



Highways Act Claims: Establishing and Escaping Liability

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Published on 9th October 2015

1. Introduction

1.1. This talk is aimed primarily at claimant lawyers dealing with claims against Highways Authorities under the Highways Act 1980, for injuries caused by a failure to repair highways maintainable at public expense. It is designed to be a practical guide to preparing such cases properly.

1.2. In order to prove a claim under the Highways Act 1980, you will ask:

- i. Did the Claimant trip over a defect and hurt themselves?
- ii. Was that defect in the highway?
- iii. Was that defect a danger to the pedestrian or vehicular traffic likely to use that part of the highway?
- iv. Did the Council do what it reasonably could to prevent the danger?

1.3. This talk focuses on i, iii and iv above. It ignores ii, at least in part. In the vast majority of cases there is no real dispute that the locus in question is indeed a highway maintainable at public expense, but that certainly can be a thorny issue and it is a topic in itself. You need look no further than Matthew White's *"Ways, Highways and Highways Maintainable at Public Expense – The Differences and Defences"* downloadable from Chambers' website.

2. Question i) Did the Claimant fall over a defect and hurt themselves?

2.1. The Claimant:

- i. Let them speak! Prove them yourselves.
- ii. The importance of numerous (in)consistent accounts.
- iii. General credibility (occupation/family/claims history);
- iv. Mechanism – slip/trip/fall/stumble/rolled ankle etc...
- v. "I'm not sure" doesn't matter and can be better!
- vi. But can they identify the precise defect?

- a. Not enough to say pavement as a whole poor: *James and Thomas v Preseli Pembrokeshire DC [1993]*;
- b. Although Claimant did succeed in *Hartley v Burnley BC [1996]* CL 5670 where the pavement was “generally scruffy to the point of dangerousness”;
- c. On a road it may be different: *AC & DC & TR v Devon County Council [2013] EWCA 418*: (See MW and CSQC case note available on Chambers’ website).
- d. Why are they sure? How can they be sure?
 - I. Landmarks?
 - II. Regular route?
 - III. Did they look down then? If not, when? Let them speak!
 - IV. Did they take photos then? If not, when?

2.2. Are there witnesses?

- i. Are they independent? If not, are they credible? “I was told my family couldn’t be witnesses as they aren’t independent”;
- ii. Neighbours/Local businesses – employees and visitors.

2.3. Contemporaneous accounts:

- i. Was it reported to the Council?
- ii. Family members/friends/work?
- iii. Medical notes. Get them at the outset!
 - a. Are they (in)consistent?
 - b. Consider writing to the doctor: did they take notes at all? Do they have a drop-down list of options?
 - c. History of falls? “Unsteady on feet” etc...
 - d. Alcohol++?
 - e. When did they attend? When symptoms were ‘severe’? Only after spoke to solicitor?

2.4. The Letter of Claim:

- i. Be vague rather than wrong! The Manchester Motorcycle case;
- ii. Remember pre-amble to Pre-Action Protocols;
- iii. Delaying the letter of claim (and taking photos periodically!).

2.5. The Medical Report and Particulars of Claim:

- i. Check with the Claimant;
- ii. CHECK WITH THE CLAIMANT.
- iii.

3. Question ii) Was it a defect in the highway?

3.1. A highway is....

- i. "...a way over which there exists a public right of passage": *Ex Parte Lewis (1888) 21 QBD 191*
- ii. "The whole or part of a highway": *s.328 Highways Act 1980*

3.2. Beware!

- i. *Ley v Devon County Council [2007] QBD;*
- ii. *McGeown v Northern Ireland Housing Executive [1995] a AC 233;*
- iii. *Gulliksen v Pembrokeshire County Council [2002] EWCA Civ 968.*
- iv. Ask for help (and see MW's article!)

