‘HIGHWAYS CASES – AN UPDATE INCLUDING BARLOW v WIGAN’

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APIL CYMRU WALES REGIONAL GROUP MEETING – 7TH JULY 2020

PURPOSE

To provide an updated overview of the most relevant/useful cases to rely upon in relation to some of the issues that arise most frequently in Tripping claims against the local authority;

- Going to Court to represent a Claimant in a 'tripper' used to involve going armed with copies of about 15 Court of Appeal authorities;
- Those can now (thankfully) be reduced to a handful of cases in most claims;
- Very recently the Court of Appeal has given Judgment in Barlow v Wigan which considers some of the arguments that can arise in relation to the status of a footpath.

ISSUES

Most cases require the parties to consider the following issues;

- 'Factual causation' and Contributory Negligence;
- The status of the path/way in question and the nature of any duty owed;
- Breach of that duty;
- Whether the Defendant has a section 58 Defence.

Hopefully I have included the main cases on those issues and a few less well-known, but occasionally very useful, ones as well.

Due to time constraints I have not considered other issues that can arise such as;

- The scope of the s.41 duty (what does it include and what is excluded);
- Utility company apparatus and street furniture;
- Ice, snow and flooding.

FACTUAL CAUSATION AND CONTRIBUUTORY NEGLIGENCE

Deal with both of this issues together as they are both largely fact sensitive so there is not generally much assistance to be found in previously decided cases.

The general position is that;

- The Claimant has the burden to prove that the accident was caused by the defect in question;
- The Court will consider the consistency of previous accounts given by the Claimant of the 'mechanics' of the accident (subject to any points in relation to admissibility); and
- The Court should also carefully consider the Claimant's oral evidence, the photographs of the scene of the accident and the evidence of any other witnesses.

<u>Medical Records</u>

- Copies of post-accident Ambulance, A&E and GP Records routinely form part of standard disclosure in tripping claims;
- They are of variable detail and variable accuracy for various reasons;
- Ideally they will record that the accident took place in the correct location and in a manner that is consistent with claim, eg tripped in pothole etc;
- Unfortunately that is not always the case;
- It is important to bear in that the primary purpose of an examining medic is not to cross-examine a potential claimant as to the precise mechanics of a fall but rather to quickly diagnose the main injuries and treat them.

Inconsistencies

In relation to inconsistent entries the judgment of Jackson LJ in **Bell v Havering London Borough Council [2010] EWCA Civ 689** can, if stuck, prove helpful;

'*31. I now move on to the medical records. The medical records relied upon by the council contain a number of entries upon which attention has been focussed both at trial and in this court. First, there is an entry made by the triage nurse which reads: "Patient fell from steps last night".*

Mr Haque submits that that is not an accurate description of the accident as now described by the claimant: what she fell from on her account now is the edge of a planter and it is not natural to describe that as a step; secondly he makes the point that "steps" is written in the plural and not in the singular.

32. I am bound to say that this seems to be a fairly minor point. Anyone who has dealt with personal injury litigation over the years not infrequently encounters inaccuracies in records of what the patient said, not necessarily because the nurse or doctor got it wrong. The patient may be in a state of confusion or the doctor may be working, or nurse may be working, under pressure, and one has to view with some caution less significant inconsistencies.'

Admissibility

In relation to admissibility you should also consider **Denton Hall Legal Services v Fifield [2006] EWCA Civ 169**;

77. It is therefore necessary to remind ourselves of the evidential status of such material. What the doctor writes down as having been told him by the patient, as opposed to the opinion that he expresses on the basis of those statements, is not at that stage evidence of the making of the statement that he records. Rather where, as here, the record is said to contradict the evidence as to fact given by the patient, the record is of a previous inconsistent statement allegedly made by the patient. As such, the record itself is hearsay. It may however be proved as evidence that the patient did indeed speak as alleged in two ways. First, if the statement is put to the witness, she may admit to having made it. Alternatively, if she does not "distinctly" so admit the statement may be proved under section 4 of Lord Denman's Act 1865 . Second, by section 6(5) of the Civil Evidence Act 1995 those provisions do not prevent the statement being proved as hearsay evidence under section 1 of that Act. If the court concludes that such inconsistent statement has been made, that goes only to the credibility of the witness; the statement itself cannot be treated itself as evidence of its contents. Authority is scarcely needed for so protean a proposition, but I would venture to mention the observations of Lord Esher MR in North Australian v Goldsborough [1893] 2 Ch 381 at p 386.

...

80. This failure to identify before the trial the issues in dispute with Mrs Fifield's account, and the material on which the dispute was based, meant that this part of the trial took on

much of the worst aspects of the pre-Woolf world, with the case being developed only as the trial proceeded. Much of that was permitted to happen because of the universal assumption that the medical records are "evidence", without analysis of what if anything it is that they prove. To obviate such difficulties in future, and to ensure that factual issues in medical cases are economically and efficiently tried, the following procedure should be adopted. First, a party who seeks to contradict a factually pleaded case on the basis of medical records or reports should indicate that intention in advance, either by amendment of his pleadings or by informal notice. Then, the opposite party must indicate the extent to which they take objection to the accuracy of the records. When the area of dispute is identified, a decision will have to be taken as to whether the records need to be formally proved by either of the means referred to in §3 above. Thereby, not only will the ambit of the dispute be clarified in advance, but also it will be clear what interpretation is sought to be put on what my Lord has called somewhat Delphic records: for an example, see §14 above.

81. Two consequences may then follow. First, if the foregoing precautions have not been taken, the trial judge may be reluctant to permit reference to reports of the patient's statements in the medical records for the purpose of contradicting her evidence. Any such reluctance is unlikely to be criticised by this court. Second, on the other side of the coin, if there is unreasonable failure to admit that such statements were made, to the extent that it is necessary to call busy doctors to court simply in order formally to prove them, then such failure of co-operation is likely to be penalised, possibly severely, in costs.

82. None of this procedure should be burdensome; it should indeed be merely part of the narrowing and clarifying of the issues that should take place in any event in advance of the trial. Had the procedure been adopted in this case the trial would undoubtedly have been shorter, easier, and simpler for this court to adjudicate upon.'

However it is also important to bear in mind paragraph 27.2 of PD32 (Evidence) of the CPR and the further Court of Appeal decision in **Charnock v Rowan [2012] EWCA Civ 2**;

'*20. Mr Turner submits that the passage of Buxton LJ's judgment in the Denton Hall case referred to above, albeit obiter, contains an error of law. At paragraph 77 Buxton LJ said: "What the doctor writes down as having been told him by the patient, as opposed to the opinion that he expresses on the basis of those statements, is not at that stage evidence of the making of the statement that he records."*

21. Both Mr Turner and Frank Burton QC, for the first 8 respondent claimants, take the view that s.1 of the Civil Evidence Act 1995 makes such a statement admissible. They agree, too, that Buxton LJ, when he went on to describe the effect of such a statement as going to credibility alone, citing North Australian v Goldsborough [1893] 2 Ch. 381 at 386, appears to have overlooked the reversal of this doctrine by the Civil Evidence Act 1968 and again by s.6(5) of the 1995 Act.

