

For the purposes of a defence under Section 58 the Court shall have regard to the following matters:

- the character of the highway, and the traffic which was reasonably expected to use it;
- the standard of maintenance appropriate for a highway of that character and used by such traffic;

The evidence required to establish that a system of inspection, maintenance and repair is adequate needs to include details of the classification of the highways, frequencies of inspection of each classification of highway, the criteria for noting defects (intervention levels) and the prioritisation of repairs. As records are vital for these types of cases their careful completion and safe keeping is vital.

“ The evidence required to establish that a system of inspection, maintenance and repair is adequate needs to include details of the classification of the highways... ”

- the state of repair in which a reasonable person would have expected to find the highway;
- whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway.
- where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed.

It is equally important to adduce witness evidence dealing with the frequency and system of inspections. If an authority is able to prove that it inspected a highway at reasonable intervals, repaired any defects which were in excess of the intervention levels which may have been noted and responded promptly and adequately to any complaints in between those inspections, a Section 58 Defence should be available in the event that the Court accepts that the relevant defect has not been “missed” at any pre accident inspection. Hence, a clear and documented system is imperative when maintaining such a defence.

It is imperative that any Section 58 Defence is supported with documentary evidence. For example, inspection records, works records, policy documentation and details of complaints. In the case of **Pridham v Hemel Hempstead Corporation** (1970) LGR 523 it was held that the court should look at whether or not there had been a careful consideration and adoption of a system of maintenance and inspection which includes the checking of a complaints book.

Julia Drummond
G.Inst.L.Ex
DDI: 0191 233 9787
Email: julia.drummond@crutes.co.uk



Crutes LLP

Offices at:

Carlisle

13 Castle Street
Carlisle
CA3 8SY

T: 01228 525 195
F: 01228 552 620

Newcastle

Great North House
Sandyford Road
Newcastle upon Tyne
NE1 8ND

T: 0191 233 9700
F: 0191 233 9701

Teesside

Crutes House
University Boulevard
Teesdale Park
Stockton on Tees
TS17 6EN

T: 01642 623 400
F: 01642 623 401

www.crutes.co.uk
info@crutes.co.uk



INVESTOR IN PEOPLE



This newsletter is for general information only. The contents are based on UK law and should not be relied on without specific legal advice.

Details correct at the time of going to print. February 2010.

publicity

crutes law firm

PUBLIC SERVICES NEWSLETTER ISSUE 1 2010

SERVICES: for Public Bodies, Local Authorities and Health Service Providers

Don't Slip Up on Winter Maintenance Claims

...it's worth looking **now** at prudent steps to take to see off these claims at the earliest stage...

“Let It Snow, Let It Snow, Let It Snow” and so sang Claimant's solicitors across the UK. Following the coldest December and January since 1981/82 many Authorities are already seeing claims being presented to them for injuries sustained following slips on the ice. With local and national news bulletins focusing on the weather conditions and reports about the alleged shortage of salt it is perhaps no wonder that many people feel that authorities have not done enough to deal with the recent conditions and ready to point the finger of responsibility. So it's worth looking now at prudent steps to take to see off these claims at the earliest stage.

The responsibility of the local authority can be found in s41 of the Highways Act 1980 as amended by the Railways and Transport Safety Act 2003. Thus s41 requires the following:

(1) *The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty,*

“ Let It Snow, Let It Snow, Let It Snow” and so sang Claimant's solicitors across the UK.... ”

subject to sub-section (2) and (4) below, to maintain the highway.

(1A) *In particular, a highway authority are under a duty to ensure, so far as is reasonably*

practicable, that safe passage along a highway is not endangered by snow or ice.

As yet there have been no decisions from the appellate court to interpret that duty which



now places an absolute duty on the highway authority, subject to the defence of reasonable practicability.

