



## Potholes and Other Roadway Issues

Every municipality knows that frost heaves and potholes cause frustration and inconvenience to motorists, and comprises a large part of a highway department's workload and has the obvious safety concerns for employees who must work in an active roadway to patch and repair. Of equal concern should be the department's *Incident Weather Policy* for addressing these defects. Having and following such a policy can help to ensure that certain municipal immunities will apply.

There are five key elements in determining whether a municipality is held responsible for damage to vehicles caused by potholes and other defects on town-owned roadways:

1. If the city or town has an Incident Weather Policy and/or a Preventive Practices Policy;
2. Whether the municipality is aware of or has received "notice" of an "insufficiency" (road defect) that may cause damage or injury;
3. Whether the municipality took reasonable and timely action to warn of and/or remedy an insufficiency;
4. Whether the municipality was negligent or could otherwise be held responsible for damage caused by the insufficiency; and
5. Whether the driver was operating properly.

Under New Hampshire law (RSA 231:90-92-a), municipalities shall not be held liable for property damage arising out of road insufficiencies unless the municipality is negligent in carrying out its duties.

If you do not have a Policy, which is critical in determining whether the municipality has liability for a road defect claim, you should know that sample policies are available by calling your Primex<sup>3</sup> Risk Management Services Consultant.

The key element to any policy is a procedure for addressing public notices or the municipality's awareness of a defect. Under RSA 231.92 a municipality is deemed to be aware of an insufficiency if:

1. Written notice of an insufficiency is received;
2. Observation of an insufficiency by a selectman, mayor or other chief executive official, town clerk, on-duty firefighters, police officers, or public works or highway officials;
3. The road insufficiency was created by an intentional act.

Item #2 means that policies and procedures need to be communicated beyond the highway department to your elected and appointed officials and police and fire departments. A procedure should be established in police and fire departments, including dispatch centers, for properly and promptly communicating information about the defect to the person responsible for handling responses to these defects.

Your Policy should outline the actions to be taken by department employees upon receipt of a motorist's written *Notice of Insufficiency*. This policy should outline the different response requirements for a formal *Notice of Insufficiency* and for a motorist's report of damage. With a *Notice of Insufficiency* it is critical that the policy be followed and corrective actions documented to show they were conducted within the specified 72-hour time frame. Please note that the Statute does not require the department to immediately repair the road defect. The "Reasonable and Timely" provision calls for the municipality to investigate, and if necessary, take action such as posting a sign warning motorists of the defect within 72 hours of the report. Naturally, repair of the pothole or other insufficiency should be made as soon as practicable.

Development or revision of your Policy should include involvement of your police department which can provide insight as to operator compliance with road regulations and prudent driver operation. If practical, police should investigate written documentation to determine if the driver was operating at posted speeds and in a reasonable and prudent manner for the conditions (state of repair of the road) and any warning signs if applicable. When possible, police reports should be part of the department's documentation.

Employees who answer the phones or deal with the public should be trained in effective communication with disgruntled citizens. They should be trained to explain that the town/city may not be responsible for damage to vehicles resulting from a pothole or other road defect. If the citizen insists, the employee should request a written report which will be taken under advisement, but there should be no indication that any payment will be made. It is also important that supervisors or other employees who may cover for lunches and days off be aware of and able to present a consistent message to the public. Some municipalities have found it useful to have printed copies of the RSA available as a handout. In many cases, the disgruntled citizen will be satisfied once they understand the limited circumstances under which a municipality may be held responsible for road defects. Many issues may be resolved without further difficulties.

If the motorist persists, then all documentation pertaining to the incident should be forwarded to the Primex<sup>3</sup> Claims Department who will provide a defense referencing the fact that there was a policy in place, that a proper notice procedure was followed, reasonable and timely action was taken, and the provisions of the Statute met. Obviously the quality of your documentation plays a key part in the resolution of any claim.

Please contact your Primex<sup>3</sup> Risk Management Services consultant if you have any questions.

## SAMPLE LANGUAGE

We are sorry to learn of the damage to your vehicle. The Town/City takes great care to maintain its roads. The NH Statute provides towns/cities with immunity from these types of claims; therefore, I regret to inform you that your damages will not be paid.

- 231:90 Duty of Town After Notice of Insufficiency
- 231:91 Municipality to Act; Liability
- 231:92 Liability of Municipalities; Standard of Care