22. Section 2(1) of the 1995 Act goes on to require such prior notice of intention to adduce hearsay evidence "as is reasonable and practicable in the circumstances for the purpose of enabling [the other party or parties] to deal with any matters arising from its being hearsay". Section 2(3) makes provision for the notice requirement to be waived. It is, however, unnecessary to explore the wording of the section further because s.2(2) authorises the making of provision by rules of court either to disapply this requirement or to regulate its

implemention. This is now done by CPR 33.3 , which inter alia waives the need for notice where a practice direction so provides. This, it would seem, gives 32 PD 27 the force, or at least the support, of law when it provides:
All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –

(a) the court orders otherwise; or

(b) a party gives written notice of objection to the admissibility of particular documents.

23. It may be said that this reverses the notice requirement set out in s.2(1) . It can equally be said that the effect is to treat the agreement of a bundle as the requisite notice, leaving it to the objecting party to serve what is in substance a document-specific counter-notice. But Mr Burton contends that more is needed for the admission of such hearsay than simply agreement of a court bundle. It requires, he submits, at least express notice of the fact that reliance is to be placed on the hearsay contained in the bundle, leaving it to the party served to require specificity. Mr Turner, by contrast, takes the stance described above in paragraph 15.

24. It has to be said that Mr Burton's position, in addition to sitting ill with the practice direction, is an invitation to almost limitless and costly wrangling both before and at trial. It may be that, at least in essentially straightforward litigation like the present, the answer to his problem lies in ensuring that the opposing case is properly pleaded, if need be by amendment following disclosure. (I record here my own respectful view that the passage of the amended defence recited in paragraph 46 of the judgment in Kearsley v Klarfield , pace what is said in paragraph 48, included an unequivocal pleading of fraud. I wonder, too, whether it was not demurrable for inconsistency.) From that point the obligation will lie on each party's lawyers to go through the agreed documents with the client or witness and take instructions on any discrepant evidence, albeit hearsay, relevant to the pleaded issues. But a party which has failed to plead its case with sufficient clarity may well find itself barred from adducing any evidence, hearsay or not, in support of an unpleaded contention.'

The combined effect of the above, particularly post-GDPR and the threat of FD, is that;

- The Defendant should notify the Claimant in advance of any trial of any alleged inconsistent entries upon which the Defendant intends to rely;
- The Claimant should then indicate whether or not the accuracy of the record is admitted;
- If it is not admitted the onus is then upon the Defendant to 'prove' the accuracy of the record in evidence; but
- If the record is included in an agreed Trial Bundle then by operation of paragraph 27.2 of PD 32 it will be evidence of its contents (whether otherwise proved or not) unless the Court orders otherwise or the Claimant serves written notice of an objection to its admissibility.

STATUS OF THE WAY (FOOTPATH, PAVEMENT, CARRIAGEWAY OR OTHER)

In the majority of cases the status of a particular way is not in issue and it is either;

- a 'highway maintainable at public expense' within the meaning of section 36 HA 1980 for which the 'highway authority' is responsible;
- a way upon occupied land governed by the Occupiers Liability Act (1957 or 1984); or
- a way upon leased property potentially governed by the Defective Premises Act 1972.

The first point to remember is that the common response from the Defendant of 'the footpath has not been adopted' does not necessarily mean that it is not 'maintainable at public expense' so as to engage the maintenance duty under s.41 HA 1980.

The precise ways in which a particular path or road may become maintainable at public expense or falls into one of the above, or other, categories is beyond the scope of this talk which will instead focus on some of the more common issues, particularly following the recent Court of Appeal decision in **Barlow v Wigan [2020] EWCA Civ 696**.

Barlow v Wigan

On 21st September 2014 the Claimant was walking along a footpath in Abram Park in Wigan when she tripped over a tree root and fell sustaining injuries. There was no dispute that the tree root/defect was dangerous but there was a significant dispute as to whether the Defendant owed the Claimant any duty at all, either under s.41 HA 1980 or s.2 OLA 1957.

The land upon which the park was located had been purchased by the Defendant's predecessor (Abram Urban District Council) in 1920 with the intention of building a public park. The park, and probably the path, was constructed by the council in the early 1930's and in any event before the coming in to force of the Highways Act 1959 (1/1/1960) and more importantly before December 1949. The Defendant council was also the local highway authority and there was no formal record of a right of way over the path.

As the Court of Appeal noted at the start of their Judgment; '*It might be thought that the question of whether she has a valid legal claim against…the present owners and occupiers of the park would be a straightforward one. Far from it. Although the material facts are scarcely in dispute the case has already resulted in two different decisions by judges in the county court and High Court; the authorities cited by counsel include five cases from the 19th*

century; and some of the issues raised have not been authoritatively decided upon at appellate level'.

At the outset however it should be noted that as a result of the pleadings and issues conceded pre-issue and at first instance (not by counsel instructed in the appeal) the case potentially became more complicated than it needed to have been.

Parks and Rights of Way

Pre-issue, as is often the case, the Defendant local authority alleged that over-time, and through continued uninterrupted use, members of the public had acquired a 'right of way' of the paths throughout the park. In this case there was no evidence of any gates being closed from time to time to prevent access to park. As a result the Defendants relied upon the House of Lords decision in **McGeown v Northern Ireland Housing Executive [1995] 1 AC 233** applying the rule in Gautret v Egerton (1867) to the effect that the users of a right of way are not owed a maintenance duty under the OLA 1957 by the owner of the land in question;

'... the rule in Gautret v. Egerton is deeply entrenched in the law. Further, the rule is in my opinion undoubtedly a sound and reasonable one. Rights of way pass over many different types of terrain, and it would place an impossible burden upon landowners if they not only had to submit to the passage over them of anyone who might choose to exercise the right but also were under a duty to maintain them in a safe condition. Persons using rights of way do so not with the permission of the owner of the solum but in the exercise of a right. There is no room for the view that such persons might have been licensees or invitees of the landowner under the old law or that they are his visitors under the English and Northern Irish Acts of 1957...'

Although this case concerned a path in a park similar arguments are often raised in relation to footpaths upon local authority housing estates (see further below) and over amenity land.

Unfortunately the Claimant appears to have accepted that assertion pre-issue and did not pursue a claim under the OLA 1957. Had that not been the case it may be that a number of the more complex arguments would have been avoided (although we won't then benefit).

The Claimant was not alone in coming to that view. In the local case of **Young v Merthyr Tydfil CBC and RCT Groundwork Trust [2009] PIQR p23** HHJ Curran QC was persuaded that a footpath through a relatively new park, constructed and opened to the public in 2001, was an unadopted highway over which the public had acquired a right of way and in relation to which McGeown applied so that neither occupier owed the Claimant any duty.

