

# Alarm National Conference 2014 Managing Risks in Austerity Highways: Practical Responses to *Wilkinson v City of York Council*

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We give every single case the care and attention it deserves.

## Introduction

1. The formulation of highway maintenance plans and their implementation is at the heart of good highway management: all local authorities are caught in a funding gap between the duty imposed by the Highways Act 1980 and the need to operate in a world of declining budgets. Together we aim to offer, through this presentation and Q & A, some practical responses based upon two recent cases and particular experience as leading Counsel for the local authority in the case of **Wilkinson v City of York Council**<sup>1</sup>
2. Government has a habit of insisting upon economies at the same time as utilising the rhetoric of investment: for example the impression is that, on the one hand, local authority budgets are being squeezed, and yet, in a speech given at the Westminster Energy, Environment and Transport Forum, on 11 July 2013<sup>2</sup>, Stephen Hammond, Parliamentary Under Secretary of State for Transport, suggested that the current government was preparing to embark upon the '*largest programme of investment in our roads since the 1970's*'.
3. Stephen Hammond also had this to say about local roads:

Another critical area for improvement is local roads.

We have provided more than £3 billion to local councils in England to maintain their highways.

And last year alone, over 850 major projects were carried out as part of an £800 million-per-year programme of road maintenance.

We want to make sure that local authorities are using their road maintenance budgets properly...

Tackling potholes and other problems, while getting best value for the taxpayer.

As with strategic roads, councils must develop a whole-life approach to maintaining local networks, which will help prevent costly problems from developing in the first place...

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<sup>1</sup> [2011] EWCA Civ 207

<sup>2</sup> Organisation: [Department for Transport](#)

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Policy: [Managing, improving and investing in the road network](#)

Topics: [Transport](#) and [UK economy](#)

Minister: [Stephen Hammond MP](#)

4. Since the enactment of the Local Government Act 2000 central Government has equated '*proper*' use of budgets to be those that obtain '*best value*' for the taxpayer. For those at the sharp end there is a tension between the Government's wish to obtain '*best value*' and the need to fulfill a statutory duty: arguably they are not strictly compatible, particularly in these straitened times, so some creativity is needed to try to balance both risks to users of the highway and 'the books'.

### The Duty

5. Here is a reminder of the statutory duty as set out in s41 Highways Act 1980:

**41 Duty to maintain highways maintainable at public expense.**

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

6. Section 41(1) is not subject to the principle of reasonable practicability in the way that s41 (1A) is; and subsections (2) and (4) do not go on to say words to the effect of '*only insofar as your budget allows*'. The Act does provide elsewhere for particular examples where budget can ameliorate the duty but not in the context of maintenance of carriageways, footways or cycle ways.

### The Statutory Defence

7. Of course the rigour of the duty to maintain is mitigated by the statutory defence:

**58 Special defence in action against a highway authority for damages for non-repair of highway.**

*(1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.*

*(2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters:*

- (a) the character of the highway, and the traffic which was reasonably to be expected to use it;
- (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
- (c) the state of repair in which a reasonable person would have expected to find the highway;
- (d) 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;
- (e) 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; but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.

8. Again, there is no mention of budgetary limitations.

### Recent interpretation

9. Three years ago, the Court of Appeal took the view that section 58 contained within it a duty which was not subject to any qualification, see Toulson LJ, at §35, in ***Wilkinson v City of York Council***<sup>3</sup>:

*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.*

10. Following that case some Claimants have felt emboldened to challenge highway maintenance policies and, in some cases, to seek to compel Local Authorities to justify those policies by reference to political

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<sup>3</sup> Ibid.

decision making; in particular where a decision appears to have been taken to depart from the *Well Maintained Highways-Code of Practice for Highway Maintenance Management*<sup>4</sup> (CoP).

11. Of course *Wilkinson*, like all highways litigation, turned on its facts. In part, the local authority only found itself in the situation it did because its maintenance programme was considered to be inadequate in terms of frequency of inspection for the particular road where the Claimant fell.

### The status of the Code of Practice

12. The 2005 version of the CoP was the subject of recent judicial consideration in the case of *TR v Devon County Council*<sup>5</sup>:

20. ...the judge fell into error. Despite the recognition in the opening words that the code was non-mandatory, this approach amounted to treating it as a mandatory standard which had to be adhered to unless there was a positive reason to depart from it. Whilst the code is clearly evidence of general good practice, its status must not be overstated. It has no statutory basis and its own terms are explicit in a section carefully entitled "Status of the Code" (this quotation is taken from the 2005 Code; the 2001 Code contains an almost exactly similar passage):

"1.3.1 The suggested recommendations of this Code are explicitly not mandatory on authorities. The key best value principle of requiring authorities to involve users in the design and delivery of service implies that authorities should have reasonable discretion to respond to such involvement.

