Devon County Council v TR
[2013] EWCA Civ 418

St John's CHAMBERS

Christopher Sharp QC and Matthew White, members of St John's Chambers Personal Injury Practice Group have represented the Respondent in the Court of Appeal in a case that will make important reading for anyone litigating road traffic accidents or claims concerning accidents on the highway.

Key points

(1) Courts should not treat the highway maintenance Codes of Practice as setting a mandatory standard which has to be adhered to unless a positive reason for departure is shown.
(2) On the facts of this case "inadvertence" leading to a driver's error "which many might make" led to a finding of 50% contributory negligence.

Background

Christopher and Matthew represented TR. TR was driving his Land Rover on the C25 in Devon. He overtook a slow-moving car and as he was doing so his offside wheels dropped into a long defect/rut or series of potholes at the edge of the carriageway. TR attempted to steer left out of the defect, but lost control of the vehicle, swerving across the road and colliding with trees on his nearside. One of his passengers (AC) was rendered tetraplegic and suffered traumatic amputation of an arm. Another passenger suffered brain injuries and multiple skeletal injuries. TR settled the passengers' claims for £4,250,000 in lump sums with periodical payments of £275,000 (index linked) for life to AC.

TR claimed an indemnity/ contribution from the highway authority on the basis that he would not have lost control of his vehicle but for the defect.

After a 5 day trial on liability, Slade J held that the defect which caused the accident was dangerous, that the highway authority could not make out its statutory defence (having inspected less frequently than *Code of Practice* recommendations without proper justification), and that TR was not contributorily negligent in the accident.

The Court of Appeal upheld the decision of Slade J in respect of dangerousness. They also upheld the decision that the highway authority could not make out its statutory defence (albeit giving some solace to highway authorities as they did so). They substituted a finding of 50% contributory negligence.

Dangerous defect?

The highway authority contended that the defect was not dangerous where TR entered it. It sought to draw an analogy with **James v Preseli Pembrokeshire District Council** [1993] PIQR P114, contending that it was necessary to show that the defect that caused the accident was dangerous in the Highways Act 1980 s.41 sense at the point of entry into the defect. The Court of Appeal dismissed this element of the appeal finding that James v. Preseli was not analogous at all. Rather after TR entered the rut he promptly got to the worst part of it which was (on any view) dangerous. The defect as a whole caused loss of control.

In essence this lends support to Slade J's decision that one has to consider defects differently when dealing with a vehicle (as against a pedestrian) suffering misfortune by reason of a highway defect.

Statutory defence under s.58 of the Highways Act 1980

The highway authority had a system of periodic inspection of highways which followed its own classification, but it was common ground that the relevant road was a category "3b" road as set out in the 2005 *Code of Practice for Highway Maintenance Management* ("CoP"). The CoP recommends inspection of such roads every month. The highway authority inspected every 6 months.

Devon had carried out no formal risk assessment in respect of their departure from CoP recommendations. Slade J held that in those circumstances "... *the evidence advanced in this case falls far short of establishing that Devon considered all relevant matters in deciding on a 6 monthly rather than 1 monthly regime of inspection...*"

At paragraph 20, in a judgment with which the others agreed, Hughes LJ (as he then was) said:-

> "*In this approach, the judge fell into error. Despite the recognition in the opening words 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"...:*

> *"1.3.1 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.*
> *1.3.2 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."*

The key statement is that at the outset. The code does not set out mandatory rules. It is evidence of good practice. Authorities must exercise their own judgment. The second sentence of 1.3.1 is clearly simply an example of the kind of consideration which might be relevant. When it comes to the specific issue of inspection intervals, other considerations will clearly include traffic use, experience, the frequency of adverse incidents and the like. The advice in 1.3.2, to make explicit reasons for adopting different policies is clearly wise, given the exposure of highway authorities to the possibility of litigation. But it is advice, not a rule. ***It cannot amount to a rule that it will of itself be a want of reasonable care to adopt a different inspection interval unless some particular process of reasoning is passed through, and set out somewhere in writing; if it did, that also would be to make the code a mandatory instrument.*** *The judge's approach amounted to treating paragraph 1.3.2 as a mandatory rule of procedure, justifying a procedural and/or reasons challenge if it were not complied with, and then the inspection interval as a prescribed rule in the absence of demonstrated reasons for departure."* (bold added).

This decision of the Court of Appeal should come as significant solace to highway authorities. Since Wilkinson v. City of York [2011] EWCA Civ 207 there has been a perception (albeit a wrong perception in the author's view) that any departure from CoP recommendations means that a highway authority cannot make out its s.58 defence. That is not what the Court of Appeal determined in Wilkinson. Rather it determined that on the facts of that case a Deputy District Judge had been entitled to conclude that annual inspection of the relevant road was insufficient, having regard to CoP guidance (per Toulson LJ at para 32).

The Court of Appeal in Devon v. TR has made clear that the CoP is not mandatory guidance, any departure from which prevents a highway authority proving a s.58 defence.

What the Court of Appeal in Devon v. TR has *not* said, however, is that a first instance judge is not entitled to have regard to departures from the CoP when considering the issue of whether or not a highway authority can prove the taking of reasonable care to make out a s.58 defence. One would have thought that that will still be a very relevant consideration. What is clear, however, is that an unjustified departure from the CoP does not *necessarily* mean that a s.58 defence cannot be made out.

Highway authorities will want to know what other highway authorities are doing. In Devon v. TR there was evidence that a number of other highway authorities inspected this type of road 6-monthly. Hughes LJ said "*At the very least, the evidence of the practice of other authorities pointed towards a respectably held view, amongst professionals charged with highways maintenance, that six monthly inspections of local distributor roads were a reasonable response to the duty to maintain. On the well understood Bolam principle (Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582) that evidence went towards showing that Devon had exercised reasonable care in its general policy for such roads.*"

The Court of Appeal held that the trial judge was wrong in finding "*that Devon's adoption of an inspection frequency of six months for local distributor roads generally was a want of reasonable care*" (per Hughes LJ at paragraph 25; note in passing that that arguably misstates the burden of proof since a claimant does not have to prove a want of reasonable care, rather a highway authority has to prove that they had taken reasonable care).

The Court of Appeal nonetheless upheld the finding that Devon could not make out a s.58 defence on the facts of this case. The road on which the accident happened (as against local distributor roads generally) was held to require more frequent inspection by reason of the fact that defects appeared on it regularly, and that finding was open to the judge.

Driver's fault

There was no suggestion that TR was driving too fast (he was found to be driving at 45mph on a 60mph limit road). Whilst Devon criticised TR for over-reaction when he found himself in difficulty (i.e. steering too hard to get out of the rut) the trial judge did not find him to be at fault for that and the Court of Appeal considered that she was entitled to reach that view.

That left the question of fault on TR's part for getting into the rut in the first place. The Court of Appeal held that even if the rut had water in it, it was there to be seen. It was said that "*It can only have been inadvertence on the part of TR that he did not see the defect in the road and avoid it... Although the error may have been one which many might make, it amounted to a significant failure to keep a proper lookout and to manage the car correctly; it had terrible consequences. In my view the only proper finding was that there was contributory negligence to the extent of 50%.*" (per Hughes LJ at para 31).

So "*inadvertence*" leading to an error "*which many might make*" translated on the facts to a finding of 50% contributory negligence.

Matthew White ©
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Matthew.white@stjohnschambers.co.uk
St John's Chambers