The Court of Appeal in Barlow did not go behind the concessions made at first instance and considered alternative arguments in relation to the creation of a highway (none of which would have helped the Claimant in Young). As a result the comments made in relation to McGeown were unfortunately obiter and remain to be argued again. Nonetheless Bean LJ was clearly of the opinion that McGeown ought not lead to such a conclusion and, by implication, has been widely misunderstood (and misapplied) over the years;

'9. Mr Cawson QC for Wigan Council accepted before us that Wigan owe duties under the Occupiers' Liability Act 1957 to users of the park such as Ms Barlow in respect of all parts of the park other than highways: including, for example, the areas of grass on either side of the Path. The Council's repeated reliance in correspondence on McGeown 's case was sufficient to persuade the Claimant's legal advisors that no claim could be put forward under the Occupiers' Liability Act 1957 . (The particulars of claim did include allegations of common law negligence, but these were not pursued at the trial). So we, like Judge Platts and Waksman J, have to deal with the case on the basis that Ms Barlow can only succeed in her claim by showing that the Path on which she fell was a highway maintainable at public expense, so that she has a cause of action for breach of statutory duty under s 41 of the Highways Act 1980 . But in doing so we must not be taken to endorse the correctness of the Council's contention. Since there may be other cases of this kind in the future, and since the proposition that a local authority can owe a greater duty to park users walking on the grass than to park users walking on a path is to my mind absurd, I should put on record why I consider that McGeown v Northern Ireland Housing Executive [1995] 1 AC 233 does not require any such conclusion.

...

13. I suspect that the true ratio of both Gautret v Egerton and McGeown v Northern Ireland Housing Executive is that if a person is only lawfully on a defendant's land because of the existence of a public right of way which he or she is using, then there is no duty of care owed by the landowner either at common law (save in respect of dangerous acts such as the digging of pits) or under the Occupiers' Liability Acts . But whether that is the case will have to await a decision in another claim. I only add that if I am wrong about this, and there really is no duty on anyone to maintain paths in municipal parks which have become rights of way, the traditional notices saying KEEP OFF THE GRASS ought in fairness to park users to be replaced by notices saying KEEP OFF THE PATHS.'

Although the point was not addressed further it is of note that Charlesworth on Negligence has long said;

'At common law a question was often raised whether there was a class of persons that came within the description of persons entering "as of right" since they came on property, not because they were invited or permitted to do so but because the occupier had no power to prevent them from entering.[106] Section 2(6) of the 1957 Act resolved any such problem by providing that:

"For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

Accordingly, such persons are entitled to the benefit of the common duty of care, which the occupier owes to all his lawful visitors. Persons entering as of right include employees of public utilities (for example, gas and electricity boards), police with search warrants, and numerous classes of enforcement officers and inspectors, all of whom have statutory rights to enter premises.[107] *In addition, there are members of the public, who use premises provided for them, such as promenades,*[108] ***public parks****, playgrounds, libraries, shelters and conveniences.*'

In summary, and in relation to footpaths in parks;

- they are probably not public rights of way to which McGeown applies; and
- do not concede that they are;
- hopefully the more complicated arguments that follow can then be avoided.

Highways Maintainable at Public Expense

As a result the Claimant in Barlow was forced to argue that the 'right of way' conceded was in law a 'highway maintainable at public expense' under s.36 of the Highways Act 1980. The issues were summarised as follows;

'14. Before the enactment of s 23 of the Highways Act 1835 all highways were, subject to certain exceptions, maintainable by the inhabitants at large, a responsibility that fell upon the parish. Section 23 relieved the parish of its responsibility in respect of highways constructed or roads dedicated after the enactment of the 1835 Act, save where certain conditions were met allowing the highway to be adopted.

15. Section 23 of the 1835 Act did not, however, apply to footpaths, save where established over a road or occupation way to which the section did apply. Thus, in respect of footpaths constructed or dedicated after 1835, the parish remained responsible for repair.

16. However, Sections 47 and 49 of the National Parks and Access to the Countryside Act 1949 had the effect that "public paths" coming into existence before the commencement of the Act on 16 December 1949 were to be repairable by the inhabitants at large, whereas liability for a public path dedicated after the commencement date fell on the inhabitants at large only if the path was dedicated in pursuance of a public path agreement. (There was no such agreement in this case.)

17. The Highways Act 1959 came into force on 1 January 1960. Section 38(1) provided that after the commencement of the Act no duty in respect of the maintenance of highways should lie on the inhabitants at large of any area, but s 38(2) made certain highways maintainable at public expense. These included, so far as relevant:

i) A highway which immediately before the commencement of the Act was maintainable by the inhabitants at large of the area or maintainable by a highway authority – s 38(2)(a) ;

ii) A "highway constructed by a highway authority after the commencement of this Act, otherwise than on behalf of some other person not being a highway authority" – s 38(2)(b) ; and
iii) A highway constructed by a local authority under Part V of the Housing Act 1957 - s 38(2)(c) .

18. Section 38(3) of the 1959 Act provided that s 38(2)(a) should not be construed as referring to, amongst other things, a highway maintainable by an Urban District Council otherwise than in its capacity as a highway authority.

19. The Highways Act 1980 was described in its long title as: "An Act to consolidate the Highways Acts 1959 to 1971 and related enactments, with amendments to give effect to the recommendations of the Law Commission". None of the amendments recommended by the Law Commission is relevant for present purposes.

20. Section 36 of the 1980 Act, so far as material, provides:

"(1) All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable… for the purposes of this Act.

(2) … The following highways (not falling within subsection (1) above) shall for the purposes of this Act be highways maintainable at the public expense:-

(a) a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority;

(b) a highway constructed by a council within their own area under Part II of the Housing Act 1985 …

(f) a highway, being a footpath, a bridleway, a restricted by way or a way over which the public have a right of way for vehicular and all other kinds of traffic, created in consequence of a special diversion order or an SSSI diversion order.…"'

As a result if can be seen that different types of highway became 'maintainable at the public expense' at different times and that previous acts have swept up highways that were already maintainable under previous legislation into the new. If you can show that a highway was maintainable under old legislation then it may, sometimes unbeknown to the council, still be maintainable by them now by a combination of the above Acts.

The two alternative considered by the Court in Barlow were whether;

- the path was a highway constructed by a highway authority within the meaning of s.36(2)(a) of the HA 1980; or
- whether it was a highway which was already maintainable at public expense immediately prior to the commencement of the HA 1980 under s, 36(1) HA 1980.

Highways Constructed by the Highway Authority

In relation to whether the path was constructed by the Defendant as a highway authority the Court concluded on the evidence that;

- the path was constructed by the council under s.164 of the Public Health Act 1875;
- the council was not therefore acting as, or exercising the powers of a highway authority when the footpath was constructed;
- although in the Court of Appeal decision in **Gulliksen v Pembrokeshire CC [2003] QB 123** Sedley LJ had stated it was not necessary for the purposes of s.36(2)(a) for the council to have been acting as a highway authority as in law the council was one legal body, his comments were obiter dicta, and wrong;
- the earlier decision on appeal of Neuberger J (as he was then) was correct and in order for s.36(2)(a) to apply it was not enough for the council to have simply been the highway authority they must also have been acting as highway authority and exercising the powers of the highway authority when the path was constructed;
- the path was not therefore maintainable at public expense under s.36(2)(a) HA 1980.

The National Parks and Access to the Countryside Act 1949

Having concluded that the Claimant could not succeed under s.36(2)(a) of HA 1980 the Court then went on to consider whether the footpath was maintainable under s.36(1) upon the basis that it was already maintainable at public expense under the previous Highway Act of 1959;

'49. The critical issue in this case is whether the path on which Ms Barlow fell was, or is deemed to have become, a highway before 16 December 1949, the date on which ss 47- 49 of the National Parks and Access to the Countryside Act 1949 came into force.