1.3.2 Authorities also have certain legal obligations with which they need to comply, and which will, on occasion, be the subject of claims or legal action. ... It has been recognised that in such cases the contents of this Code may be considered to be a relevant consideration. In these circumstances, where authorities elect, in the light of local circumstances to adopt policies, procedures or standards differing from those suggested by the Code it is essential for these to be identified, together with the reasoning for such differences."

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<sup>4</sup> Last updated 18 September 2013

<sup>5</sup> [2013] EWCA Civ 418, Hughes LJ at §20.

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

13. *TR* was seen as a welcome step back from the perceived strictness of *Wilkinson* but the slightly surprising thing about *TR* is that *Wilkinson* was not mentioned in the Judgment.
14. The question is, does this mean that the 'excesses' of *Wilkinson* have been removed? Can an absence of resources form part of the defence, namely: "...to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic..." (s58 (1)).

### **Statutory duty vs. best value**

15. The context to undertake such an approach already exists in that the 2005 CoP brought risk management to the fore. Some Local Authorities responded to that version of the CoP by incorporating into their maintenance policies the concepts and language of asset and risk management.
16. So how does one start to reflect reduced budgets without compromising the statutory duty and still providing best value? The only solution is to risk assess the network and rethink the language of the maintenance policy and see if alterations can be justified. Risk assessment can only be justified if it is based on good research: frequently posing oneself the question 'why' in relation to any assumptions or conclusions is likely to expose any potential inadequacies of reasoning.

17. Most local authorities already have established policies with intervention criteria, identified frequency of inspection and a hierarchy for all aspects of the highway. That provides a familiar framework upon which to graft any risk-based alteration.
18. As the Court of Appeal made clear in *TR*, the formulation of highway maintenance policy is a matter for each local authority taking into consideration the particular risks in that particular area. Clearly the considerations which prevail in rural England and Wales will differ from those which prevail in the urban environment but all should be derived from sound, risk based analysis.
19. In order to carry out such a risk assessment, and looking backwards from the perspective of a trial, it is suggested that a number of matters ought to be investigated (this is not an exhaustive list), assuming data is readily available:
- a. What is the Highways budget?
  - b. What is the current number and 'cost' of highways claims within the local government area?
  - c. Is it possible to look at the data from those claims (for example any findings or concessions regarding the depth of a defect) and judge to what extent an increase from an intervention level of, say, 20mm to 25mm in the footway or 40 to 50 mm in the carriageway, would lead to sufficient savings whilst ensuring maintenance of services and discharge of the duty (the latter being the intervention levels of a local authority We have successfully represented in the face of repeated challenges to its policy; and in 2011 the London Borough of Lambeth increased its intervention level from 2.5 cm to 4 cm and it would be illuminating to know to what extent that has had an impact on the numbers of claims brought and how they were defended)?
  - d. Of any claims lost, what other arguments were sustained in relation to policy: for example frequency of inspection; training of officers; speed of vehicle; and quality of documentation/ records;
  - e. What objective evidence is there in relation to the highway network to justify the hierarchy (e.g. traffic flow; analysis of the presence of schools, hospitals, nursing homes, etc. in the vicinity)?
  - f. Does the policy have within it references to '*resources*' or '*budgetary limits*' or words to that effect;
  - g. What is the current regime of training and information transfer to and from officers and/or contractors?



20. Of course it is accepted that the analysis in a. to d. above is likely to be time-consuming, and potentially costly, but it will assist in any audit and establishes the objective platform to resist the suggestion that the whole thing is merely a cost cutting exercise. Therefore, the compiling and retention of good data is likely to save money in the long run because it makes the job of comparison easier. In the event that litigation is necessary it also means that that data is held conveniently and centrally for the purposes of disclosure.

### Practical Responses

21. Once that analysis has been gathered and there is scope to alter the policy along reasonable lines, then the matter should be approved appropriately either by the local authority in Council or by an appropriate officer with delegated authority (depending on how the authority elects to make such decisions). After all the policy can be attacked on quasi-public law grounds if it appears that there was no collective thinking behind any modification in an effort to undermine the notion that the local authority had taken care in addressing s.58.

22. The next step is how any policy would be 'rolled out'. This is particularly important in a number of respects. The closing words of s.58, namely: '*...but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions*', are often overlooked and misunderstood.

23. We have seen it successfully argued that the failure to demonstrate a regime of training, instruction and qualifications results in the local authority being prevented from relying on the s.58 defence.

