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**MANAGING LIABILITY RISKS IN PUBLIC AGENCIES: A COMPARATIVE STUDY OF ROAD
MAINTENANCE IN IRELAND AND SCOTLAND**

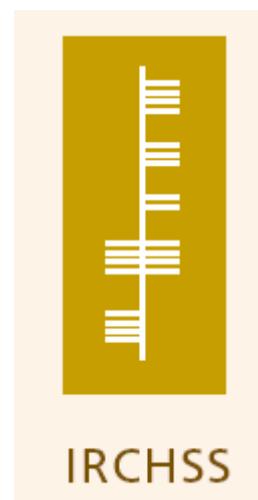
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MANAGING LIABILITY RISKS IN PUBLIC AGENCIES: A COMPARATIVE STUDY OF ROAD MAINTENANCE IN IRELAND AND SCOTLAND

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INTRODUCTION

The concept of risk has assumed a central place in understanding the challenges facing both governments and societies more generally. Whilst many risks are calculable at some aggregate level (and therefore capable of being insured against) they are often perceived as creating uncertainty at the level of particular actors and organisations. An important risk faced by many organisations is the risk of legal liability (Power et al, 2009). Whereas an organisation may perceive contractual matters as being reasonably within its control - the subject of negotiation, and so on - it is the relationship with third parties which perhaps creates the greatest degree of uncertainty: the territory of public liability. The risk of public liability attaches to all organisations which permit visitors on to their premises, but has particular significance for public authorities which have responsibility for provision of public services. The issue of public liability risk has taken on a particular salience due to increasing concerns about the existence of a 'compensation culture' in the sense of an inappropriate increase in claiming rates. Despite empirical evidence that such claims are somewhat inflated (Morris 2007; see also Better Regulation Task Force, 2004; Lewis et al 2006), an anxiety persists that fear of liability may still undermine the capacity of public authorities to carry out their activities by steering them towards excessively risk-averse behaviour (House of Commons Constitutional Affairs Committee, 2006). Urban myths abound, for example, of playgrounds being closed and cake sales being cancelled on the advice of insurance companies for whom such activities represent too great a liability risk (Carr, 2007).

Although it is meaningful to employ, as some commentators do, the notion of 'legal risk' (Power et al, 2009), it may be more revealing for empirical analysis to think instead about the range of organisational risks which follow on from, or are associated with, the prospect of legal liability. In other words, it may be more productive to see legal liability less as a discreet risk in itself, and more as a potential event which represents a range of risks for an organisation: framing 'risk' more as consequence than event. Such an approach may help us better understand the ways in which

organisations respond to the prospect of liability and *why* they do so. In this regard, we focus on liability as representing at least two principal organisational risks: financial and reputational.

Financial: Clearly, a key risk posed to public authorities by the prospect of legal liability is financial loss. Findings of liability bring with them legal obligations to compensate claimants through payment of monetary damages.

Reputational: Power et al (2009) have suggested that reputational risk is an increasingly explicit managerial category in late modern society which plays a performative role in shaping managerial behaviour. Irrespective of the financial costs of liability, then, the reputational costs of liability may also trigger managerial action with a view to preventing or mitigating those losses. Crucially, reputation is a relational concept and so begs the important question of what are the relationships in which issues of reputation are embedded. This is an empirical rather than analytical question. Close attention to the particular context is required, in other words. Nevertheless, in the context of public authorities, we hypothesise that the key relationships are (1) with the public they serve (sometimes through the medium of local politicians); (2) with peer public authorities; (3) with public sector regulators.

It should be noted, of course, that there is some overlap between these categories of risks. For example, revelations around amounts paid out in compensation by authorities may pose a risk to their reputation (e.g., Kennedy, 2007).

This paper seeks to contribute to our understanding of how public authorities respond to risks associated with legal liability, presenting some preliminary findings of a research project examining how local authorities manage liability risks. Details of this project are set out below.

THE RESEARCH PROJECT

The project,¹ still underway at the time of writing, is comparative in nature, focusing on Ireland and Scotland, and using the maintenance of road and footway networks by local government authorities

¹ 'A Compensation Culture? A Comparative Investigation of the Risk Management of Legal Liability in Public Services in Scotland and Ireland'. The project is jointly funded by the UK's Economic and Social Research Council and the Irish Research Council for Humanities and Social Sciences.

as its case study. The project has been organised in two parts. The first phase involved the collection of survey data relating to claiming, compensation payments, insurance provision, organisational arrangements and related matters in all local authorities in Scotland and Ireland. The second phase of the project, from which the bulk of this paper draws, involves a qualitative assessment of organisational responses to liability risks in selected authorities within the two jurisdictions. We have deployed observation and interviews as key research methods, supplemented where possible with documentary analysis. Fieldwork is still underway. We report here in relation to the findings of Sodor Council, the first of three Scottish local authorities to be studied, and Boverra County Council, one of the four Irish authorities studied. In such a manner the paper focuses on inter-jurisdictional comparison as opposed to the rich variety of practices that exists within each of the countries.

Why roads?

In terms of local government provision, the maintenance of roads and footpaths represents a service which attracts a very high volume of compensation claims and financial payouts to claimants. Audit Scotland, for example, reported that in 2002/3 roads departments received 33% (173) of all litigation actions against local authorities in Scotland, representing 25% (£1.6m) of the value of all successful actions. The volume of compensation claiming which does not proceed to the stage of litigation will be much higher. The roads domain, then, as a notable target of compensation claiming, represents something of an 'extreme case' in relative terms. We may hypothesise that the impact of liability risks management on service delivery would be more clearly observed in this sector than in others which attract fewer claims and pay outs. In this policy sector, aversion to liability might entail a disproportionate targeting of resources on liability 'hot spots' to the detriment of the general road quality in the wider network. For example, a local authority may focus more on improving the safety of its footways as opposed to its carriageways due to the fact that personal injury (entailing worse publicity and higher financial pay-outs) is more likely to occur through a fall on the pavement, whereas a pothole on the road is more likely to cause damage to a car, rather than its driver (entailing lower financial pay-outs and a less news-worthy story).

