

**INFORMATION FOR
SECTION 56 COMPLAINTS**

Enabling Legislation:

SECTION 56 HIGHWAYS ACT 1980

Proceedings for an order to repair highway.

(1)

A person ("the complainant") who alleges that a way or bridge—

(a) is a highway maintainable at the public expense or a highway which a person is liable to maintain under a special enactment or by reason of tenure, enclosure or prescription, and

(b) is out of repair,

may serve a notice on the highway authority or other person alleged to be liable to maintain the way or bridge ("the respondent") requiring the respondent to state whether he admits that the way or bridge is a highway and that he is liable to maintain it.

(2)

If, within 1 month from the date of service on him of a notice under subsection (1) above, the respondent does not serve on the complainant a notice admitting both that the way or bridge in question is a highway and that the respondent is liable to maintain it, the complainant may apply to the Crown Court for an order requiring the respondent, if the court finds that the way or bridge is a highway which the respondent is liable to maintain and is out of repair, to put it in proper repair within such reasonable period as may be specified in the order.

(3)

The complainant for an order under subsection (2) above shall give notice in writing of the application to the appropriate officer of the Crown Court and the notice shall specify—

the situation of the way or bridge to which the application relates, the name of the respondent, the part of the way or bridge which is alleged to be out of repair, and the nature of the alleged disrepair;

and the complainant shall serve a copy of the notice on the respondent.

(4)

If, within 1 month from the date of service on him of a notice under subsection (1) above, the respondent serves on the complainant a notice admitting both that the way or bridge in question is a highway and that the respondent is liable to maintain it, the complainant may, within 6 months from the date of service on him of that notice, apply to a magistrates' court for an order requiring the respondent, if the court finds that the highway is out of repair, to put it in proper repair within such reasonable period as may be specified in the order.

(5)

A court in determining under this section whether a highway is out of repair shall not be required to view the highway unless it thinks fit, and any such view may be made by any 2 or more of the members of the court.

(6)

If at the expiration of the period specified in an order made under subsection (2) or (4) above a magistrates' court is satisfied that the highway to which the order relates has not been put in proper repair, then, unless the court thinks fit to extend the period, it shall by order authorise the complainant (if he has not the necessary power in that behalf) to carry out such works as may be necessary to put the highway in proper repair.

(7)

Any expenses which a complainant reasonably incurs in carrying out works authorised by an order under subsection (6) above are recoverable from the respondent summarily as a civil debt.

(8)

Where any expenses recoverable under subsection (7) above are recovered from the respondent, then, if the respondent would have been entitled to recover from some other person the whole or part of the expenses of repairing the highway in question if he had repaired it himself, he is entitled to recover from that other person the whole or the like part, as the case may be, of the expenses recovered from him.

(9)

Where an application is made under this section for an order requiring the respondent to put in proper repair a footpath or bridleway which, in either case, is a highway maintainable at the public expense and some other person is liable to maintain the footpath or bridleway under a special enactment or by reason of tenure, enclosure or prescription, that other person has a right to be heard by the court which hears the application, but only on the question whether the footpath or bridleway is in proper repair.

Definition of 'Out of Repair':

Under the Highways Act 1980, a highway is 'out of repair' when its surface is defective, unsound, or impaired by neglect or use, failing to allow safe passage for the public. It specifically means the physical state of the surface is insufficient for the ordinary traffic of the neighbourhood.

Key Aspects of 'Out of Repair':

- Definition: **The surface is defective or disturbed, creating a hazard or making it impassable.**
- Examples: Rutted paths, bad drainage, slippery surfaces, or missing structural components.
- Distinction from Obstruction: 'Out of repair' relates to the condition of the path itself, whereas an obstruction is an object placed on it (e.g., a broken fence is an obstruction, a large hole in the path is out of repair).
- Legal Duty (Section 41): The highway authority must maintain the road so it is **safe to pass at all seasons, with lack of resources being no defense.**

Further guidance on asset management for local highways authorities can be found in the 'Code of Practice for Well-Managed Highways Infrastructure'. This states that **"drainage assets should be maintained in good working order to reduce the**

threat and scale of flooding. Particular attention should be paid to locations known to be prone to problems, so that drainage systems operate close to their designed efficiency.”

Legal Precedent Case History:

The Court of Appeal - Burnside v Emerson [1968] 1 WLR 1490

The duty of maintenance of a highway which was, by section 38 (1) of the Highways Act, 1959, removed from the inhabitants at large of any area, and by section 44 (1) of *1497 the same Act was placed on the highway authority, is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it **reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition**. I take most of those words from the summing-up of Blackburn J. in a case in 1859, Reg. v. Inhabitants of High Halden.

“Non-repair” has the converse meaning. Repair and maintenance thus include providing an adequate system of drainage for the road; and it was in this respect that the judge found that the highway authority in this case had failed in their duty to maintain the highway.

This case defined the duty of highway authorities to maintain highways in such good repair as renders them reasonably passable for ordinary traffic at all times without danger caused by physical condition. The court applied Diplock L.J.'s principle as the correct test for assessing whether the highway was in repair, finding the road met this standard despite some verges being unsuitable for all traffic.