50. If a footpath was expressly dedicated or deemed to have been dedicated as a highway before 16 December 1949 then it was repairable by the inhabitants at large of the local parish.

51. Section 47(1) of the 1949 Act provided that the rule of law whereby a highway was repairable by the inhabitants at large was to apply to all public paths (that is to say all paths which had been or were deemed to have been dedicated as highways). However, the effect of s 49 of the same Act was that this would not apply to any public path constructed after the commencement of the Act otherwise than in pursuance of a public path agreement.

52. The Highways Act 1959 abolished the duty with respect to the maintenance of highways placed previously on the inhabitants at large of any area and replaced it with the concept of a highway maintainable at the public expense.

53. Section 38(2)(a) of the 1959 Act created two kinds of highway maintainable at public expense, in each case by reference to the position immediately before the 1959 Act came into force (which was on 1 January 1960). The first was those which were in 1959 maintainable by the inhabitants at large; that meant those responsible by virtue of s 47 of the 1949 Act; and that in turn depended on whether the highway was dedicated or deemed to have been dedicated before 16 December 1949. The second category is those which in 1959 were "maintainable by the highway authority". The fact that the highway authority (in this case Abram) had constructed a path before 1949, whatever the capacity in which they did so, would not help Ms Barlow because under the 1949 Act regime that did not make the highway maintainable unless it had been dedicated or was deemed to have been dedicated as a highway before 16 December 1949 (or there was a later public path agreement). Section 38(3) of the 1959 Act applies to this second category. Section 36 of the 1980 Act, in particular s 36(2)(a) , was not intended to, and did not, alter that position.

...

55. I have already noted that whether Ms Barlow can succeed under s 36(1) depends on whether the Path was, or is deemed to have been, dedicated as a highway before 16 December 1949.

56. A highway may be created by (a) express dedication by the landowner (of which there is no evidence in the present case); (b) deemed dedication under what is now s 31 of the 1980 Act; or (c) dedication inferred at common law.'

The Court concluded that;

- in order to succeed the Claimant had to prove that the path had been dedicated as a highway prior to December 1949;
- there was no evidence of an express dedication;
- the Claimant could not prove a deemed dedication under s.31 HA 1980 because that required her to prove 20 years uninterrupted use retrospectively from the date that the issue arose (s.31(2)) which was over 20 years after 1949 even though the park had been open since the 1930's;
- dedication at common law however could be presumed from the facts that the park and paths were laid open to the public from the early 1930's and had been in constant, and uninterrupted, use ever since and at common law the dedication is deemed to have occurred at the outset, ie 1930 and not only from 20 year prior to the issue arising;

- as a result the Claimant could show that the footpath was a highway dedicated prior to the 1949 that became maintainable at public expense under the HA 1959 and continued to be maintainable under HA 1980.

Whilst the argument in this case, unusually, focussed upon a footpath in a park it more commonly arises in relation to;

- urban footpaths around pre-WWII housing;
- old paths running through open land that pre-date 1949;
- many of which can be identified on old Ordinance Survey maps often marked with 'FP';
- some are registered by the local authority as official rights of way.

Although the argument is raised in a number of text books, including the Encyclopaedia of Highway Law, this is the first case to confirm that the argument is correct and further elaborate upon the burdens of proof and periods from which uninterrupted user needs to be shown.

Highways Constructed by the Housing Authority

Although the Court in Barlow disagreed with some of the reasoning in the early decision in Gulliksen the overall conclusion remains;

- applying some of the arguments discussed above;
- a footpath on a local authority housing estate constructed by the local authority under Part V of the Housing Act 1957 was also maintainable at public expense under the HA 1959; and
- continued to be so maintainable under HA 1980 as a result.

In **Sheila Ley v Devon CC [2007] 2WLUK 698** Dobb J held that in order for the reasoning in Gulliksen to apply the way in question still had to satisfy the definition of a 'highway'. In that case access to the path in question was intended for 'residents only' and there were signs displayed to that effect. The path had not therefore been dedicated as a highway.

BREACH OF DUTY AND DANGEROUSNESS

In **Rochester Cathedral v Debell [2016] EWCA Civ 1094** the Court of Appeal held that the test in relation to a breach of duty in respect of a footpath under the OLA 1957 was the same as it is under HA 1980 and that cases such as Mills v Barnsley (below) apply;

- that point was however conceded by counsel and not fully argued;
- it may be open to argument as the test in Mills was, in part, based upon policy grounds and the limited financial resources of local authorities;
- it is therefore difficult to see why an multinational occupier with deep pockets should benefit from a test specifically set to take account of the limited means available to local council highway departments.

Nonetheless, and as a result, although a case under the OLA 1957, Rochester v Debell now summarises the most relevant caselaw and tests in relation to s.41 HA 1980;

'*9. This particular accident in this case involved a pedestrian using a footpath. Tripping, slipping and falling are everyday occurrences on the roads and pavements. No highway authority or occupier of premises like the Cathedral in this case could possibly ensure that the roads or the precincts around a building were maintained in a pristine state. Even if they were, accidents would still happen; it is part of the human condition.* ***There will always be some weathering and wearing away of roads, pavements and paths resulting in small divots, slopes or broken edges which might provide some kind of risk to the unwary and lead to accidents. The law does not seek to make the highway authority or the occupier of land automatically liable for injuries caused by such accidents. The obligation on the occupier is to make the land reasonably safe for visitors, not to guarantee their safety. In order to impose liability, there must be something over and above the risk of injury from the minor blemishes and defects which are habitually found on any road or pathway. The law has to strike a balance between the nature and extent of the risk on the one hand and the cost of eliminating it on the other.***

10. These points were brought out by the decision of the Court of Appeal in ***Mills v Barnsley Metropolitan Borough Council [1992] 1 P.I.Q.R P291*** *. The appellant claimed that she had been injured as a result of catching her heel in a small hole in the road. The road consisted of paved slabs interspersed with paving bricks. One of the bricks had broken off leaving a hole which was two inches across at its widest and one and a quarter inches deep. The case was brought under the Highways Act 1980 . By section 41 the authority is under a duty to maintain the highway. The authorities, including the judgment of Steyn LJ in Mills itself, establish that the failure to maintain is only established where there is a danger to traffic or pedestrians in the sense that danger may reasonably have been anticipated from its continued use by the public. Counsel accepted that essentially the same test should be applied in the circumstances of this case under section 2 the 1957 Act.*

11. The critical question is when danger can reasonably be said to have been anticipated. The Court of Appeal (Dillon and Steyn LJJ) considered this question in Mills and overturned a finding of liability made by the county court judge. Lord Justice Steyn gave a judgment in which he said this:

"…The short point is whether the judge was right in these circumstances in regarding this as a danger to women. Like the judge, I do not consider that it would be right to say that a depression of less than one inch will never be dangerous but one above will always be dangerous. Such mechanical jurisprudence is not to be encouraged. All that one can say is that the test of dangerousness is one of reasonable foresight of harm to users of the highway, and that each case will turn on its own facts. Here the photographs are particularly helpful. In my judgment the photographs reveal a wholly unremarkable scene. Indeed, it could be said that the layout of the slabs and the paving bricks appears to be excellent, and that the missing corner of the brick is less significant than the irregularities and depressions which are a feature of streets in towns and cities up and down the country. In the same way as the public must expect minor obstructions on roads, such as cobblestones, cats eyes and pedestrian crossing studs, and so forth, the public must expect minor depressions. Not surprisingly, there was no evidence of any other tripping accident at this particular place although thousands of pedestrians probably passed along that part of the pavement while the corner of the brick was missing. Nor is there any evidence of any complaint before or after the accident about that part of the pavement. Like Mr Booth, I regard the missing corner of the paving brick as a minor defect. The fact that Mrs Mills fell must either have been caused by her inattention while passing over an uneven surface or by misfortune and for present purposes it does not matter what precisely the cause is.