3.3. In the highway...

- i. It might be a grass verge: *West Sussex County Council v Russell [2010] EWCA Civ 71;*
- ii. Not metalwork, bollards etc...
- iii. *Kim Ali v City of Bradford MDC [2010] EWCA Civ 1252*: Mud, plant growth and debris not actionable.
- iv. *Valentine v TFL [2010] EWCA Civ 1358*: Grit and other debris in the highway is not covered by section 41, but there might be duty in negligence.
- v. The Misfeasance/Non-feasance Distinction – not always easy! Very hard (almost impossible) to argue that failing to exercise a power is misfeasance (non-feasance in disguise), although *Hanbury on Defective Premises* suggests it is possible.
- vi. Powers v Duties:
 - a. *Stovin v Wise [1996] All ER 801*: No duty to improve sight lines at a junction (but remember paragraph at end – WsM case);
 - b. *Gorringe v Calderdale MBC [2004] 2 All ER 326*: No duty to paint road markings warning to slow down;
 - c. *Thompson v Hampshire County Council [2004] EWCA Civ 2016*: HA not responsible for highway's layout under HA1980;
 - d. *Spencer v Wirral MBC (2008)*: Protruding tree roots layout not disrepair;
 - e. *Yetkin v London Borough of Newham [2010] EWCA Civ 776*: LJ Smith explains Gorringe and explains that its ok to plant shrubs as long as they aren't too big (misfeasance);
 - f. *McCabe v Cheshire West & Chester Council and BAM Nuttall Ltd (2014)*: No duty to maintain street-lights, discretionary power. Only liable if performed some positive act that created a danger.

3.4. Identifying the right Highway Authority:

- i. Secretary of State for Transport if motorway or major trunk road;
- ii. The County council, Unitary Authority or Metropolitan District (in England);
- iii. The County Council or County Borough Council (in Wales);
- iv. In Greater London, the London Borough Council or Common Council (in City of London). Sometimes TfL;
- v. Just ask – each HA has a register of roads its responsible for (which may not be complete!).

3.5. Involving Agents & Utility Companies:

- i. You don't have to – the Highways Act duty is non-delegable:
 - a. *Reid v BT* [1987]: utilities always rely on Highway Authority inspections and are therefore fixed with same knowledge. HA missed dangerous defect and BT thus liable to Claimant.
 - b. *Nolan v Merseyside County Council and North West Water Authority* 15th July 1982 CA: both equally liable, 50/50 correct apportionment.
- ii. But you may want to anyway:
 - a. *Wells v Metropolitan Water Board* [1937] 4 All ER 639;
 - b. *Pitman v Southern Electricity Board* [1978] 3 All ER 901;

4. Question iii) Was that defect a danger to the pedestrian or vehicular traffic likely to use that part of the highway?

4.1. The Duty of Care:

- i. Section 41 Highways Act 1980;

4.2. The claimant must prove: *Mills v Barnsley MBC* [1992] PIQR P291:

- i. Highway dangerous for the ordinary traffic that passes over it (be that pedestrians, cyclists, cars, the elderly or infirm etc...)
- ii. Dangerous condition was caused by failure to maintain or repair (easy – unless it's a hazard caused by some perfectly maintained but terribly designed patch of road, it will be)
- iii. Injury resulted from that failure (i.e. Claimant fell over it).

4.3. The expected standard of repair?

- i. "The Liverpool Cases":
 - a. *Griffiths* [1966] 2 All ER 1015: ½ inch rocking slab was dangerous;
 - b. *Meggs* [1968] 1 All ER 1137: ¾ inch not dangerous;

- c. *Little* [1968] 2 All ER 343: ½ inch triangular depression 3" long not dangerous: "not expected to be a bowling green";
 - ii. Newer cases:
 - a. *Mills v Barnsley MBC* [1992] PIQR P291: dangerous to apply a rule of thumb. 1¼ inch deep hole just 2 inches wide (so only danger to high-heels) not dangerous;
 - b. *Lawrence v Kent CC* [2012]: 15mm protruding manhole not dangerous.
 - c. *James v Preseli* [1993] PIQR P114: 25mm trip "not in need of urgent repair"
 - iii. Typically about an inch on pavement, two inches on road.
 - iv. But context is everything:
 - a. *Cenet v Wirral MBC* [2008] EWHC 1407 (QB): carriageway is a lower standard than pavement unless there is a good reason to treat it the same (natural crossing points?);
 - b. *Jones v Rhondda* [2008] EWCA Civ 1497: "the ordinary traffic of the neighbourhood";
 - c. What to look for:
 - I. Position on the highway (at edge, natural crossing point, in middle?)
 - II. What type of road is it? Country lane v city centre
 - III. Nearby facilities: OAP homes, hospitals, schools.
 - IV. How wide is it? i.e. 2 inches over 2 ft v 2 inches over 5cm.
 - v. Whose opinion counts?
 - a. *Dalton v Nottingham CC* [2011] EWCA Civ 776;
 - b. *Lawrence v Kent CC* [2012] EWCA Civ 493;
 - c. Fact it's over HA intervention criteria is not decisive (*James v Preseli*) as may have very good system, but usually relevant consideration.
 - d. Subsequent repairs are not decisive (*Ley v Devon CC*) as sensible occupier may repair to be extra safe, but again usually relevant.