Why Ireland and Scotland?

The comparison between Irish and Scottish local authority road maintenance is instructive because of the existence of key differences despite broad similarities in terms of country size, population,

governmental structure and road type. The key differences which promise comparative purchase concern (1) the legal standards of negligence within tort law; (2) the nature of the insurance market in relation to public liability; and (3) the public sector audit regime.

Legal standards The legal regimes as regards the duty of care owed by local authorities to road users and pedestrians are quite different between Ireland and Scotland. In Scotland, local authorities have a statutory duty under the Roads (S) Act 1984 to maintain roads. They also owe a duty of care under common law to inspect roads and footways for safety defects in accordance with the general practice of roads authorities (*Gibson v Strathclyde Regional Council*, 1993 SLT 1243). In effect, then, it is not the courts which determine what is 'reasonable' for the purposes of satisfying the legal duty of care. Rather, the courts generally defer to the standards of reasonable inspection practice set down in a guidance document entitled '*Well Maintained Highways*'. This document was developed and published by the UK Roads Liaison Group, a collective of local authorities and other public agencies concerned with roads. In other words, in Scotland, the law determining the liability of local authorities for harm suffered through safety defects is highly procedural. It operates more like administrative law than like mainstream tort law. Local authorities do not have a duty to prevent harm from occurring as result of road defects. Instead, they have a duty to conduct cyclical inspections according to the schedule set out in *Well Maintained Highways* and to carry out repairs once they are identified (either through inspections or through complaints from members of the public).

In Ireland, by way of contrast, the law of tort observes a distinction between nonfeasance and malfeasance in relation to the tortious duties of local authorities. The distinction matches that of omission and commission. Nonfeasance denotes a failure to act, while malfeasance denotes a positive action. Liability only attaches to malfeasance. Local authorities cannot, then, be held liable in tort for failing to maintain and repair a road, however serious the disrepair of the road may be. They are liable only for acts of a positively negligent character where some manner of intervention creates the subject of litigation (McMahon & Binchy, 2000). So, where a road has been well constructed initially but wears out over time because of use and weather, local authorities are not legally liable for loss occasioned by safety defects. Nonetheless, this nonfeasance defence should only be relied upon where authorities are confident that the road in question falls within these limited circumstances. The confines of the nonfeasance defence have encouraged a certain amount of judicial creativity about its applicability to concrete situations. After all, for many roads, there will

have been some manner of reconstruction and resurfacing during their history. Accordingly, although the nonfeasance-malfeasance distinction offers local authorities some immunity from liability in certain circumstances, they often labour in some uncertainty about the extent of their duties in tort.

Irish tort law as it applies to road maintenance, then, although less certain, is more substantive in character when compared to Scots law. The logic of the legal regimes contains opposing incentives. Whereas Irish law incentivises authorities to refrain from repairing roads under certain conditions but to make a lasting repair should they do so, Scots law incentivises authorities to repair always where defects are brought to their attention, but not necessarily to a lasting standard. On this basis, we might hypothesise that authorities in Scotland and Ireland will respond differently to the existence of safety defects in roads and footways should they take steps to prevent or reject liability claims.

Public Liability Insurance Market All local authorities in Scotland and Ireland insure themselves against financial losses incurred through legal liability. Authorities certainly differ in the extent to which they have 'excesses' or 'deductibles', but no local authorities entirely self-insure. The Irish market for liability insurance is dominated by Irish Public Bodies Mutual Insurance Ltd. IPB was established by statute in 1926. With the exception of a number of highly specialist policies relating to art collections and historical valuables, IPB has been the sole provider of insurances to every Irish local authority since its inception. The interdependence of the insurer and its clients has become self-perpetuating, fostering reform inertia and restricting the entry of competitors to the market. By way of contrast, following the collapse of the UK's mutual insurer in the early 1990s, Scotland now enjoys a market for liability insurance (Hood and Kelly, 1999). There are now 3 major insurers covering local authorities' public liability: Zurich, AIG and Travellers St Pauls. Scottish local authorities generally renew their insurance contracts through a public tendering process every 3 or 5 years.

The existence of an insurance market in Scotland suggests alternative hypotheses concerning the significance to local authority risk management practices of the provision of insurance by private companies. On the one hand, the market provides for greater competition between insurance companies, encouraging them to offer lower premiums notwithstanding greater risk exposure on the part of local authorities because of poor risk management practices. In this sense, the market may stifle the development of risk management practices by overlooking the issue in the interest of

winning tenders. On the other hand, however, the existence of a market for insurance may encourage private companies to offer risk management training to local authorities as an incentive to accept their tender. In this sense, the market may actually improve opportunities for risk management developments within local authority practice. In Ireland, by way of contrast, the monopoly position of IPB puts it in the position to be a 'risk bully' and require improvement of local authorities in terms of risk management practices, although the company has opted to eschew this approach and instead focus on the provision of risk management advice as 'added value'. A second important distinction between the insurance markets is the outsourcing of claims handling procedures to private contractors in Scotland (Hood and Young, 2003), whilst in Ireland it is undertaken by the local authorities internally, in effect, at times, on behalf of their insurer. Thus Irish risk management practices are intertwined with notions of handling and reacting to individual claims in a manner that is not observable in Scotland. In any event, the different position of Ireland and Scotland in relation insurance markets raises the possibility that we may see insurance companies acting differently in terms of encouraging or facilitating more pro-active risk management practices in relation to legal liability.