Finally, I add that, in drawing the inference of dangerousness in this case, the judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous. In my judgment the plaintiff's claim fails on this first point.

Lord Justice Dillon agreed and made essentially the same point in the following succinct terms:
"The liability is not to ensure a bowling green which is entirely free from all irregularities or changes in level at all. The question is whether a reasonable person would regard it as presenting a real source of danger. Obviously, in theory any irregularity, any hollow or any protrusion may cause danger, but that is not the standard that is required."

12. It is important to emphasise, therefore, that although the test is put by Steyn LJ in terms of reasonable foreseeability of harm, this does not mean that any foreseeable risk is sufficient. The state of affairs may pose a risk which is more than fanciful and yet does not attract liability if the danger is not eliminated. The observations of Lloyd LJ in ***James v Preseli Pembrokeshire District Council [1993] P.I.Q.R. P114*** *, a case which applied the test in Mills , are pertinent:*
"In one sense, it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. But that is not the test of what is meant by 'dangerous' in this context. It must be the sort of danger which an authority may reasonably be expected to guard against."

13. Lord Justice Ralph Gibson to similar effect noted that the test of foresight of harm is liable to result in too onerous a standard of care:

"… it has been established by the decisions of this court that the standard of care imposed by the law upon highway authorities is not to remove or repair all and any defects arising from failure to maintain, such as differences in level or gaps between paving stones, which might foreseeably cause a person using the carriageway or footpath to fall and suffer injury, but only those which are properly to be characterised as causing danger to pedestrians. There is, I think, an apparent element of circularity in some of the formulations of duty or breach of duty which have been advanced. Thus the test of dangerousness is one of reasonable foresight of harm to users of the highway.

But in drawing the inference of dangerousness the court must not set too high a standard. Any defect, if its uncorrected presence is to impose a liability, must therefore be such that failure to repair shows a breach of duty…."

14. These cases were relied upon in Brett v London Borough of Lewisham (20 December 1999) by Chadwick LJ and in Jones v Rhondda Cynon Taff CBC [2008] EWCA Civ 1497; [2009] R.T.R.13 paras 11-12 per Laws LJ.

15. We were referred to the decision of Eady J in Galloway v London Borough of Richmond Upon Thames (20 Feb 2003) in which he said that Mills had adopted a two stage test for determining whether an un-remedied state of affairs constituted a breach of duty, namely whether there was foreseeability of harm and, as a second stage, whether a reasonable person would regard it as presenting a real source of danger. I can see why he may have been tempted by this approach because grounding the test in foreseeability of harm alone is open to misinterpretation and risks setting the standard too low. But I agree with Mr Pittaway QC, counsel for the claimant, that ***Mills did not intend to lay down a two stage test; the judges were in my view seeking to express the same test in different ways. The authorities suggest that ultimately it is the test of reasonable foreseeability but recognising the particular meaning which that concept has in this context. The risk is reasonably foreseeable only where there is a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action. A visitor is reasonably safe notwithstanding that there may be visible minor defects on the road which carry a foreseeable risk of causing an accident and injury****.*

16. In the end it is an exercise of judgment for the trial judge whether the danger is sufficiently serious to require the occupier to take steps to eliminate it. Provided the judge has properly directed himself, this court can only interfere if he has reached a judgment which a reasonable judge could not properly reach on the evidence.

…

24. In terms of the direction which the judge gave himself at para.11 of his judgment, at one level it can be said that the judge applied precisely what Steyn LJ said was the test in Mills . (In fact the judge said "foreseeable" rather than "reasonably foreseeable" but it seems clear that he meant the latter and Mr Walker did not suggest otherwise.). But for reasons I have given, the mere formulation of the test in those terms is not enough unless the judge appreciates how the reasonable foreseeability test it is to be applied in the context of accident cases of this nature. I do not accept Mr Walker's submission that the risk of an accident was a fantastic possibility; in my view it was foreseeable in the same way that accidents resulting from other blemishes in the highway, such as the hole in Mills , which was in fact similar in size to the piece of concrete in this case, are foreseeable. Nor do I accept that the judge was obliged in terms to address the balance between the rights of the claimant and the cost to the Cathedral of eliminating the risk. ***That is factored into what might be termed the heightened***

foreseeability test which the courts have applied in this context. *It is not in fact the cost of removing the particular danger, which may not have been particularly expensive (although we had no evidence about that) but the cost in terms of time and money of having to identify and remedy faults of this nature.*

25. However, I do accept Mr Walker's submission that the judge did not apply the foreseeability test in the appropriate way and that this amounts to a misdirection. ***There is no recognition in the judgment that not all foreseeable risks give rise to the duty to take remedial action. The judge had to apply the concept of reasonable foreseeability taking a practical and realistic approach to the kind of dangers which the Cathedral were obliged to remedy***. *Had he done that, I do not think that he could have reached the decision he did. The judge's recital of the foreseeability mantra does not take the claimant far enough.*

26. ***The question for the judge was whether the piece of concrete created a danger of a kind which the Cathedral authorities were required to address. Was it something more than the everyday risk which pedestrians inevitably face from normal blemishes? I recognise that the risk resulted not from the normal wear and tear but from the negligent act of the driver hitting the bollard. But that does not affect the question whether the nature of the risk was such as to create "a real source of danger", to use the words of Dillon LJ in Mills*** *. I do not believe that it was open to the judge to find that it was, essentially for the reasons advanced by Mr Walker. This was an extremely small piece of concrete which could not be said to pose a real danger to pedestrians. It would be very unlikely that a pedestrian would walk so close to the bollard even approaching it at an angle, or that he would injure himself if he did. Accordingly, even if, contrary to my view, the judge did apply the right test, then in my judgment his conclusion was not open to him.'*

The case provides a very useful, and comparatively succinct, summary of the main case law;

- the Claimant does not have to satisfy a two-stage test as suggested in Galloway;
- but there is a 'heightened foreseeability test';
- the Court will ultimately still have regard to reasonable foreseeability and all the circumstances; but
- the Court must acknowledge that not all foreseeable risk requires repair.

All of the circumstances commonly include;

- the type of highway in question (footway or carriageway)
- the nature of the locality (city centre shopping area to little used country lane);
- the surface area of the defect;
- the nature of the defect (gently sloping sides or abrupt edges);
- the depth of the defect;
- the intervention criteria applied (or defect criteria).

Intervention Criteria and Category 1 Repairs

The intervention criteria set by the highway authority is not determinative so a defect below the criteria might be dangerous and one above may not be.