4.4. Proving the defect:

- i. Photos and measurements:
 - a. Both ends of spirit-measure visible and flush with floor either side;
 - b. Shots taken low so not emphasising depth;
 - c. Good quality easy with camera phones;
 - d. For rocking flags or bricks take pictures showing full range of movement;
 - e. Get wide shots of defect in context;

- f. Don't put a ruler in a puddle!
- g. Photos taken ASAP and regular intervals thereafter. Months later is no good – different defect and calls into question whether Claimant knows where fell;
- h. Claimant should be there!
- ii. Video better if 'mobile' defect – camera phones;
- iii. Witness evidence can prove dangerousness on its own:
 - a. Measured wrong corner but "my foot was wet";
 - b. Rocking bricks in Manchester – "not as bad as it was" and clear something had been done as weeds gone!
- iv. Did the Council inspect and repair soon after?
- v. Complaints and previous accidents;
- vi. Local residents.

5. Question iv) Did the defendant do what it reasonably could to prevent the danger?

5.1. Section 58 Highways Act 1980: "took such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic"

- i. It is a DEFENCE, it is for the DEFENDANT to prove.
- ii. If there is a flaw in the system, they cannot make out the Defence: Lord Diplock in *Griffiths v Liverpool Corporation [1967] 1 QB 374*: "unless the Highway Authority proves that it did take reasonable care the statutory defence...is not available to it at all. Nor is it a defence for the highway authority to show that even if they had taken all reasonable care this might not have prevented the danger which caused the injury";
- iii. Sections 41 and 58 make no mention of budgetary considerations (in contrast with Section 41A): *Wilkinson v City of York Council [2011] EWCA Civ 207*: budgetary considerations are not good grounds for deviating from code of practice but beware:
- iv. *Jones v Rhondda Cynon Taf CBC [2008] EWCA Civ 1497*: while s41 is an absolute duty to maintain, that is a duty to maintain so the highway is reasonably passable for ordinary traffic of neighbourhood. This was a footpath that led nowhere, nobody was likely to use it, at least not without care, so a 0.6m hole was not a 'danger';
- v. *Karina Williams v Knowsley MBC*: infrequent inspections days prior to accident;
- vi. *Millard v Walsall MBC [2014]* (CC first instance and MW appeal) the recent extreme weather and how the HA reacted to them to adapt

its regime were relevant to whether it had established its defence under the HA – as long as its given careful thought it might be justifiable. **NB: It will require good evidence of careful thought!**

5.2. Inspection:

- i. Regular enough? Codes of Practice for Inspections: not binding but good evidence – need good reason to depart – judge still decides what necessary: *Devon County Council v TR (2013)*
- ii. Taken into account useage/location properly?
- iii. Disclosure of documents – pre-action disclosure – what do they mean?
- iv. Quality of inspection – walked or driven? *Day v Suffolk CC [2007]* EWCA Civ 1436 criticism of driven inspections (25mph by lone inspector insufficient).
- v. Criteria adopted by inspector – is it too rigid? Often can't know until XX. Do they, for example, note any defects below the intervention level for monitoring?
- vi. Size of defect works both ways, neither of which appealable:
 - a. "So big must have been present on inspection": *Lloyds TSB v Leeds CC [2007]*
 - b. "So big inspector wouldn't have missed it": *Day v Suffolk CC [2007]* EWCA 1436
- vii. Keep a file of all Codes of Practice/Policy Documents: cf with other councils. The Essex example.
- viii. Nature and cause of defect – might it have rapidly deteriorated? Inspectors invariably try it on. Depends on judge whether accept that (not experts, not independent, but easy to say a lot of experience and honest and credible);
- ix. Witnesses: was the defect there before pre-accident inspection? Why would they remember? Moved house, Birthday etc? Was it dangerous then? Remember people are terrible at guessing heights, dates etc, so tangible comparisons/events so important – but ordinary people can give an opinion on danger!
- x. Google! Time machine. If no date, could find houses for sale in photo and do some detective work on Zoopla.