Public Sector Audit Each year a public agency called Audit Scotland reports on Scottish local government performance under the Best Value regime. Each policy domain of local government has been allocated some Key Performance Indicators ('KPIs'). Once the data is received by Audit Scotland, the results are published in the form of tables with all 32 Scottish local authorities ranked against each other. This permits a comparison of performance across local authorities and, in relation to a single local authority, across time. In terms of road maintenance, the significant KPI (known as the 'carriageway condition' KPI) is as follows: "the percentage of the road network that should be considered for maintenance treatment." This is assessed every year by an automated inspection system ('TRACS') conducted by way of a driven inspection of roads. Roads are categorised as either A, B, C or 'unclassified'. Each year, all 'A' roads are inspected, albeit in one direction only. Fifty *per cent* of 'B' and 'C' roads are inspected, also in one direction only. Ten *per cent* of 'unclassified' roads are inspected, again in one direction only. The vehicles take a reading every 10 metres and assess the surface texture of the roads, ranking roads as either 'red', 'amber' or 'green' according to their quality. They do not detect or assess potholes. Nor do they assess footways. There is also a KPI relating to compensation claiming: it focuses on the incidence of claims being received by the local authority in relation to all of its services – the number of claims received by a local

authority per 10,000 head of population. Data on this KPI is similarly published in the form of a ranked table.

The equivalent body in Ireland is the Local Government Audit Services (LGAS), a central government agency whose primary purpose is to ensure financial probity in the management of local government affairs. A secondary function is geared towards ensuring value for money. Given the resources available to the agency, and its jurisdictional limits, it does not investigate value for money in relation to road services. Since 2006 LGAS has had the power to be shown local authority risk registers but does not investigate issues of risk management performance in the day-to-day operations of the authority. Whilst a network of local authority managers compiles broad brush stroke data on road maintenance, there is no equivalent publication of performance-related ranked tables.

The existence of a more active public sector auditor in Scotland as regards road maintenance points to the possibility that we will see greater evidence of Scottish authorities engaging in gaming behaviour in order to protect or improve their positions within performance rankings. The extent to which such behaviour coincides or conflicts with liability risk management is an important issue which may shed light on the potential significance of liability to service delivery. In other words, we might hypothesise in relation to Scotland that liability avoidance will be more significant to service delivery if it coincides with an improvement in Audit Scotland's performance league tables. However, if liability avoidance conflicts with improvement in the performance rankings, or is immaterial to it, then we may see it being sidelined as an organizational priority. For Ireland we might hypothesise that the lack of equivalent formal comparison renders competitive behaviours between authorities less pronounced and thus there would be one less goal to compete with operational efficacy.

FINDINGS

In this section of the paper we set out an overview of some of the findings of the research project to date. In both countries we have observed three techniques being practiced which are aimed at reducing or eliminating risks associated with legal liability:

- (1) the prevention of harm to road users;
- (2) the prevention of liability irrespective of harm;
- (3) liability insurance

We demonstrate the complex interaction of financial and reputational risks that fall within the broad ambit of 'legal risk' and demonstrate how responses to each are shaped by the particular configuration of legal regimes, insurance markets and oversight structures within each jurisdiction.

Scotland – Sodor Council

Sodor Council is one of 32 unitary local government authorities in Scotland responsible for the delivery of basic public services such as housing, primary and secondary education, social work, environmental health and roads. Sodor has a population of almost 200,000 people and a mixed rural / urban geography. In addition to large areas of rural land, it has 3 densely-populated urban centres. Its road network runs to around 800km.

Observational and interview-based fieldwork took place on a part-time basis over a period of 4 weeks in Sodor Council. Most of the research time was spent with the roads maintenance section of the council's Roads and Transport Service. Observational work was spent with roads and pathway inspectors, accompanying them on inspections, as well as observing them in the office. Formal and informal interviews and discussions took place with a wide array of officers, ranging from administrative assistants to the Head of Service. Research time was also spent with Sodor's insurance officer and an insurance assistant, and with the Council's call centre which receives and logs complaints about road conditions (amongst other things).

In the sections below, we present some of the finding about the ways in which Sodor Council operated with a view to reducing the organisational risks posed by legal liability.

Prevention of Harm to Road Users

As already indicated above, local authorities in Scotland operate a cyclical inspection system in line with the guidance set down in *Well Maintained Highways*. Sodor Council is no different. Four road inspectors and one footway inspector are responsible for carrying out these inspections across the Sodor road network. *Well Maintained Highways* sets out guidance for a hierarchy of roads and footways relating to road use and location, with corresponding guidance about how frequently inspections should be carried out. Depending on a road's place in the hierarchy, it should be inspected on a monthly, quarterly or yearly basis. Sodor Council follows this guidance. It operates a database for its roads maintenance section which generates these cyclical commitments for the

inspectors. The database also records all complaints about road defects received from members of the public. Such complaints are investigated by the inspectors who make a decision on inspection about whether the defect constitutes a safety hazard. The inspection of Sodor's roads for the maintenance of safety, then, is both pro-active and reactive. In terms of deciding whether defects require repair work, the inspectors follow the guidance set out in *Well Maintained Highways*. It stipulates that on a footway a pothole or uneven surface must present an edge of 20mm or more for it to be unsafe. In relation to the carriageway, potholes must be at least 40 millimetres deep.

Prevention of Liability Irrespective of Harm

As noted above, the Scottish legal regime places importance on whether an inspection regime is complied with rather than on whether a safety defect exists. In this sense, the proper carrying out of an inspection regime can both prevent harm occurring to road users *and* prevent liability from attaching even if harm occurs or might occur. However, there was also clear evidence of inspection and repair work which was geared more towards preventing liability *per se* than preventing harm. The demonstrability of inspection frequency was sometimes more important than the rigour of those inspections. Having been told by the inspectors about the 20mm and 40mm guidance regarding the threshold of safety defects, it was surprising to observe inspectors failing to measure the depths of the defects they encountered. The footway inspector, for example, could judge at a glance whether the edge of a hole or dislodged paving slab was 15mm, 20mm or 25mm. Similarly a roads inspector could judge the severity of a pothole full of rainwater by swilling the water round the hole with his foot. Assessments of safety were more intuitive than technical in character. The lack of precision with which inspectors assessed defects on cyclical inspections suggests that precision is not required for a claim to be repudiated. Indeed, there was, at times, even a lack of precision in identifying the exact defect complained about. On occasions (including one observed), where the complainant has been vague in his/her descriptions of the site of the defect and the stretch of road has a number of potholes, the inspector effectively has to guess which pothole has been complained about.