The prudent authority should therefore be taking steps to gather evidence now as to their

actions throughout the cold snap and have ready a standard bundle of documents to disclose AT PRE ACTION STAGE to support their defence of

reasonable practicability. Do not fall into the trap of simply disclosing the usual highway documents. If the documents relevant to reasonable practicability are not disclosed at pre-action stage, canny

Claimant's solicitors might elect to issue proceedings, await disclosure, discontinue their claim and argue that the costs should be paid by the Defendant for failing to disclose the appropriate documents at pre-action stage. Thus the Claimant's solicitors recover costs out of an otherwise hopeless case.

The following documents are suggested as the bare minimum:

- The Council's winter service policy and plan including salting plans/routes;
- Evidence of assessment of usual priority salting routes;

- Forecast data provided to the authority upon which the authority acted;
- Actual data of weather conditions;
- Evidence of actions taken including records of salt applications, spread rates and routes;
- Any orders from the Secretary of State with regards to reduction of salt spreads /application;
- Any evidence of the re-prioritisation of routes in the light of 6.

It would be advisable to also give confirmation that the winter service policy complies with the recommendations made in “Well-Maintained Highways – Code of Practice for Highway Maintenance Management” published by the Roads Liaison Group.

These documents should form the basis of any defence to claims brought. The reality is so often that it is not the policy itself but the lack of evidence of implementation which cause difficulty and prudent authorities will be looking to gather evidence now of that implementation. Where a number of claims have been intimated for particular roads or locations then it is suggested that statements should be prepared now whilst memories are fresh.

To subscribe to any of Crutes' newsletters, please email newsletters@crutes.co.uk with the sector publication you are interested in:

- For Insurers
- For Public Bodies, Local Authorities and Health Service Providers
- For Families and Individuals
- For Businesses and Professionals

Crutes LLP (trading as Crutes Law Firm and Crutes Mounseys Law Firm) is a limited liability partnership. Registered in England and Wales (registration number OC317170) and regulated by the Solicitors Regulation Authority. Registered office: Great North House, Sandyford Road, Newcastle upon Tyne, NE1 8ND. A list of members is available for inspection at each of our offices.

Sue Howes
Partner
DDI: 01642 623 421
Email: sue.howes@crutes.co.uk

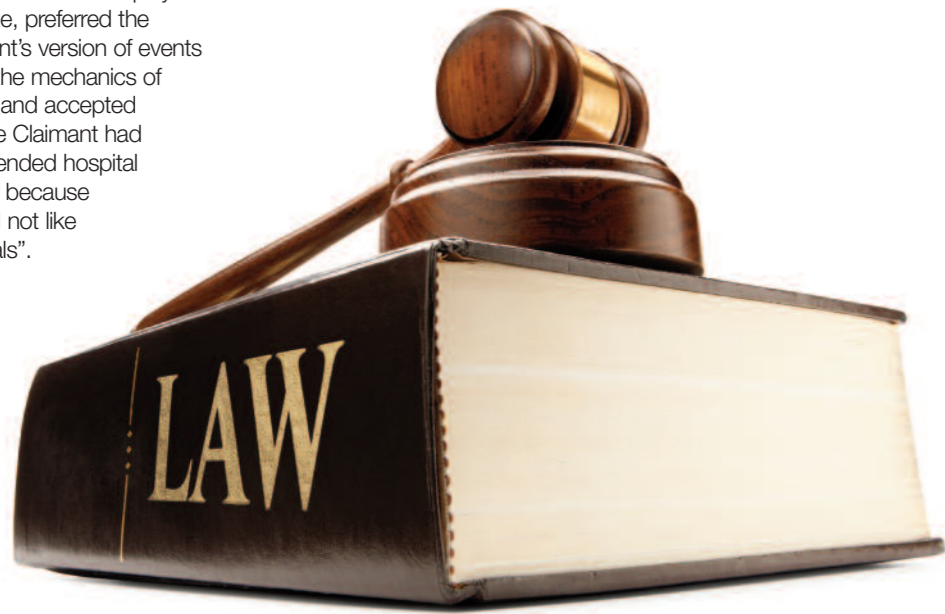


Around the courts

in 90 days...