5.3. Repair:

- i. Was the repair performed quickly enough given the nature of the defect? Either before the accident (if alleging should have been repaired beforehand) or after (evidence of inferior system)?

- ii. Was the defect the subject of a previous substandard repair (in which case negligent misfeasance rather than non-feasance)?
- iii. Temporary repairs (s.58 criteria);
- iv. Should the defect have been picked up on other visits? i.e. repairing nearby potholes in between inspections, improvements to the road etc... *Simson v London Borough of Islington (2013)* serious defects on a residential road should have triggered further investigations which would have discovered the defect in question

5.4. Records:

- i. Are there missing records? Complaints etc... If so, how can show was inspected and what was found? How know defect wasn't listed for repair and then record lost? How do you know nothing else crucial is missing?
- ii. Are the records clear enough? Repair team might be confused?

6. Contributory negligence:

6.1. Some case law:

- i. Pedestrians are not expected to look down at the ground at every step they take: *Stowell v Railway Executive (1949) 2 All ER 193, at 196.*
- ii. 1/3 responsibility attributed to the Claimant in *Susan Ellis v Bristol City Council (2007) EWCA Civ 685*, where the Claimant worked in a care home, knew most of the residents were incontinent, knew of a sign in the staff room warning of this exact danger and could have kept a special lookout in the areas where she knew there was an increased risk of hazard, but still slipped on a patch of urine caused by one of the residents;
- iii. 40% deduction in the case of *Wells v Mutchmeats and Another (unreported)*, where a meat inspector stepped into a tray of disinfectant in an abattoir during the foot-and-mouth outbreak. This 'was not a standard tripping case'. The Claimant had been specifically tasked with checking that the amount of disinfectant in the trays was appropriate and should have known the trays were liable to move if he stepped on them;
- iv. *Burnside v Emerson [1968]*: speeding motorist 2/3rds liable;
- v. *Day v Suffolk CC [2007]*: driver 40% liable when drove into large pothole in snowy conditions, as was aware of poor state of road;
- vi. Blind Claimants: *Haley v London Electricity Board [1964] 3 All ER 185* and the Equality Act 2010.

7. Snow & Ice

7.1. The changing law:

- i. *Haydon v Kent County Council [1978] 2 All ER 97;*
- ii. *Goodes v East Sussex County Council [2000] 3 All ER 603:* no liability owed by HA for snow and ice on highway.
- iii. Section 41A Highways Act 1980 (in 2003): "to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice"

7.2. Some cases:

- i. *Pace v Swansea City and County Council [2007]* detailed working example of what is reasonably practicable: council had an adequate and proper policy for salting the roads and the policy had been implemented at the time.
- ii. *Rockliffe v Liverpool City Council (2013):* policy to only treat footpaths affected by snow (and therefore leaving a path covered in ice) was breach of duty.
- iii. *Yew v Gloucester County Council (2013):* council entitled to rely on finite resources and need to prioritise car users in failing to salt or grit footpath.

7.3. Highways Authority will need to produce:

- i. Copy of the Council's winter weather policy;
- ii. Proper explanation as to the prioritisation that was given to the accident location;
- iii. Evidence of systems in place for early warning of impending inclement weather (ICELERT, MET Office);
- iv. Evidence of gritting regime employed;
- v. Broader evidence of number of roads within authority, number of gritting vehicles and grit available;
- vi. Beware blanket policies (e.g. that they will not inspect footways at all due to policy reasons).

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9th October 2014

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