The lack of need of precision in inspection was confirmed by the footway inspector. He informed that "you're allowed to miss things [on inspections]." He went on to say that if, on an inspection, he detected 4 or 5 defects and noted such, then it could subsequently be argued that it was unlikely that he had missed a defect that would give rise to liability. Equally, one might add, given the capacity for defects to worsen fairly quickly over time (through cold/wet weather and heavy use), it is possible for local authorities to argue that at the time of the inspection the defect was not unsafe,

but only became so subsequently. The point here is that the inspection process is largely hidden from (re)view. The only way it could be properly interrogated and reviewed is under examination in court. However, although Sodor's inspectors have received training in how to give evidence in court, it is extremely rare for them to have to do so. The vast majority of claims are not litigated, and the vast majority of those that are never make it to court.

An organisational focus on preventing liability irrespective of harm was also evidence in relation to the ordering of repairs. Inspectors vary in the extent to which they order repairs on reactive inspections. One of the inspectors shadowed (Julian) seems to order repairs for most defects complained about. Julian is, we were told, one of the more risk-averse officers. However, it seemed from observations that the defects for which he ordered reactive repairs were no worse than other defects we had seen. When challenged about this, Julian agreed. He confirmed that any one of the other similar defects pointed out "could be a claim". When asked why he ordered a repair on some rather than all defects which were of similar severity he said it was because someone had made a complaint in relation to the ones being repaired. He continued that if another member of the public made a claim in relation to the same defect after he had inspected it but not repaired it, then the council could be liable to pay compensation. The fact that Julian does not order repairs on all problematic defects, but only in relation to those complained about, is evidence of a practice aimed at limiting liability rather than avoiding harm. Because there was a record of the council having been made aware of the defect, to protect themselves from liability, a repair had to be ordered.

Further evidence of repair work being targeted at preventing liability rather than harm relates to the durability of repairs. During the winter months (when fieldwork was taking place) most of the repairs ordered are of a temporary nature. To order permanent repairs was felt to be too costly and likely to slow the repair work down too much. Further, the road maintenance team were quite sceptical about the quality of work carried out by the Direct Labour Organisation (the Council's repair workforce). Some of the inspectors estimated that 90% of temporary carriageway repairs carried out in the winter will fail within 24 hours. This was partly to do with poor workmanship on the part of the Direct Labour Organisation, and partly to do with the fact that temporary repairs in winter have much less chance of "taking" because of the wet and the low temperatures. All this leads to the situation where repairs are being made as a response to a complaint in the full expectation that the problem will probably re-emerge after a short space of time. As one senior office noted:

we fill a lot of holes but we probably don't fill them to the standard that we would wish to with the quality of material and the quality of repair that we would like to. What we're doing

is simply filling holes. We ... are holding the network together, spinning plates in three dimensions.

Insurance

Sodor Council insures itself against public liability but has a very high excess on its policy. All claims under £100K are met by the Council itself. The council is able to have this high excess because of insurance reserves being built up by its insurance manager - through very canny financial management. Over the period of 10 years, the overall charge made to departments for the council's insurance premium has remained constant. However, at the same time, through the raising of the excess on the policy, the insurance premium has been dropping significantly. In effect, service departments have been over-paying for their specific insurance needs. This has permitted the insurance manager to build an insurance reserve fund of £11m. In addition to this fund being put towards claims that have been made, he can also set aside large sums for future contingencies such as Equal Pay settlements. This accounting practice is published in the council's annual accounts and so, technically speaking, service heads are made aware of it. The insurance manager doubts, however, whether they have fully taken it in.

Discussion of Sodor Council

Although there was evidence of the above 3 risk management techniques at play in Sodor, they have varying significance in terms of responding to the financial and reputational risks outlined above. By relating the risk management techniques to the financial and reputational risks, we can gain insights into the overall significance of legal liability to public service delivery.

Reputational Risk We mentioned above that reputation is a relational concept and suggested that there are three key relationships at play here for public authorities: with public service users/constituents; with peer public authorities; and with public sector regulators.

The prospect of liability represents a low reputational risk for Sodor's road department in terms of its relationship with road users and local constituents. There are three main reasons for this. First, in terms of the wider constituency learning about liability findings, the management of claims militates against this. The vast majority of claims are settled, never reach court and so do not enter the public

domain. Indeed, the practice of claims being decided by an independent third party claims handler helps to distance the council from the liability decision – a fact that is not lost on the council officers.

Second, reputational loss can be mitigated substantially through good customer service when things go wrong. Sodor Council has a very strong customer care ethos. The consumerist ideology of service delivery was particularly clear and remarked on by a number of senior officers who had observed its rise during the course of their careers. Good customer service also applies to responding to liability claims. A few years prior to fieldwork the work of the roads inspectors had been altered so that, in addition to the four standard road inspectors and one footway inspector, two additional inspectors were specifically tasked with investigating and responding to claims. This change in work allocation was intended to speed up the time taken to respond to claims. It has improved markedly. Whereas claims used to take up to 36 weeks to resolve, they are now being resolved within 21 days on average. So, any potential damage to the council's local reputation amongst constituents and road users can be significantly mitigated through such procedural initiatives.

Third, in terms of the wider council's reputation with its constituents, it was generally regarded by the roads officers that their department was not a hot issue. In contrast to service departments such as Education or Social Work, the roads department was regarded as bit of a poor relation: "it doesn't win votes" as one of the senior officers put it. There was an expectation, in other words, that in terms of local politics and the pressures that can be brought to bear by local politicians, the quality of the roads was a softer political issue when compared with schools or social work provision.