In James (above) it was stated that;

'*The second sentence comes after the assistant recorder had referred to Mr Dixon's measurement. He then said:*
"It fell below the standard of the Local Authority. The Local Authority acts at a guideline of 25 mm. and that is I am informed nationally recognised".

According to Mr Goldrein, these passages show that the assistant recorder regarded himself as being bound in law to hold that anything less than 25mm was insufficient to establish liability. ***If that was indeed what the assistant recorder meant, then he would undoubtedly have been wrong****. But I cannot extract that meaning from his judgment. The reference to 25mm serves quite a different purpose. It is the point at which highway authorities generally, up and down the country, regard a trip as requiring urgent repair. There is nothing in the judgment to suggest that the assistant recorder regarded it as a rule of thumb which must be applied by the courts.*'

Further, in **Dalton v Nottinghamshire CC [2011] EWCA Civ 776** it was also stated that;

'23. We do not consider that the judge's findings on dangerousness and causation can sensibly be challenged. The judge did observe that his finding that the block constituted a danger was clearly evidenced by the category one repair order made in December 2006 and that Mr Fearn's grading of the need for a category one repair was tantamount to an assessment by him that the highway was dangerous – judgment paragraph 20. We do not think that the judge thereby lost sight of the need to make his own independent assessment of dangerousness. ***The issue of a category one repair order was indeed a powerful pointer to the correctness of his conclusion. We are not impressed by Mr Brown's point that the criterion for the identification of a category one defect is an "immediate or imminent hazard" and that an imminent hazard may not be synonymous with dangerousness. An immediate or imminent hazard is something which, in this context, presents a danger to users of the highway. In Esdale v Dover District Council [2010] EWCA Civ 409 , a case decided under the Occupiers Liability Act 1957 , it was held by this court that a failure by a council to comply with its own policy as to standards of safety is not determinative of the question whether the Council has in all the circumstances taken such steps as are reasonable to see that visitors are reasonably safe. This is obviously so, since the council's policy may either fall below or exceed that which is reasonable. But where a council has an inspection and maintenance regime couched in terms of the identification of an immediate or imminent hazard, the identification by the council of a defect so defined is obviously powerful evidence of the presence of a danger against the risk of which the council can reasonably be expected to take steps to safeguard the public****. Nor do we consider that in assessing dangerousness in this case the judge set the standard too high. We accept that minor depressions and holes in pedestrian areas are a fact of life. Here however the danger lay in the combination of height differential and instability, moreover it was in the mouth of the twitchell, a particular area which called for vigilance going beyond even that which The Square as a whole was acknowledged to attract.*'

On any view good quality photographs and measurements of the defect are the starting point;

- make sure the date of the photographs can be proved (increasingly easy in the digital age) and that the photographs are contemporaneous to the accident date;
- there is nothing wrong with taking additional photographs upon later dates if clearer and they may show that the condition of the defect did not alter much over time which may help show that it would have been in a similar condition to that shown in the initial post-accident photographs at the date of the accident;
- cross-referencing the Defendants inspection and repair records may also give an indication of the size of the defect at a particular time eg if listed for a particular type of repair or if the dimensions are stated in the repair documents; and
- Google Streetview may also show the defect to be in a similar condition around the time of the accident.

If in difficulty consider **Day v Suffolk CC [2007] EWCA Civ 1436**. The Claimant hit a pothole when driving along a country lane in the snow and sustained injury. The Defendant repaired the hole before the Claimant was able to take any photographs or measurements. The Claimant was successful nonetheless as the Trial Judge accepted that for the pothole to have caused the airbags to deploy and to have damaged the car, in conjunction with other witness evidence, showed that it was probably dangerous. The Defendant appealed unsuccessfully. The Court stated that;

'*Judges have to decide whether to draw inferences, often on limited evidence, in cases such as this. They are the fact-finders. The public rely on their experience and knowledge of the case in their judgment as to whether an inference should be drawn. The test was that of balance of probability. Was it more likely than not?*'

As a result;

- whilst in most cases good quality photographs are essential, they are not strictly necessary for a Claimant to be able to prove their case in law although in the modern era there would need to be a very good explanation;
- Day is perhaps more likely to be of use where the quality of the photographs is in issue and the Defendant invites the Judge to 'reject' or 'disregard' the Claimant's photographs.

THE SECTION 58 DEFENCE

Section 58 of the Highways Act provides the highway authority with a defence provided it can prove that it took such care as was reasonably required to ensure that the highway remained free from danger;

- The Defendant often adduces evidence of a system of scheduled inspections and ad-hoc repair;
- The Defendant may also allege that the system follows the recommendations made in the former Local Authority Association Code of Good Practice or the now UK Road Liaison Group Code of Practice 'Well Managed Highway Infrastructure' (formerly 'Well-Maintained Highways');
- It is sometimes suggested that the Claimant not only has to prove that the accident was caused by a dangerous defect but that the defect was also present at either the time of the Defendant's last pre-accident inspection or at some other point in time when it would have been reasonable to carry out an inspection;
- That is not correct; the Defendant has the burden to prove the s.58 Defence and there are a number of consequences.

The point was raised, but not decided in Day (above);

'... However, a fresh point has been raised on behalf of the defendants in the course of oral submissions. Mr Cotter submits that once it is established, as it has been, that there was an insufficient inspection on behalf of the county council, then a finding of a breach of the absolute duty in section 41 is inevitable. He relies on the speech of Lord Hoffman in Goodes v East Sussex County Council [2000] 1 WLR 1356 , where Lord Hoffman analysed the statutory scheme, and stated that the duty was an absolute one...

...

12. Mr Cotter submits that the judge having found that there was no adequate inspection on 28 October 2001, and the duty being an absolute one, then the liability is established and the defence fails. He carried it to the extent of submitting that, following that principle, even if there were evidence of the pothole having been caused only the day before the accident happened, then there would be a good claim based upon the failure to conduct an adequate inspection in October 2001. It is not necessary to decide that point for the purpose of deciding this case. It has not been fully argued. It was not argued before the judge, and anything that is said about it in this court is obiter . I do have to say, however, that on what I know I am unable to accept that proposition as stated by Mr Cotter. There was a defect in the system of inspection, but the causative effect of that defect must, in my judgment, be considered in deciding whether liability occurs. It seems to me to follow from the wording of section 58(2) that merely to show some breach of a duty to inspect is not always sufficient. I have read the section earlier in this judgment. Section 58(2)(d) provides that a relevant factor is 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 dangers to users of the highway.

13. If, on the example given by Mr Cotter, the pothole had been created the day before, so that the defendant had no knowledge of it and could not reasonably be expected to know of it, then it would appear to me to be that, even if there was a faulty inspection in October 2001, the claim for damages would fail. However, I repeat that such finding is no part of the decision which it is necessary to make to determine this appeal. For the reasons I have given, I would dismiss this appeal.'