24. Broken down into its elements that paragraph means that a local authority must, if it is to rely upon its defence, be able to demonstrate the following:

- a. How did it arrange for the highway to be inspected? That is who did it employ, or contract with, and what were the relevant terms of employment and/or the contract?
- b. How was the 'competence' of those charged with the role vouchsafed? In other words what training and/or qualifications do the highways officers have (and what has been provided by



the local authority by which they are now employed) or what assurances were given in the contract regarding competence, and how, and by whom, are performance targets set and monitored the contract monitored?

- c. How often and by what means is any such training refreshed or updated? Ideally all staff should have undergone recognised training and have a relevant qualification in highway inspection and undergo regular refresher training. Likewise, how often are the contractors' performance indicators checked?
- d. Who supervises the activities of the officers/contractors? Is their work subject to regular review to maintain standards? A senior member of the appropriate department needs to be able to give evidence regarding their staff, how they are overseen and how their work is, from time to time, checked: this avoids the classic but groundless opinion evidence in a statement to the effect that, in terms, *'We think Mr/Mrs. X is a reliable highways inspector and s/he simply would not have missed that massive hole the Claimant is complaining about'*. Again, if you or your local authority witnesses are asked to sign such a statement ask yourself 'why' or 'what is the support for this opinion'? If you cannot answer those questions you have identified a risk that needs assessment;
- e. Ensure that all staff are given proper instructions regarding the new policy and how it is to be implemented. This means more than simply handing over a copy to the highways inspection team: it should always be accompanied by education of any new or different areas of approach; and it should be made clear what it is required of staff including, where appropriate, what might happen if the job is not done in accordance with the policy. It is my almost universal experience that highways officers are diligent and careful, however, if a highways policy deals with their supervision and performance management that at least gives one the opportunity to say how seriously the local authority takes its obligation; and
- f. Consider an example of a mock trial or some form of court-room training to put officers who are inexperienced in the trial environment in the position where they have to confront their nerves and cope with Counsel in an environment which, although realistic, is less hostile.

25. One thing we have observed is that highways officers frequently have no real understanding about the classification of the network hierarchy: knowledge of why a road is classified as it is gives the witness the confidence to answer questions when in the witness box and makes them less defensive (a characteristic which sometimes leads to witnesses appearing unreasonable or stubborn about unimportant matters). In particular it is rare to find any objective assessment other than the footway in

question is 'in the city centre' or 'on a bus route'. Can we make a plea for traffic information to find its way into the thinking behind hierarchies at least in relation to major roads? Even though it may be 'obvious' that a prestige route in a city centre requires, say, weekly inspection, the law prefers to see evidence as to the consideration given to such an important issue.

### **The shifting of costs**

26. All local authorities are familiar with the notion of competitive tendering and 'outsourcing' services can result in savings: of course a commercial decision has to be taken to ensure that the cost of purchase of those services and the cost of insuring the risks is competitive when compared to in-house provision.
27. An alternative may be from savings resulting from the formation of consortia (such as the suggested 25% saving to be achieved by Transport for London's scheme involving Kingston Upon Thames, Islington, Brent, Camden, Lambeth and Wandsworth)<sup>6</sup>.
28. Of course the duty remains that of the local authority but, subject to the drafting of the indemnity clause, it could help to deflect the cost away from the public purse (although we realise that that is small comfort for insurers).

### **Conclusion**

29. The reality is that highways claims have grown in number in the age of the conditional fee agreement. It is too early to tell whether the post 1 April 2013 changes to the CPR will make a significant difference to the numbers of such claims now that success fees are no longer recoverable.
30. In the short term there are many, many cases which pre-date the revision to the rules and so it will be some time after 2016 before one can truly evaluate the position. Clearly, the need to curb spending in the face of an onerous statutory duty and large numbers of claims is a difficult balancing act.
31. The key to successful management of the costs/risk relationship, and, if necessary, successful defence of highway claims, always starts with a policy which is based upon good information; avoids the bear

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<sup>6</sup> <http://www.transport-network.co.uk/2bn-plus-highways-works-begin-in-London/8617#.U3os0Sh7SmQ>

trap of identifying budgetary limits as the driver for change; and ensures that staff are well trained and well informed.

32. Although planned, evidence based amendment to maintenance policies and thorough 'roll out' may have a short-term cost implications, they are, arguably, an investment for the future and could give rise to medium to longer term savings. Such an approach will ensure that challenges to policy and/or the competence of highways officers are much less likely to undermine successful defence of claims. After all, in this context, planned maintenance generally results in a longer lasting fix than a patch and mend approach.

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