As regards the council's reputational relationships the Audit Scotland, the public sector regulator, the prospect of liability was regarded as a very low risk. Although, as we noted above, a key performance indicator exists in relation to liability claims (number of claims received per 10,000 head of population), this was regarded as fairly meaningless for two main reasons. First, it takes no account of the risk profile of local authorities. So, for example, the two local government domains attracting most claims are roads and housing. However, not all local authorities have housing stock. Some have transferred them over to the private sector. Equally, not all local authorities conduct their own road maintenance. Some have contracted the task out. Like is not being compared with like, in other words. Second, although Audit Scotland's guidance on what data to submit indicates that it wants data regarding all public liability claims made against local authorities, the title of the KPI mentions 'litigated' claims. Local authorities, then, are submitting different kinds of data. Whereas some provide data on all claims received, others only provide data on claims which proceed to the stage where a writ is issued. Accordingly, although Sodor sits near the bottom of the

ranked table of Scottish local authorities this is not regarded as a significant matter because the KPI is not respected by the local authority community.

The third reputational relationship we highlighted is that of local authorities with their peers. However, this is entirely intertwined with the relationship with the public sector auditor because of Audit Scotland's publication of ranked league tables. This is the principal (if not the only) way in which public authorities learn about each others' performance. For the reasons stated above, the prospect of liability represented a very low reputational risk. By way of contrast, however, how Sodor Council performed in terms of the carriageway condition KPI was of supreme importance. Sodor's politicians paid considerable attention to how well Sodor ranked against other councils. Some years prior to fieldwork Sodor had been placed low down in the rankings. The council responded by making key investment decisions to improve its place. In a discussion about how to prioritise budgets, the Head of Service indicates the significance of KPI rankings for planning work:

Head of Service: Sodor started in 1996 [with local government re-organisation] and quite a large proportion of the monies was in reactive work and a smaller proportion in planned work. We made a big effort ... [for] three, four years and we reversed that and we were doing quite well. But over the last two or three years, just mainly [due to the weather] ... the budgets have gone. We're tilting back... Next year we need to spend quite a bit more on reactive work just trying to hold the roads together ... We got six million three years ago for the roads and the idea was to get us up the ladder of the performance indicators where we were twenty-eighth. We've come up to twelve on the condition of the road performance indicator. So that was quite a defined way of going about our work which has achieved that. That neglected some of the roads when we did that ... The job was to get us up the performance indicator.

Question: Can I ask a naïve question about why rising up performance indicator tables matters?

Head of Service: It matters to politicians. It's good practice. I mean if we could do it right across the board that's the direction that we want to go if we had enough money. I mean it's a fairly useful, it's not an absolute, I mean it's an indicator to an engineer where to look and if politicians weren't involved and they weren't published we would use them to guide where we put the money. We would be using them to compare with ourselves year on year rather than compare with other authorities but because they're published politicians have a say in it, then you are really comparing yourself with others.

In short, the reputational risk posed by poor performance in the ranked table relating to the carriageway condition completely overwhelms concerns with reducing the incidence of liability. Although liability avoidance is an observable aspect of Sodor's routines and practices, it is really a peripheral matter. In the centre stage of their operations is a concern with customer care on the one hand, and the performance rankings regarding the carriageway condition on the other.

Financial Risk Liability also posed a low financial risk to the roads department of Sodor Council. The first and most obvious point in this regard is that the legal regime is heavily weighted against liability attaching to harm suffered through road or footway defects. As we saw above, the council is only liable if it has failed to carry out regular inspections or failed to respond to a safety defect once it has been brought to its attention. This is reflected in the fact that over the last seven years, on average, 72% of Sodor's roads claims were repudiated.²

However, the low financial risk is also explained in part through the Council's internal insurance arrangements. Until 2 years prior to fieldwork, there was no relation between what departments incurred in terms of liability losses and what they paid towards the insurance costs of the council. Their contribution to the insurance premium was a flat fee, in other words. Two years ago the flat fee system was altered to reflect individual departments' demands on the insurance budget – departments' "total cost of risk" as the insurance officer put it (i.e. their proportion of the cost of the premium, claims handling, plus pay outs). However, although the roads department's contribution increased (by approximately £200K), they were not told how much of this increase related to liability losses (as opposed to, for example, employee insurance costs, property insurance costs, etc.) In other words, the roads department regards its contribution to the insurance budget as an unavoidable and fairly stable sum which still represents a fairly small portion (£460K) of its annual budget (£11m).

Sodor's insurance officer shares the view of liability for road defects as representing a low financial risk. He described the roads department's liability losses as "attritional losses". He suggested that, regardless of how much a roads department invested in road improvements, there would always be several hundred claims per year. It is an unavoidable feature of that service.

² Indeed, Scotland-wide, the average repudiation rate in relation to roads claims has increased in recent years by 15% (APSE, 2009)

Ireland – Boverra County Council

Bovarra County Council is one of 34 local government authorities in Ireland. Unlike Scottish local authorities, in Ireland such bodies have a more infrastructural mandate, not providing any educational, health or policing services, but focusing on issues such as housing, waste management, water, drainage, sewerage and roads. Boverra's population is approximately 140,000 but its road network is a lengthy 4,200 km. Although a predominantly rural authority, it has three town-lands of a semi-urban nature. Observation and interviews took place in Boverra over a very intense two day period with a wide range of participants from all levels of the organisation, ranging from administrative assistants to the Head of Service for Roads. Immediately, the county's Risk Control Officer acted as a research sponsor and urged his colleagues to offer a level of frankness which they obliged. Observations were recorded in fieldnotes, whilst informal interviews were hand recorded contemporaneously. Formal interviews were tape-recorded. Below we present some of the finding about the ways in which Boverra County Council organises its road and insurance arrangements in such a manner that compares Sodor's response to organisational liability risks.