(Section 44 of the Highways Act 1959 is re-enacted in the same terms as Section 41 of the Highways Act 1980)

Hereford & Worcester County Council v Newman [1975] 1WLR 901

I consider that a highway can only be said to be out of repair if the **surface of it is defective or disturbed in some way or 'has become unsound or impaired by neglect or use'**. Not every defect in the surface would constitute being out of repair – e.g. an icy road would not in my view be out of repair. But if the surface is in a proper condition I do not think it can ever be said that the highway is out of repair...

Kind v Newcastle-Upon-Tyne City Council [2001] EWHC Admin 616

The court reasoned that the duty to maintain a highway under Section 41 of the Highways Act 1980 requires the highway authority to keep the highway reasonably passable for ordinary traffic, **not to upgrade or improve it beyond its existing character**. The justices' order required improvement rather than repair, and that the present day character of the highway is relevant in determining its state of repair.

Goodes v East Sussex County Council [2001] WLR 1356:

Confirmed and endorsed the objective test from Burnside regarding the duty to repair highways. The court relied on Lord Hoffmann's endorsement of Burnside to validate the test applied by the Crown Court in assessing the highway's state of repair

Burgess v Northwich Local Board [1880] QBD 264

Lindley J. held that “the duty of the highway surveyors is to keep the road as dedicated to the public in such a state as to be **safe and fit for ordinary traffic**”.

A.G v Benyon [1969] 2 AER 273

The public is entitled to **enjoy the full width of the highway**. The width is a matter of evidence, but where there is a made up carriageway the prima facie the full width that is made up highway.

R v High Halden [1859] 1FF 678

Blackburn J. said that the road must be kept in such repair as to be **reasonably passable by the ordinary traffic of the neighbourhood** at all times of the year.

A.G. v Scott (1904) 1 KB 404 [1905] 2 KB 160

The **level of repair changes as the ordinary traffic changes**. A highway authority cannot refuse to repair a road necessary for motor traffic on the grounds that it was dedicated and originally made in the days of horse drawn traffic.

R v Claxby (Inhabitants) [1855] 24 LJQB 223

In general, the level of repair must **follow the character of the traffic using**, or wanting to use, a road, but a lessening of the frequency of use of a road is not a reason to lower the standard of repair.

R v Inhabitants of Healaugh (Times 18/4/1863)

Baron Martin “The way ought to be put into such a state of repair that persons might walk along **dry shod**.”

Lack of Funds No Defense:

Wilkinson v City of York Council [2011] EWCA Civ 207:

The obligation to maintain highways in a structural condition which makes them **free from foreseeable danger** to traffic using the road in the ordinary way is an unqualified obligation of highway authorities of long standing.

R v East Sussex County Council Ex p Tandy 2 WLR 884

Lord Brown-Wilkinson – **Local Authorities and the Court cannot take into account the availability of financial resources** when deciding how to discharge a statutory duty. A duty is a duty. The Courts have no remit to downgrade such duties to mere discretion.

The Secretary of State as highway authority in relation to the strategic roads network – the duty to maintain the highway:

Section 41 of the Highways Act 1980 contains the duty to maintain the highway, and, by section 41A, a duty to ensure, so far as reasonably practicable, that safe passage along a highway is not endangered by snow or ice.

Section 41 is a duty owed to those using the highway. It is not a guarantee that the highway will be safe. However, **the highway has to be maintained in such a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition. The standard of repair of the highway must reflect the type and level of use that is made of it.** The duty in s41 has to be read in the context of s58 of the Highways Act which provides a special defense if it can be proved that the highway authority took such care as in all the circumstances was reasonably required to secure that the part of the highway in question was not dangerous to traffic.

Code of Practice Has No Legal Basis:

The 2005 version of the CoP was the subject of recent judicial consideration in the case of *TR v Devon County Council* 5:20.

...The judge fell into error. Despite the recognition in the opening words (A1.2.1) that the code was non-mandatory, this approach amounted to treating it as a mandatory standard which had to be adhered to unless there was a positive reason to depart from it. Whilst the code is clearly evidence of general good practice, its status must not be overstated. **It has no statutory basis** and its own terms are explicit in a section carefully entitled "Status of the Code" (this quotation is taken from the 2005 Code; the 2001 Code contains an almost exactly similar passage): "A1.2.1 The suggested recommendations of this Code are explicitly not mandatory on authorities. The key best value principle of requiring authorities to involve users in the design and delivery of service implies that authorities should have reasonable discretion to respond to such involvement.

Authorities also have certain legal obligations with which they need to comply, and which will, on occasion, be the subject of claims or legal action. ... It has been recognised that in such cases the contents of this Code may be considered to be a relevant consideration. In these circumstances, where authorities elect, in the light of local circumstances, to adopt policies, procedures or standards differing from those suggested by the Code it is essential for these to be identified, together with the reasoning for such differences."

Therefore, the Highways Authorities' self-imposed Network Maintenance Management Plans, or similar policies, have no relevance in respect of the test of 'out of repair' under Section 56 of the Highways Act 1980.

Counter Notices:

Must be served by 'Proper Officer' of the Council (Section 321 Sub-Section 1).
Must be authorised in writing (E.g. By resolution of the Council) to be a 'Proper Officer'