

Court of Appeal decides: a Highway Authority that does not evaluate a report of a pothole until the next working day cannot show that they took reasonable care: *Crawley v. Barnsley MBC* [2017] EWCA Civ 36

Matthew White, Barrister, St John's Chambers

Published on 3rd February 2017

That's right... the highway authority's system was to inspect reported defects the next working day. Not good enough (in the circumstances), according to the Court of Appeal, writes Matthew White, member of our personal injury team.



THE FACTS

At 4.20pm on Friday 27/1/12 a member of the public reported a carriageway pothole to the defendant highway authority ("D").

D's system was to look at reported defects the next working day unless they were reported by the emergency services and were in a sensitive location (in which event an emergency standby team would go out).

On the evening of the day after the report (i.e. on Saturday 28/1/12) C was out jogging when he fell in the pothole and was injured.

The court found the defect to be dangerous (i.e. a breach of Highways Act 1980 s.41).

D, having been notified of the defect on Friday afternoon, had not inspected it yet. It was inspected on the next working day (i.e. Monday – after the accident happened).

THE FIRST INSTANCE DECISION AND FIRST APPEAL

The District Judge dismissed the claim, finding that D's system was reasonable (i.e. the s.58 defence was made out). The Circuit Judge allowed an appeal. His reasoning was that complaints received on Monday to Thursday were considered by a highway inspector the next day. If a complaint was made on a Friday there was a delay of at least 2 days (more if a bank holiday). The only justification for that would be lack of resources. Lack of resources is irrelevant (*Wilkinson v. City of York Council* [2011] EWCA Civ 207). D ought to have trained staff taking calls

reporting defects to evaluate the level of danger, or all ought to have been forwarded to an "on-call" inspector.

THE COURT OF APPEAL

D appealed. The Court of Appeal were divided. Jackson LJ would have found for the highway authority. Briggs and Irwin LJ found for C.

What the court agreed on

All 3 judges in the Court of Appeal agreed that lack of resources is not a defence following Wilkinson (the contrary does not appear to have been argued). That said, it was held that the fact that most people do not work at the weekend is a feature which "goes beyond mere resources" and is relevant to "all the circumstances" (which must be considered under s.58).

The dissenting view

Jackson LJ's view was that the system of inspection on the next working day (or immediately in a case of exceptional urgency) was reasonable.

The majority view

Briggs LJ (with whom Irwin LJ agreed) held that the system operated, which made no evaluation of defects reported out of hours (which might be serious), was insufficient for the highway authority to show that it had taken reasonable care.

What this case does not say

The decision was not that a highway authority must respond to all reported defects by inspecting immediately (even out of hours). Rather the decision was that in circumstances in which the highway authority usually inspected the next day, it was not reasonable to leave reported defects over the weekend with no evaluation of how serious they were.

Points for highway authorities

It will be interesting to see how highway authorities deal with this. Some might take the view that accidents happening between report of a defect and its examination by an inspector are sufficiently rare that they don't need to do anything. I would worry about that in relation to false claims (albeit that it would take a fraudster rather more sophisticated than the usual to take advantage of such lacuna in a highway authority's process). Perhaps highway authorities will have to train staff to make an assessment of danger over the phone. Good luck with that! I would expect the common experience of highway authorities to be that most defects are reported by members of the public to be "huge", and "obviously very dangerous". Perhaps call handlers will need to be trained to assess the accuracy of the report and/or to test it with probing questions.

Matthew regularly litigates highway claims, usually for various highway authorities. Notable cases include:-

- *Devon County Council v TR* [2013] EWCA Civ 418; [2013] PIQR P19 (Court of Appeal determined that codes of practice for highway maintenance should not be treated as mandatory standards which had to be adhered to unless there was a positive reason for departure). For a more detailed consideration of the case, click [here](#).
- *Young v Merthyr Tydfil CBC* [2009] PIQR P23 (no duty of care in relation to a highway which is not a highway maintainable at public expense).
- *Millard v Walsall MBC*, unreported, 30/6/14 (despite *Wilkinson v York* a highway authority was entitled to suspend routine inspections on budgetary grounds in unusual circumstances (such as an extreme weather event) For a detailed consideration of the case, click [here](#).

St John's Chambers

Matthew.White@stjohnschambers.co.uk

3rd February 2017