Prevention of Harm to Road Users

In Ireland, the inspection and maintenance of roads and footpaths for the most part is far less formally systematic than the Scottish system described above. The formulation of national guidelines is in its drafting stage, with a number of sections of roadway being used as 'pilot' sites for its refinement. Given Ireland's particular tort regime for the provision of road services, the nascent guidelines are purposively focused on the efficient use of resources and the promotion of safe conditions. The guidelines will require an inspection regime largely comparable to that which currently exists in Scotland, although it is likely to be some time before they are implemented on a national basis. A significant difference between existing practices in the jurisdictions relates to the deployment of informatics in the administration of inspection and repairs. Whilst a number of Irish authorities are developing capacities in this regard, in Boverra County Council paper diaries held by various members of staff separately hold complaint and repair records, whilst a central complaints 'database' (Excel spreadsheet) is notable for its under-use. Nevertheless, Boverra Council maintains a continuous system of reactive inspections and repairs, based on the complaints received from members of the public and local politicians, supplemented by the observations of staff members. Repairs are prioritised based on danger posed and volume of traffic as well the notion that once working in a particular area, it makes sense for crews to treat all presenting defects. Kevin, the area's

Risk Control Officer, a hybrid position of safety officer and claims handler, attempts to raise levels of proactive repair. He applies pressure to managing engineers to prioritise those defects he considers as particularly dangerous or the subject of a previous claim. Indeed, the presence of claims-handling within the authority structure effectively renders liability claims another source of road safety information to which to react. Generally, roads staff within Irish authorities report that their motivation for road maintenance is not the reduction of liability risk, but a requirement to render roads as safe as possible within the capacity allowed by their resources as part of overall quality service provision.

Prevention of Liability Irrespective of Harm

Proactive inspection does not play a prominent role in Irish local authority efforts to prevent liability. Kevin conceded that it could prove helpful but that on a cost benefit analysis it would ultimately divert more resources from their operational goals than it would free up. Unlike Scotland, there is no effective duty of care to monitor proactively for defects and to repair them within a reasonable time. Indeed as noted earlier, the distinctive feature of the Irish legal regime is that liability generally cannot attach to failure to maintain a road, merely positive acts of negligent repair. This must, however, be qualified by accounts of study participants which attribute a high degree of unpredictability to the lower Irish courts which, they feel, often look past the 'nonfeasance defence'. As such, and due to the particularities of their relationship to their insurer, Irish authorities have developed systems of internal claims-handling. Claims-handlers prepare detailed reports in relation to all potential claims. This enables a rapid and informed decision to be taken on the merits of individual claims and whether they might be repudiated outright, or expediently settled. Given the roads-technical nature of the misfeasance / nonfeasance dichotomy, it is not particularly surprising to find engineers rather than lawyers performing key decision-making functions with regards to liability. Indeed, on the rare occasions that road claims reach judicial hearing, it often the evidence of the authority engineer versus a plaintiff's expert witness that will prove decisive. A key tactic is to identify a third party who negligently interfered with a road or footway, whether a utility or contractor, to whom liability can be assigned. Locus inspections that inform the management of claims vary in quality between local authorities, but will generally always include a detailed description and measurement of the alleged defect and a record of all works carried out in the immediate area.

The legal regime in Ireland means that all road repairs need to be of a high quality or else fresh liability risks are introduced. Thus, dangerous defects are first temporarily patched with 'pre-mix(ed tar-macadam)' before a permanent repair is effected, ideally within a number of weeks, although this will often wait until there is a high concentration of patches which would justify the reinstatement or resealing of an entire section. In Boverra, which is a particularly risk-responsive authority, Kevin has developed a particular philosophy on how to deploy road repairs in response to liability risk, informed by his 11 years of experience:

1. Where a defect has arisen due to their potential misfeasance, no matter how ambiguous, repair it immediately. Thus, even if the decision is taken to deny liability and contest a claim, he can testify as to the response of the authority to potential safety hazards.
2. Where a defect has arisen due to 'natural' wear and tear on a section of road or footpath that is otherwise sound, accept its presence and refrain from creating the liability risks that arise: a. in the course of roadworks, b. in terms of creating a potential misfeasance issue.
3. Where a section of road or footpath has a number of defects and reinstatement would be relatively inexpensive, do so. This achieves the Council's operational goals of supplying safe passage of people and traffic in the first instance, and secondly may save them the uncertainty and claims handling costs that would accompany any accidents that might be generated.

Thus, although Boverra's financial risks as a result of potential legal liability may call for them to eschew all repairs except those necessitated by the failure of their own previous works, the Council adopts a wider approach. This suggests that its operational goals and the risk of damage to its reputation are significant drivers of their repair programme, as much if not more so than the prevention of liability irrespective of harm. Boverra exhibits similarities to Sodor in prioritising the repair of defects that are the subject of public complaints, again due to the heightened risk of liability that attaches to defects known to authorities and yet unrepaired.

Insurance

Unlike Sodor, Boverra maintains a zero excess policy, which means that ultimately its insurers pay out on all its claims. Boverra, in comparison to certain low-excess Irish authorities, is nevertheless proactive in its management of liability risks. Its policy premiums are annually charged between a

minimum and maximum level determined by the value of claims paid out. Kevin, moreover, reports that the relationship of trust he has built with various individuals in the insurance company ensures that he is generally afforded the discretion to decide on payouts himself, which only on very rare occasions will be questioned. For this reason, Boverra avoids both the moral hazard and lack of control over claims resolution that might be expected in zero excess authorities. The stagnant nature of the Irish insurance market has prompted this sort of intertwinement between local authority claims staff and insurer. Kevin reports that the authority has investigated raising its excess but concluded that any savings this would generate would be outweighed by the requisite costs of developing the capacity in investment management necessary to self-insure.

