.

Prospective claimants and their advisors need early sight of the defence they face before any proceedings begin. Funding dynamics have shifted, with CFA success fee uplifts gone and replaced by qualified one-way cost shifting. Where a 100% uplift once let a claimant firm or barrister win one case and lose another and still break even, reliance on taking a percentage

of damages has tilted the landscape towards the Defendant. The earlier potential litigation is stopped, the less costly it is for the local authority or its indemnity insurer.

Disclosure is the single most important factor in resisting claims, with relevant documentation made accessible and shared early likely to see many claims fail to progress. A key difficulty in highways litigation is that repudiation often comes without disclosure of inspection documentation, leaving claimants unable to gauge whether a section 58 defence will defeat their claim despite a proven loss.

The pre-action protocol requires authorities to be able to produce twelve months of inspection records, maintenance records, relevant committee minutes, complaint records, and details of other incidents on the relevant section of highway. Although the necessary records usually exist, authorities often fail to respond in time due to competing pressures, so pre-action disclosure applications became routine and claimant solicitors would often repeatedly request standard documentation, then apply to court and secure a costs order against the authority on the grounds of unreasonableness.

However, once it became clear that authorities generally did have the relevant documentation but were simply slow to produce it, the courts often held the usual costs position, knowing few applications developed into litigated cases. Early, comprehensive, and well-reasoned disclosure not only strengthens an authority's position but can prevent litigation altogether, an important consideration given the move towards qualified one-way costs shifting, which has changed the economics of pursuing and defending these claims.

Insurers and authorities must consider how a given defect might affect different road users in different ways, perhaps causing only a minor issue for a car but a far more serious risk to a cyclist or motorcyclist. There is therefore an emphasis on well-evidenced decision-making, supported by individuals able to give credible evidence as to how risk assessments were conducted at the time in question.

Technology can be key in improving the quality and accuracy of data and supporting information, and having robust systems in place can feed into organisational behaviours that ensure ordered evidence is on hand to defend claims, indicating to courts that these systems are consistent and reasonable, while demonstrating to other parties the ability of certain authorities to successfully defend claims.

Authorities should also remain broadly consistent with the approach taken by other local authorities, as a position can be harder to defend if inconsistent with what is regularly used elsewhere. Improved guidance would lead to greater consistency and help authorities identify what evidence is needed to support decision-making and risk assessment processes. The judiciary is human and alive to sympathy for vulnerable road users, so accurate inspection findings, with clearly evidenced reasoning at the point of inspection, rather than after the event, helping courts see the rationale behind decisions. The ideal situation would be a consensus on what is reasonable, allowing the courts to judge cases on their merit and the law.

In closing, David cautioned against comparing systems to those of other authorities after a claim has arisen, instead advocating proactively building in benchmarking as part of internal best practice. Ultimately, a lack of funding is not accepted as an excuse for a breach of statutory duty; authorities and insurers must be prepared to proactively evidence their systems.

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.