In the matter of **Forster -v- South Tyneside Council** the infant Claimant brought a claim when he suffered injury as a result of his finger being caught in a door (between the edge and the door frame) at school which closed by means of a mechanical closing system. The Claimant alleged that the mechanism was defective. Such an allegation was denied by the Defendants. Further, the Defendants averred that the incident was essentially a true accident. The Court found that the system of inspection (3 monthly) was adequate and that the door was not defective. The Claimant's case was dismissed.

An example of the difficulties that can be encountered in maintaining a "causation" defence was seen in the case of **Turnbull -v- Newcastle City Council**. The Claimant alleged that he had fallen due to his foot catching the top of a dislodged kerb stone. A medical note entry recorded that the Claimant had fallen over a metal manhole cover. The Claimant's explanation for the entry was that he may have said, when explaining the mechanics of his fall to the attending physician, that "it felt like he fell down a manhole" due to the nature of his fall. The physician who made the above entry was called to give evidence at trial. An allegation of intoxication was also raised and the Claimant questioned as to why he had not attended hospital until 2 days later. The Court found that alcohol had not played an issue, preferred the Claimant's version of events as to the mechanics of the fall and accepted that the Claimant had not attended hospital sooner because "he did not like hospitals".



The Claimant's case was successful. A very favourable decision to the Claimant but an example of the problems Defendants face when maintaining a "causation" defence in the local courts.

In **Hodgson -v- South Tyneside Council** the Claimant alleged he had fallen due to a defective drain cover, located near a crossing point in the road (designated by a path through a grass verge to the road itself). The Claimant gave evidence that he had stepped off the kerb and onto the defective drain itself causing him to fall to the ground. The Defendants maintained a denial of liability on the basis that the protruding edge of the defect was 32mm (below the Defendants intervention level of 40mm for defects in the carriageway but in excess of their intervention level for defects in the footway) and therefore was not a defect which warranted repair. The Claimant argued that defect was dangerous having regard to its dimensions and location. The trial Judge disagreed and the Claimant's case was dismissed.

Further, in **Simpson -v- Darlington Borough Council**, the proceedings concerned a fairly unremarkable tripping claim. However, the Claimant alleged losses exceeding £250,000. The Defendants maintained that the defect was not one which had warranted repair. The Claimant produced photographs which were initially said, during correspondence, to have been taken on the date of the accident. However, whilst giving his evidence to the Court, the Claimant stated that the photographs had been taken some 15 months post accident. The Court took the view that the defect was not hazardous at the time of the Claimant's fall and dismissed the Claimant's case.

A matter involving a tripping hazard of a different type was addressed in the proceedings of **Hancock -v- South Tyneside Council**. The Claimant was a decorator employed by the Defendants who worked out on site. He was obliged to use a metal container/cabin for storage of paint. On the day in question the Claimant was the first person to open the container. The Claimant alleged that he fell over a peg located at the entrance to the bottom of the container, which came outwards by 1 to 2 inches, and formed part of the locking mechanism on the doors of the cabin. The Defendants denied liability on the basis that the peg/locking mechanism complained of was simply not a hazard. The Claimant alleged that on the day in question the cabin was raised a bit higher than it ought to have been. On balance the trial Judge found that the cabin was raised in the way described by the Claimant and to a sufficient extent to cause a hazard. The Judge was satisfied that there had been a breach of The Workplace Regulations and the Claimant therefore established primary liability. A reduction of 30% for contributory negligence was made for the Claimant's failure to pay proper attention.

Finally, in **Broadbent -v- Newcastle City Council**, the Claimant was employed as a cleaner. She was lifting a vacuum cleaner down 9 steps when she fell. The Defendants maintained that the steps were in good repair, hand rails were fitted to both sides and anti slip strips fitted to the nose of each step. The case really hinged on whether the act of the cleaner transporting the vacuum down the steps should have been avoided. The Defendants maintained that a lift was available for use by the Claimant near to the entry point to the steps in question. The Claimant alleged that she was not aware of the existence of the lift and that she had not been properly trained on manual handling issues or the availability of the said lift in any event. The Defendants were unable to provide any evidence confirming that the Claimant had definitely been informed of the existence of the lift (described as the "Lord Mayor's lift" in evidence). However, the Court found that the existence of the lift was so "blindingly obvious" to the Claimant that had she used it the accident would not have occurred. The Claimant's case was dismissed.