Discussion of Boverra County Council

There is considerable complexity to the manner in which Boverra's reputational and financial risks interplay within the sphere of the authority's response to liability risk more generally. Within the Council itself, the significance of liability risk to the organisation is contested. Whilst Kevin, whose job it is to control such risks, prioritises the reduction of harm and the reduction of liability pay outs, his manager the Head of Service for Roads is more circumspect and explains that there are wider factors at play:

'Really, while I think that it is important for the authority to be protected against suits, I think we have quite a bit of defence with the issue of nonfeasance and malfeasance (sic). I am aware that there are a number of accidents, trips and falls and road vehicle damage, and yes we have to defend against these as far as possible, this has to be seen in a wider context... In an ideal world, if a road is generating claims we should be able to target it and make the necessary repairs... I have to see what the number of trips and falls means in the context of the overall budget. How significant is this area in terms of generating losses. Then I have to see if we spend this money... would this lead to a corresponding drop in our insurance costs over time? I have to do this cost-benefit analysis and conclude that maybe it doesn't make sense to do this... It would be very cheap to put in concrete or tar macadam paving in the Townstreet, but there is the aesthetic point to consider. As an engineer I want to be functional, but in my position I have to be aware that we have to maintain an appeal to tourists and of course shoppers. If the residents decide to shop elsewhere then profits fall and we have less business to rate. We have to think about an architectural approach to

laying out town streets, with pleasing pavings, trees and the rest... So we have to approach it from a planning and a civic point of view' (extract from fieldnotes).

Here the head of service articulates the view that liability risk is a minor concern in the overall context of service provision. He maintains that his objective is to provide the best possible service with the resources available to him. The spend required to 'make safe' a key pedestrian thoroughfare without damaging its aesthetic appeal (approximately €1m - €1.8m) would far outstrip the savings generated by the reduction of existing claim payouts (approximately €120,000 - €200,000 per year). The solution of reinstating the street with cheap and safe material is dismissed out of hand as such a move would create significant reputational risk for the Council which strives to be seen as acting for the benefit of local residents and businesses. Ultimately, the existence of the insurance policy effectively severs a connection between direct infrastructural investment and financial savings to the authority. The insurance company has not offered the authority any great financial incentive or pressure to make this investment. The Council is thus maintaining a footpath in manner that is legally and somewhat financially risky, whilst in another sense reputational risk-averse. A compromise solution is being considered in the form of a low-cost adhesive treatment for the paving slabs which Kevin nevertheless believes is far from ideal.

Although lacking the same inter-authority reputational issues that apply to Scottish local authorities, their Irish counterparts do face risks in relation to their local reputation with road users and local politicians. Kevin reports that despite their low risk to persons and vehicles, road potholes represent a major bone of public contention. He intimates that public complaints in relation to such defects form something of a refrain but that his attention is drawn more to the footpath defects that expose the Council to high-cost liability suits. Given the culture of Irish political life, in particular the phenomenon of 'clientelism', local politicians tend to represent strongly to their roads officers in relation to their performance on pothole repairs. Similar pressure applies in Riverton County Council, another Irish authority, where political pressure has diverted resources for pavement repair away from a high-traffic commercial district to residential areas with relatively low footfall but high voter turnout. The Head of the Roads Department within this authority reports his displeasure at this, admitting that he hopes our research might be used to bulwark against equivalent pressure in future. It is clear that local authorities can face competing pressures between the exigencies of responding to competing reputational and legal risks.

Equally there are other occasions in which reputational and financial risks relating to legal liability can be mitigated in tandem. Whilst insurance remains Bovarra's principle response to the financial

risks embodied by legal liability, nuanced issues of reputational risk impact on this arrangement. The outcome of liability claims against Boverra County Council often diffuses through public consciousness, owing to the area's small population and intimate rural culture. Thus failures to pay out on claims considered as meritorious would detract from the Council's public service profile, whilst the appearance of being a 'soft mark' is likely to invite spurious and opportunistic claims. As Boverra is a zero-excess authority, decisions around paying out on liability claims technically reside with its insurer, although, as previously noted, an effective discretion has been delegated to Kevin. He uses this arrangement to bolster the reputation of the authority by making payments to those individuals to whom compensation may not be strictly due under the restrictive Irish tort regime:

'On average, small claims are between 2 and 3 hundred euro each and I'd only pay out maybe 10, 15 or 20% of them. Even then, we'd have a standard denial of liability for most of the small claims. But I might make a settlement payment for some of them, more out of a sense of social conscience, so maybe if it's a pensioner or someone who indicates that they are in difficult financial circumstances, a single mother, or a tourist as well, I feel I have a certain duty to maintain the reputation of Boverra' (extract from fieldnotes).

Where aggregate claim costs inform the calculation of insurance premiums, Kevin mitigates the financial risk of legal liability through actively pursuing the expedient settlement of high value claims without incurring the additional costs associated with litigation. In doing so he takes the opportunity to demonstrate to the claimant that their concerns are being taken seriously by the authority, whilst using the goodwill this generates to drive down the cost of resolving the claim:

'Generally their (the claimants') first reaction to the injury itself, you know they're hurt, there's a bit of anger and whichever. Then there's a general sympathy or an empathy towards the general public at large, "it happened to me and I don't want it happening to anybody else", so the vast majority of people who ring in here want to see a repair affected to the area immediately. We will do it immediately as well... We will do the settlements with them, and the settlements would be on the lower side of just reimbursement of outlays: medical expenses, loss of income, clothes... broken glasses or whichever... you can generally settle for 10 percent or 15 percent of their real value.'

Thus claims-handling and responsive risk control is central to the manner in which Irish local authorities can mitigate financial and reputational losses stemming from road and footpath hazards. Boverra, however, is uniquely positioned to operate thus despite being a zero-excess authority. Kevin reports that his relationship with IPB, the monopolistic public bodies insurer, is rather unique,

built on personal relationships and 11 years of cooperation. By contrast, insurance staff in Riverton County Council have complained that decisions effectively imposed on them by their insurance companies expose them to the risk of further liability claims. Indeed, in all the Irish local authorities studied a clear consensus emerged around the importance of deterring claims as a key aspect of managing liability risks. Given the unpredictable nature of the Irish legal regime, this can be best achieved through promoting the 'message' that the authorities will contest ambiguous claims vigorously. The Riverton claims staff were concerned that the insurance company had settled a borderline claim out of expedience (in order to save the cost of defending the claim in court) and in doing so had "sent out all the wrong signals to people who might be thinking about making a similar claim". Thus in reducing the financial burden of a particular claim (ostensibly reducing the financial damage of legal liability) the fear is that the authority would face greater risks of legal liability in the long term due to this particular kind of reputational damage. Although as noted, claims do not represent a direct financial risk to Irish authorities on account of their insurance arrangements, it is interesting to note that insurance and claims handling staff articulate a sense of personal frustration and loss where they feel that their employers are paying out unnecessarily. Indeed, many such staff proudly report of the reductions in insurance premiums they were able to secure.