The burden of proof, together with the relevance of the Codes of Practice, was considered in

Wilkinson v City of York Council [2011] EWCA Civ 207;

31 I then turn to the section 58 defence which has been the main subject of argument on this appeal. The criticism of the Deputy District Judge which the Circuit Judge upheld, and which has been repeated in this court by Mr Limb QC for the highway authority, is that the judge failed to give any adequate reason for rejecting the defence advanced under section 58 . However, it has to be borne in mind how the issue on section 58 had been presented to him. On one side, the highway authority contended that a system of 12-monthly inspections was sufficient. On the other side, the claimant contended that, having regard to the nature of the road, there ought to have been three-monthly inspections in accordance with the national code. The judge accepted the claimant's case on that central dispute. The next question is whether there was adequate material on which he could properly do so. In my view there was.

32 I bear in mind that the national code is not a statutory document. It is a document which provides guidance. I also sympathise with the comment by the Circuit Judge that it may not be easy precisely to put Whitby Road within either of the forms of words used in the national code under categories 4a and 4b. But the Deputy District Judge had asked questions which were pertinent to the likely usage on this road. Because this was a fast-track case, and the damages were modest, the parties did not go to the lengths of discovering the number of patients who were registered at the health centre, how many visits by patients there would be per day, how many people would go to the hairdressing salon every day and so on, but on the evidence it was a road which served a wider population than the local residents. ***In my judgment the Deputy District Judge was entitled to conclude that it was the sort of road for which annual inspection was inadequate, having regard to the guidance in the national code and the absence of any reason other than financial for departing from the national code****. I do not read his reference to "six-monthly" as indicating indecisiveness on the central issue. Rather, he accepted the claimant's case and observed that even a six monthly inspection might have made a difference.*

33 The Circuit Judge considered that the Deputy District Judge fell into error in that he failed to give proper heed to the financial considerations which led the highway authority to adopt the programme which it did. In his judgment the Circuit Judge said:

"It seems to me that resources are always a factor, and it is a balance between what the ratepayers will bear and how the resources should be allocated, which is a matter for the elected members of the council. A judge, it seems to me, should be slow to reject the evidence given by a responsible council official that resources did not permit a more frequent inspection than that which was given."

34 ***In my judgment this was a wrong approach by the Circuit Judge to the defence provided by section 58 . If this were a judicial review application of a decision by a local authority which involved having to determine how local government resources should be allocated between different good causes, it would be a very different matter, but section 58 provides a defence where the authority has done that which was "reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic".***

35 That requires an objective judgment based on risk. Elsewhere in the Act Parliament has included manpower resources as a matter to be taken into consideration where this has been thought appropriate. Section 150 , dealing with the power of the court to make orders in relation to the removal of obstruction from roads, expressly enjoins the court to have regard to such considerations, but they do not feature in section 58 . The various matters, of course not exhaustive, to which the court is required to have particular regard in section 58(2) are all objective matters going to the condition of the highway and what the authority may reasonably have been expected to know about it. There is a good reason for this. The obligation to maintain highways in a structural condition which makes them free from foreseeable danger to traffic using the road in the ordinary way is an unqualified obligation of highway authorities of long standing. If Parliament had wanted to weaken that fundamental obligation, now contained in section 41 , it would have done so. Section 58 had a different purpose. Section 58 was designed simply to afford a defence to a claim for damages brought against a highway authority which was able to demonstrate that it had done all that was reasonably necessary to make the road safe for users, not an authority which decided that it was preferable to allocate its resources in other directions because other needs were more pressing than doing what was reasonably required to make the roads safe.

36 ***There remains the issue of causation, which has been advanced as an additional line of defence on this appeal. Mr Limb submitted that the burden was on the claimant to show that the pothole had arisen prior to the latest date when the authority ought reasonably to have inspected the road. There was no evidence as to when the pothole first developed. Accordingly he submitted that there was a fatal gap in the claimant's evidence. He based that submission on the following passage in the judgment of Steyn LJ in Mills v Barnsley Metropolitan Borough Council [1992] PIQR 291*** *:*

"The principles laid down are clear. 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

a) 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;

b) the dangerous condition was created by the failure to maintain or repair the highway; and

c) the injury or damage resulted from such a failure. Only if the plaintiff proves these facta probanda does it become necessary to turn to the highway authority's reliance on the special defence under section 58(1) ."

37 ***Mr Limb argued that it follows from the second requirement that the claimant has to show not only that the accident resulted from a defect in the highway of a kind which was liable to cause an accident, but also that the defect resulted from a failure by the highway***

authority other than the mere non-repair of the highway. In my judgment the argument is fallacious. It has to be remembered that it is not every dangerous condition of a highway which results from a breach of the highway authority's maintenance duty. This was made clear by Lord Denning at page 357:

"The duty to 'maintain' in the sense of repair and keep in repair is an absolute duty. This was emphasised by Diplock LJ in Griffiths v Liverpool Corporation [1967] 1 QB 374 -389 where he said: 'It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain ... ' In this respect it is like the duty to fence under the Factory Act . If a machine is not securely fenced, the occupier of the factory is liable even though he has not been negligent at all. So also if a highway is out of repair there is a failure to maintain, even though the highway authority has not been negligent at all. But this absolute duty is confined to a duty to repair and keep in repair. It was so stated by Diplock LJ himself later in Burnside v Emerson [1968] 1 WLR 149 -1497 when he said: 'The duty of maintenance of a highway which was, by section 38.1 of the Highways Act 1959 , removed from the inhabitants at large in the area and by section 44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of a neighbourhood at all the seasons of the year without danger caused by its physical condition'."

Lord Denning continued:

"Maintain does not, however, include the removal of obstructions, except when the obstruction damages the surface of the highway and makes it necessary to remove the obstruction so as to execute repairs."

38 Subparagraph b) in the passage cited from the judgment of Steyn LJ reflects the need for the claimant to show that the danger was due to a failure to maintain in the absolute sense explained by Lord Denning, but no more than that. ***Properly understood, it provides no foundation for the argument put forward by Mr Limb. Mr Limb's argument amounts to saying that section 58 makes it now incumbent on a claimant in every case of this kind to prove that there was not merely a breach of the duty to maintain but a negligent breach of the duty to maintain. That proposition was rejected by this court in Griffiths v Liverpool Corporation , which Lord Denning cited. In that case, Diplock LJ said at 390–391****:*

"Sub section 2 [of section 1 of the Highways (Miscellaneous Provisions) Act 1961 , which is now section 58 of the 1980 Act] does not in my opinion make proof of lack of reasonable care on the part of a highway authority a necessary element in the cause of action of a plaintiff who has been injured by danger on the highway. What it does is to enable the highway authority to rely upon the fact that it has taken reasonable care as a defence — the onus of establishing this resting upon it. A convenient way of expressing the effect of the subsection is that it does not qualify the legal character of the duty imposed by subsection (1) but provides the highway authority with a statutory excuse for not performing it ...

Unless the highway authority proves that it did take reasonable care the statutory defence under subsection (2) is not available to it. Nor is it a defence for the highway authority to show that even if it had taken all reasonable care this might not have prevented the damage which caused the incident."

The nature of the section 58 Defence, the burden of proof and causation was considered again in by the Court of Appeal in **Crawley v Barnsely MBC [2017] EWCA Civ 36;**

38. I have reached the opposite conclusion, largely along the same lines as the reasoning of HHJ Robinson, who was in my view right to allow the appeal from DJ Babbington. I acknowledge at the outset that the question whether the council had a s.58 defence was a multi-factorial question of fact and law, to which the answer given by the first instance judge deserves respect, and from which an appellate court should only depart if satisfied that it was clearly wrong, or if there is some serious defect or lacuna in the reasoning which requires the evaluation to be re-made afresh.

