Upfront

VOL TEN SUMMER 2019

ALARM EDITION

The **GLORIOUS SUMMER** of 2018

Horizon scanning for the **PUBLIC SECTOR**

Grenfell Tower **TWO YEARS ON**

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HORIZON SCANNING *for the public sector*

Chris Booth, Partner and Head of the Insurance department at Forbes Solicitors, looks at some key changes looming in the year ahead.

Extension of fixed recoverable costs

In July 2017, Sir Rupert Jackson presented his report on recommendations for extending the fixed recoverable costs ("FRC") regime in civil litigation. The key recommendations were for:

- An extension of FRC to the whole of the fast track (with a review of those costs every three years).
- A new intermediate track for fixed costs cases above the Fast Track for certain claims up to £100,000. This would only apply to cases of "modest complexity" which could be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side.

In March 2019 the Ministry of Justice launched a consultation on extending Fixed Recoverable Costs in civil cases in England and Wales. The government is consulting on:

- Extending FRC to all other cases valued up to £25,000 in damages in the Fast Track.
- A new process and FRC for noise induced hearing loss claims.
- Expanding the Fast Track to include the more straightforward "intermediate" cases valued at £25,000 – £100,000 in damages.

The Government is also seeking views on Part 36 offers and unreasonable litigation conduct, including, but not limited to, the proposals for an uplift on FRC. Figures suggested are 35% for the purposes of Part 36 and an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct in an effort to incentivise early settlement.

In the consultation it is noted that there appears broad agreement with Sir Rupert that an uplift on FRC is preferable, as indemnity costs undermine the principle of FRC by requiring detailed costs assessment (and the keeping of records to inform an assessment should it arise). As with FRC more generally, this approach would also provide more certainty for litigants.

The Consultation ended on 6th June 2019, following which the Government will publish a response "in due course". The process will also be kept under review once implemented.

The expectation is that FRC may be further extended to other classes of claims including claims of higher value. Furthermore, active steps will be taken to control costs incurred prior to the first Costs and Case Management Conference where cases are not otherwise subjected to FRC.

https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/

Code of practice 'well-managed highway infrastructure'

The new Code of Practice is now in place, having been implemented on 28th October 2018. Authorities need to ensure they have the right training in place for everyone involved in the process, from top decision makers to the highway inspectors. Forbes have been actively assisting our public sector clients to ensure they are well established with their processes and to ensure they have the best possible evidence with which to demonstrate their compliance with the new Code.

The UK Roads Liaison Group ("UKRLG") has released an Asset Management Competence Framework to help highway authorities implement the recommendations of the Code of Practice and The National Winter Service Research Group ("NWSRG") has published a new practical guide for winter service.

Brexit

Deal or no deal? It is still unclear what form specifically Brexit is going to take and how it will impact the public sector and litigation generally. The expectation is that it will not be known for some time how far the ripples of the Brexit negotiations will travel.

Discount rate

Pursuant to the Civil Liability Act 2018, the Lord Chancellor, has officially commenced the first review of the discount rate under the new Civil Liability Act. He is required to announce the new discount rate by 5th August 2019.

Increase in Small Claims Track

The implementation of this has now officially been delayed until April 2020. The Government has however confirmed its intention to increase the Small Claims Track limit for personal injury claims to £5,000 for road traffic accident related personal injury claims, and to £2,000 for all other types of personal injury claims.

Whilst there are conflicting views on the justification for the increase, most agree that this is likely to result in an increase in the number of litigants in person, certainly in motor cases.

The concern is that the reforms could lead to an increase in Claims Management activity with the inevitable void left by claimants without legal representation. The new Financial Guidance and Claims Act 2018 seeks to address this in regulating claims management services and prohibiting claims management organisations from using unsolicited calls for the purposes of direct marketing in relation to claims management services.

To assist with this, there is to be an online platform, designed with litigants in mind, which the Government has confirmed will be the subject of "extensive user testing in order to ensure that the system is easy to use for all user groups and that the guidance is clear". The Government is proposing for the platform to be ready for large-scale testing by October 2019 with the view to implementing the whiplash measures, including the rise in the small claims limit to £5,000, fully in April 2020.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725157/Govt_Resp_to_Justice_Committee_s_Report_on_Small_Claims_Limit_for_Personal_Injury_print_.pdf

Post-implementation review of LASPO – civil litigation funding and costs

In February 2019, the Ministry of Justice published its long awaited review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Part 2 assesses the impact of five statutory reforms implemented following Sir Rupert Jackson's 2010 Review of Civil Litigation, including:

i. non-recoverability of conditional fee agreement ("CFA") success fees;

ii. non-recoverability of after-the-event insurance ("ATE") premiums;

iii. the introduction of Damages-Based Agreements ("DBAs");

iv. changes to Part 36 offers; and

v. banning referral fees in personal injury ("PI") cases.

The overall objectives of the Part 2 reforms were to reduce the costs of civil litigation, encourage early settlement, reduce unmeritorious claims and to rebalance the costs liabilities between claimants and defendants while ensuring that parties with a valid case could still bring or defend a claim.