What we can see in the analysis of Irish risk control practices is that there are very nuanced principles of legal, financial, and reputational risks at play within the provision of road services and responding to tortious claims generated thereby. Internal claims-handling procedures allow for reputational and financial risks to be managed in tandem, whilst external control of settlement decisions exposes Irish authorities to a reputational risk that may in turn generate greater liability risks.

DISCUSSION AND CONCLUSION

What are we to make of these findings? What can they tell us about the significance of liability risk management to public service delivery? Perhaps the first and most obvious point to note is the fact that in both jurisdictions there was considerable evidence of risk management techniques at play - through the prevention of harm, through the prevention of liability irrespective of harm, and through insurance. However, to return to the starting point of the paper, it is only really the prevention of harm which is capable of counting as the 'excessively risk-averse' behaviour feared by those who lament a compensation culture. And in both countries liability risk management through the prevention of harm was not the central way in which authorities dealt with potential liability.

Rather, the risk management of liability was dominated in both Ireland and Scotland by insurance practices. Indeed, the existence of insurance effectively insulated the Irish and Scottish authorities from being deflected from other priorities and objective by the prospects of liability. Further, it is hard to completely disentangle overlapping aims which combine to underpin the pro-active practices of preventing harm from occurring in the first place. In Scotland, for example, the routines of inspection and the responses to customer complaints seem to have been motivated as much by a concern to maintain the safety and quality of the roads as by a concern to avoid liability through the prevention of harm. This is certainly not the kind of over-anxious public sector behaviour representing a distortion of public service goals.

All this is not to say, of course, that the prospect of liability was entirely irrelevant to how the local authorities operated in Scotland and Ireland. As we saw, there was certainly evidence of defensive practices in terms of steps taken to avoid liability irrespective of harm. Indeed, this is the area where the differences between Ireland and Scotland are particularly clear. The Irish and Scottish authorities moulded their defensive practices to match their respective legal regimes. However, defensive practices by local authorities are fairly common and we should not be too surprised by this. Such practices are certainly not only prompted by the law of public liability. Local authorities can be equally defensive in how they respond to administrative law and the prospect of judicial review, for example (e.g. Halliday, 2004).

But what of the comparative purchase of these findings? Is it not a puzzle that, despite the notable differences between Scotland and Ireland, we can observe the common dominance of insurance as the principal means to respond to liability risks? Why has the existence of an insurance market and an active public sector auditor not prompted more of a difference in the way in which the Scottish authority operates?

To take the question of insurance first, the answer lies in the fact that, although Scotland has a market for insurance, this has not particularly encouraged pro-active practices of avoiding liability through the prevention of harm. Although insurance companies in the tendering process ask for information about how local authorities are seeking to avoid losses to property (e.g. by inquiring about security cameras, burglar alarms and sprinklers) they do not yet ask for similar information in relation to public liability losses. And in Ireland, although IPB's effective monopoly puts it in a position to be a 'risk bully', it does not do so. It certainly offers risk management training. But this is standard in Scotland too. Insurance companies use it as an incentive in the tendering process.

In relation to audit, the fact that Scotland has an active auditor in relation to road maintenance when compared to Ireland make little difference because the KPI relating to liability claims is not respected by the local authority community. It is regarded as meaningless and is effectively ignored. What really matters is how local authorities fare according to the carriageway condition KPI. Notably, the carriageway condition survey does not look at footways where local authorities are most vulnerable to high-value personal injury claims. So there is a 'disconnect' between Scottish local authorities' gaming behaviour in relation to the carriageway condition KPI and their management of liability risks. Until such times as Audit Scotland implements a KPI relating to liability claims which captures the imagination or competitive spirit of Scottish local authorities, liability risk management will remain largely in the peripheral vision of Scottish road managers, much like their Irish counterparts.

REFERENCES

- Association for Public Sector Excellence (2009) *Highways and Winter Maintenance, Summary Report 2007/8*, Manchester: APSE Performance Networks
- Better Regulation Task Force, (2004). *Better Routes to Redress*, London: Cabinet Office.
- Carr, S. (2007). 'They all Want Compensation, but Few Will Take Responsibility for its Effects on Society'. *The Independent*, 22 February 2007 (London).
- Halliday, S. (2004). *Judicial Review and Compliance with Administrative Law*, Oxford: Hart Publishing.
- Hood, C., Scheytt, T., Soin, K. And Sahlin, K. (2009). 'Reputational Risk as a Logic of Organizing in Late Modernity', *Organization Studies*, 30: 301-24.
- Hood, J., and Kelly, S. (1999). 'The Emergence of Public Sector Risk Management: The Case of Local Authorities in Scotland' *Policy Studies* 20:273-283.
- Hood, J. and Young, P. (2003), 'The Risk Management Implications of Outsourcing Claims Management Services in Local Government', *Risk Management*, 5 (3) pp. 7-17
- House of Commons Constitutional Affairs Committee (2006). *Compensation Culture* (3rd Report of Session 2005-6: HC 754-1), London: The Stationary Office
- Kennedy, E. (2007). 'Falls and trips costing councils more than they spend on repairs', *Irish Independent*, March 27th 2007
- Lewis, R, Morris, A. and Oliphant, K (2006) 'Tort Personal Injury Claims Statistics: Is there a compensation culture in the UK?' *Torts Law Journal*, vol. 14, 158-75
- Morriss, A. (2007). 'Spiralling or Stablising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury', *Modern Law Review* 70:349-378.
- McMahon, B. & Binchy, W. (2000), *Irish Law of Torts*, (3rd Edition) Dublin: Butterworths