Highways Litigation: ALARM Bells Ring for Highway Authorities following Maintenance Survey

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Author: Nicholas Robinson

Last week saw the publication of this year's Annual Local Authority Road Maintenance (ALARM) survey. This was the 26th such report commissioned by the Asphalt Industry Alliance (AIA). It is an independent survey of local authority highways departments in England and Wales. The full report can be viewed and downloaded here.

Key Findings of the 2021 ALARM Survey

The report notes that despite highway maintenance budgets going up 15% this year they remain lower than two years ago. The report states that "*maintaining roads to target conditions is still out of reach for local authorities in England and Wales despite an increase in highway maintenance budgets*". There are some eye-catching statistics, including that the average frequency of road resurfacing is now once every 68 years and that it would cost £10.24 billion (and take 10 years) to fix the backlog of maintenance work on local roads in England and Wales. This equates to around £63.1m per authority.

A single-page summary of the key findings can be seen here.

Interestingly the report found a fall of £3.6m in the amount of compensation payments compared with the previous year (although the figure increases to £15m when associated staff costs are included). Given that there is an estimated budget shortfall of £752.6m (£4.5m per authority) this seems unlikely to be a long-term trend, and the report sets out that inconsistent funding patterns have led to a 'patch and mend' policy which is a short-term and expensive approach without any corresponding improvement in the quality of the road network. The local authorities appear to appreciate this is a short-term approach but state they do not have enough resources for preventative measures when resources are needed for "*fire-fighting and carrying out reactive works*".

It will also be of concern that the long-term sustainability of much of the road network is likely to become an increasing problem. Currently around 30% of roads now fall into the amber (some deterioration) category (the categories being green (good), amber, and red (poor – needing planned maintenance in the next 12 months)) and these roads will lead to ever-increasing maintenance issues as they continue to degrade and age. This can be seen to some extent in London where there was a 5% increase in 'red' roads needing planned maintenance in the next year.

The Highways Litigation Context

Inevitably budgets are central to the approach of highway authorities but where litigation is concerned it places the authorities in a difficult position. It has been well-established since *Wilkinson v City of York* [2011] EWCA Civ 207 that local authorities who seek to justify a reduction in their maintenance regime as a result of financial restraints will be in difficulty making out their section 58 defence.

It is similarly well-established law that section 58 of the Highways Act 1980 does not include a causation defence (*Griffiths v Liverpool Corporation* [1967] 1 QB 374), meaning that absent a reasonable inspection regime liability is established even where a reasonable inspection would not have found the defect.

The implications are potentially stark for highway authorities with a vicious circle being created. An increased incidence of defects may in fact necessitate or justify an increased frequency of inspection (see *TR v Devon County Council* [2013] EWCA Civ 418) and associated cost. This is particularly relevant given the prevailing risk-based approach to inspection regimes engendered in the *Well-Managed Highway Infrastructure* Code of Practice.

In addition, increasing repair costs and litigation costs will divert resources from resurfacing projects and highway authorities will struggle to justify any attempts to reduce costs through reduced inspections or repair.

It is unclear to what extent the pandemic has influenced these figures although the report does highlight the divergent opinions from different authorities in this regard. Many authorities have found that the lockdowns have reduced their ability to undertake maintenance and led to delays, whilst others have found works could be brought forward due to reduced traffic levels. Certainly there is likely to have been a reduction in accidents and consequently claims with reduced usage of the highways. This may provide some much-needed breathing space for highway authorities although the respite is likely to be brief in light of the funding shortfall.

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