Mark Douglas
Associate
DDI: 0191 233 9737
Email: mark.douglas@crutes.co.uk



The Highways Act 1980

Claims relating to tripping accidents on the highway have a significant impact on all highway authorities...

Claims relating to tripping accidents on the highway have a significant impact on all highway authorities. Section 41 of the Highways Act 1980 imposes a statutory duty on highway authorities to maintain highways for which they are responsible.

If we take a moment to review the 1980 Act, a cause of action against a highway authority for breach of statutory duty can only arise in relation to those highways which are maintainable at public expense and those which are maintainable by that authority. A distinction must also be drawn between maintenance and improvement as there is no duty on the highways authority to improve highways e.g. to widen an existing road.

In order for a claim to succeed under Section 41 of the Highways Act 1980, a Claimant must show that the part of the highway where their accident occurred was not reasonably safe and that the accident was caused by the dangerous condition of the highway. The test for "dangerousness" is one of reasonable foresight of harm of highway users. In the case of *Mills v Barnsley Borough Council* (1992) the Court held:

"In order for a plaintiff to succeed against a highway authority in a claim for personal injury for failure to maintain or repair the highway, the plaintiff must prove that:

- the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;
- the dangerous condition was created by the failure to maintain or repair the highway; and
- the injury or damage resulted from such a failure."

Steyn J went on to say:

"...it is important that our tort laws should not impose unreasonably high standards, otherwise scarce resources would be

diverted from situations where maintenance and repair of highways was more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interests..."

In essence, it must be the sort of danger which a highway authority may reasonably be expected to guard against.

It is widely accepted that minor irregularities and areas of unevenness do not render a highway dangerous. The "Liverpool cases" from the 1960's generally emphasised this point. Perhaps the most useful comments were in the case of **Littler v Liverpool Corporation** 1968 where Cumming Bruce J said:

“...it must be the sort of danger which a highway authority may reasonably be expected to guard against.”

"...The test in relation to a length of pavement is reasonable foreseeability of danger. A length of pavement is only dangerous if, in the ordinary course of human affairs, danger may be reasonably anticipated from its continued use by public who usually pass over it. It is a mistake to isolate and emphasize a particular difference in levels between flagstones unless the difference is such that a reasonable person who noticed and considered it would regard it as presenting a *real source of danger*. Uneven surfaces and differences in levels between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. *A highway is not to be criticised by the standards of a bowling green...*"

The necessity of a Claimant pointing out the spot at which they fell is a prerequisite in "tripping claims". The spot at which a person falls must be considered dangerous

rather than the surrounding pavement. The point was made in the case of **Whitworth V City of Manchester** 1971 where the Court of Appeal held:

"The relevant question is whether that which caused the accident constituted a danger not whether there are differences in level which did not contribute to the accident constituted a danger..."

Another useful authority in this respect is **James v Presili Pembrokeshire Council** (1993) where the Court held:

"...The question in each case is whether the particular spot where the Claimant tripped or fell was dangerous...but if the particular spot was not dangerous, then it is irrelevant

that there were other spots nearby that were dangerous or that the whole area was due for resurfacing..."

If the Claimant is able to prove that they sustained injuries due to a dangerous 'defect' in the highway which was created by the failure to maintain or repair the highway then the burden falls to the Defendant and it becomes necessary to turn to special defence under Section 58 of the Highways Act 1980. Such a defence is available to a highway authority in the event it is able to prove that it had taken such care as in all the circumstances was reasonably required to ensure that the part of the highway to which the action relates was not dangerous to traffic. The onus is then on the highway authority to prove the defence on the balance of probabilities.

Continued on back page...