39. The starting point is that this pothole was, as the trial judge found, in fact a Category 1 defect within the meaning of the Code. This was because its presence represented an immediate or imminent hazard. Once recognised as a Category 1 defect on inspection, it needed immediate attention, either by immediate repair or by being rendered safe by the immediate placing of a notice, by fencing or coning, followed by repair as soon as possible. That it required immediate attention was eventually accepted by the council's inspector, Mr Macey, in cross examination.

40. The critical question is whether the report made to the council on the Friday afternoon, in the terms described by my Lord at paragraph 15 above, gave rise to a real risk that the pothole was a Category 1 defect, sufficient to require some response on the part of the council by way of evaluation, either remotely (for example by asking questions of the caller) or by urgent inspection. In my judgment it clearly did. The caller described "deep potholes" in terms which suggested a risk of causing damage to a vehicle if the caller drove over them in the future. Once read by Mr Macey on the Monday morning, it was sufficiently serious to call for inspection by him on the same day.

41. The trial judge dealt with this question in two short sentences. After reciting the claimant's submission that the telephoned report called for immediate inspection, he said: "We are getting into a very hypothetical situation. The entry in the complaint log on 27 January does not give rise to any necessity to go out straightaway."

42. Making every allowance for the pressures on the District Judge, giving an ex tempore judgment at the end of a fast track trial, this issue deserved more than just an unreasoned answer to a supposedly hypothetical question. It was not hypothetical at all. The defect was in fact reported exactly as stated in the call log. Judge Robinson's much deeper analysis, based on the largely uncontentious evidence before the trial judge, gave the critical question the balanced analysis which it needed. It demonstrated that the council's arrangements for responding to reports of highway defects out of hours and at weekends were such that reports by people other than the emergency services were, generally, just logged to await review by highway inspectors during the next period of working hours, regardless whether their terms were (as here) such as to disclose a real risk of the existence of a Category 1 defect. I say 'generally' because the evidence suggested that a report of an extremely large or deep hole might be passed to the weekend on-call team, although not apparently if the reporter even said that actual harm or injury had been incurred.

*43. **There was some discussion during the hearing of the first appeal and in this court whether a system which had led to an inspection by the weekend on-call team, on the Saturday, would have prevented the claimant's injury, if the pothole was repaired only on the following day, i.e. the Sunday. But a s.58 defence is not concerned with questions of causation in that way. A system for responding out of ordinary working hours to reports of***

potentially serious defects may be reasonable even if it might not, on particular facts, have prevented the injury. In my judgment the council's system failed the s.58 test not because, had reasonable steps been taken, the injury would definitely have been prevented. It failed because the system suffered from the built-in flaw that reports of potentially serious defects would not be evaluated at all by someone with the requisite skill out of working hours, unless they came from members of the emergency services. *That was the key to Judge Robinson's reasoning, and I agree with him.*

44. The evidence at trial did not in fact show whether the pothole which injured the claimant continued to represent a danger from the Monday, when it was inspected, until the Tuesday, when it was repaired. It may or may not have been fenced off, or coned. If not, then in accordance with the Code, it should have been, once recognised as a Category 1 defect by reason of the immediate or imminent hazard. So the causation based analysis does not in my view offer a defence to the council even if, contrary to my view, it would be appropriate to analyse the facts in that way for s. 58 purposes.

45. My only departure from Judge Robinson's reasoning is that I would not regard the need for a less well staffed system for responding to reports of highway defects out of working hours as merely a matter of resources, and therefore legally irrelevant under s.58 . It may be that the point was dealt with in that way in the evidence, but I agree with my Lord that the need for staff to take time off, mainly at weekends, is a feature which goes beyond mere resources. Nonetheless I would not regard the reasonable need to make out of hours arrangements for such reports to be dealt with by a smaller team as making it reasonable to adopt a system which simply failed to make any out of hours evaluation at all of reports of potentially serious and dangerous defects, other than those reported by the emergency services, or those where the defect is so obviously dangerous as to need no evaluation at all.'

The upshot of the above is that;

- The Defendant has to prove that they have a reasonable system in place for highway maintenance (and that it was put into practice);
- If the Defendant cannot discharge that burden the s.58 Defence should fail;
- A lack of resources is not part of the s.58 Defence (although it is considered under s.41 HA 1980 and the test of 'dangerousness' above);
- The Claimant does not have to prove a causative link between the failure of the s.58 Defence and the accident;
- The Claimant does not have to prove that the defect was present when the last inspection took place, or when it should reasonably have taken place, and/or that it was in such a condition as to require a repair pre-accident; but
- If the Defendant can prove that it was not present in such a condition and that their system was reasonable the s.58 Defence should succeed.

In practice there are number of issues to consider in relation to the s.58 Defence although most involve trawling through the Defendant's documents and disclosure.

Was the system reasonable in theory;

- Is the Defendant's system appropriate for the nature of the locality;
- Does the system in fact follow the recommendations made in the Codes of Practice (quite often in Wales they do not);
- Is there a reasonable explanation for not following the recommendations other than lack of resources?

Was the system actually put into practice properly;

- Did the inspections take place when they were scheduled and if not, why not;
- Was a pre-accident inspection missed;
- Was the defect in fact identified pre-accident but left unrepaired;
- Were all relevant pre-accident complaints responded to?

Should the defect have been identified pre-accident;

- Was the defect identified post-accident and/or post-photographs and measurements;
- If the Defendant failed to identify the defect post-photographs how can the Defendant prove that it was not also present pre-accident;
- Is the defect visible on Google Streetview around the time of the pre-accident inspections?

Would the Defendant have repaired the Claimant's defect even if seen pre-accident;

- Did the Defendant accept that the defect was dangerous and need of repair post-accident;
- If the Defendant maintains that the defect is not 'dangerous' so as to require a repair and the Court ultimately concludes that it was a breach of s.41 HA 1980 how can the Defendant prove that their system was a reasonable one?

CONCLUSION

Whilst the above is lengthy it hopefully provides some useful extracts from the more recent and most helpful cases concerning the common issues that arise in Tripping Claims against the local authority.

The main issues can normally be reduced to;

- Did the accident happen on an adopted highway;
- If not was the highway maintainable at public expense by some other means;
- If so, can the Claimant prove that the defect caused the accident;
- Can the Claimant prove that the defect was 'dangerous' at the time of the accident;
- If so, can the Defendant prove that they had a reasonable system for highway maintenance in place, and
- That they properly put in into practice, and
- If not, was the accident partly the Claimant's fault?

Even if the way is ultimately not 'maintainable at public expense' nonetheless covered by either the Occupiers Liability Act or Defective Premises Act;

- Is there really a public right of way over the land in question; and
- Even if so, does that mean that the occupier/owner does not owe a duty to maintain?

Although sometimes risky, and potentially complex, the risks involved are still worth taking.

30 PARK PLACE,

CARDIFF.

BEN DAVIES,

7TH JULY 2020.