The Government review concluded that, on balance, the Part 2 reforms have been successful in reducing the costs of civil litigation. It cites that base costs have reduced by 8 - 10% in real terms for PI claims and early settlement rates have improved. The report also suggests there has also been a decline in unmeritorious claims based on "claims volumes data, the changes in financial incentives to CFAs, the test of fundamental dishonesty for QOCS and anecdotal stakeholder feedback".

In relation to costs protection, it is reported that QOCS is currently working well. Although, the review notes that defendants are concerned about the frequent late withdrawal of claims by claimants prior to trial and claimants are concerned about the perceived excessive use of 'fundamental dishonesty' allegations by defendants.

The government also recognises that there has been a poor take up of DBAs and that the regulations require amendment, but points to the independent review of DBAs, which is currently being undertaken and is expected later in 2019.

The government maintains that the Part 2 reforms, as a package, have "met their objectives and are functioning effectively".

The government concedes in the report that some issues may be revisited at a later stage, but noted that most lawyers would support "a period of relative stability".

https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo

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THE NEW DAWN OF

Highway Maintenance

After an agonising two-year preparation period from the publication of the Code of Practice 'Well-Managed Highway Infrastructure', the new era of Highway Maintenance is now well and truly under way.

Since its publication in October 2016, local authorities have been hard at work drafting new internal policies, new standards and delivering training sessions to complement the new 'risk-based approach' to highways maintenance that underpins the new Code of Practice

The new Code removes the old 'one-size-fits-all' standards for highways maintenance intervention and in its place recommends that a risk-based approach should be adopted for all aspects of highway infrastructure maintenance, including setting levels of service, inspections, responses, resilience, priorities and programmes.

Authorities were set a deadline of October 2018 to become fully compliant with the new Code. With its emphasis on consistency in training, providing adequate documentation and collaboration with neighbours, the new regime seeks to allow authorities the opportunity to create bespoke policies to suit their area-specific needs and challenges. The concern, however, is that it will create even greater scrutiny of the policies and decisions made by highway inspectors.

The impact

There is no doubt that many local authorities have benefited from the fact that, whilst October 2018 was given as the deadline for implementation, it was permissible to adopt the new Code prior to this date. Additionally, some local authorities discovered that the new Code did not present the seismic shift once feared.

As so often happens with large, sweeping changes to industry standards, the fears of the new system have been shown to be unwarranted. We are yet to see any real boom of litigation from those seeking to exploit the shortcomings of the new system. Instead, authorities are finding that they are no longer as constrained by the law when justifying actions taken; and that they have a stronger voice when defending claims as they are no longer being shouted down for failing to apply the minutiae of detail required by the old code of practice.

The future

In truth, perhaps the bigger questions of the new regime are yet to reach the courts. For example, at present, it is no defence for an authority to say that it failed to maintain a highway due to funds being used for more pressing needs. Yet with the new Code's emphasis on giving authorities the freedom to create and enforce their own guidelines based on local needs, some have wondered if this will give authorities the chance to use 'lack of funds' or 'low priority' as a stronger defence for not maintaining a highway. Sadly, such a ruling is unlikely to override existing case law, and would therefore need to come from a higher authority such as the Supreme Court, where cases often take years to reach trial.

So whilst the implementation of the new Code of Practice did not represent a cliff edge, it is likely that we are still to see the most significant changes, making it essential to keep abreast of the latest legal developments as and when they come in.

Forbes regularly advises on a wide range of matters relating to highways maintenance and standards.

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Discount Rate

DECISION DUE THIS SUMMER

After a turbulent passage through Parliament, the Civil Liability Act ("the Act") received Royal Assent late last year on 20th December 2018. The Act crucially provides a new mechanism for determining the personal injury discount rate.

The personal injury discount rate is used to determine lump sum damage awards to claimants who have suffered a serious personal injury. The former Lord Chancellor, Liz Truss, controversially set the current rate in February 2017 when she reduced the discount rate from 2.5% to minus 0.75%. The lowering of the discount rate resulted in a dramatic increase in compensation payments to claimants.

Pursuant to the provisions of the new Act, the Lord Chancellor was formally required to commence a review of the discount rate within 90 days of the Act receiving Royal Assent. On 19th March 2019, Rt Hon David Gauke MP finally set the ball rolling when he announced that he was to launch his review. The Act provides for the rate to be set by reference to a low risk diversified portfolio of investments, rather than very low risk investments as at present. Low risk is less risk than would be taken by a prudent and properly advised investor and more risk than very low risk. The rate will be set following a consultation with the Government Actuary and the Treasury; and, on the subsequent reviews to be carried out every 5 years, with an independent expert panel chaired by the Government Actuary, and the Treasury.

The Lord Chancellor now has 140 days to conclude his review of the rate, and he must announce the new discount rate by 5th August 2019.

Forbes comment

The Government's view appears to be that the present system is over-compensating personal injury claimants and therefore, it is highly likely that the rate will be amended accordingly, which is good news for insurers, public sector organisations and large bodies who have significant personal injury liabilities.

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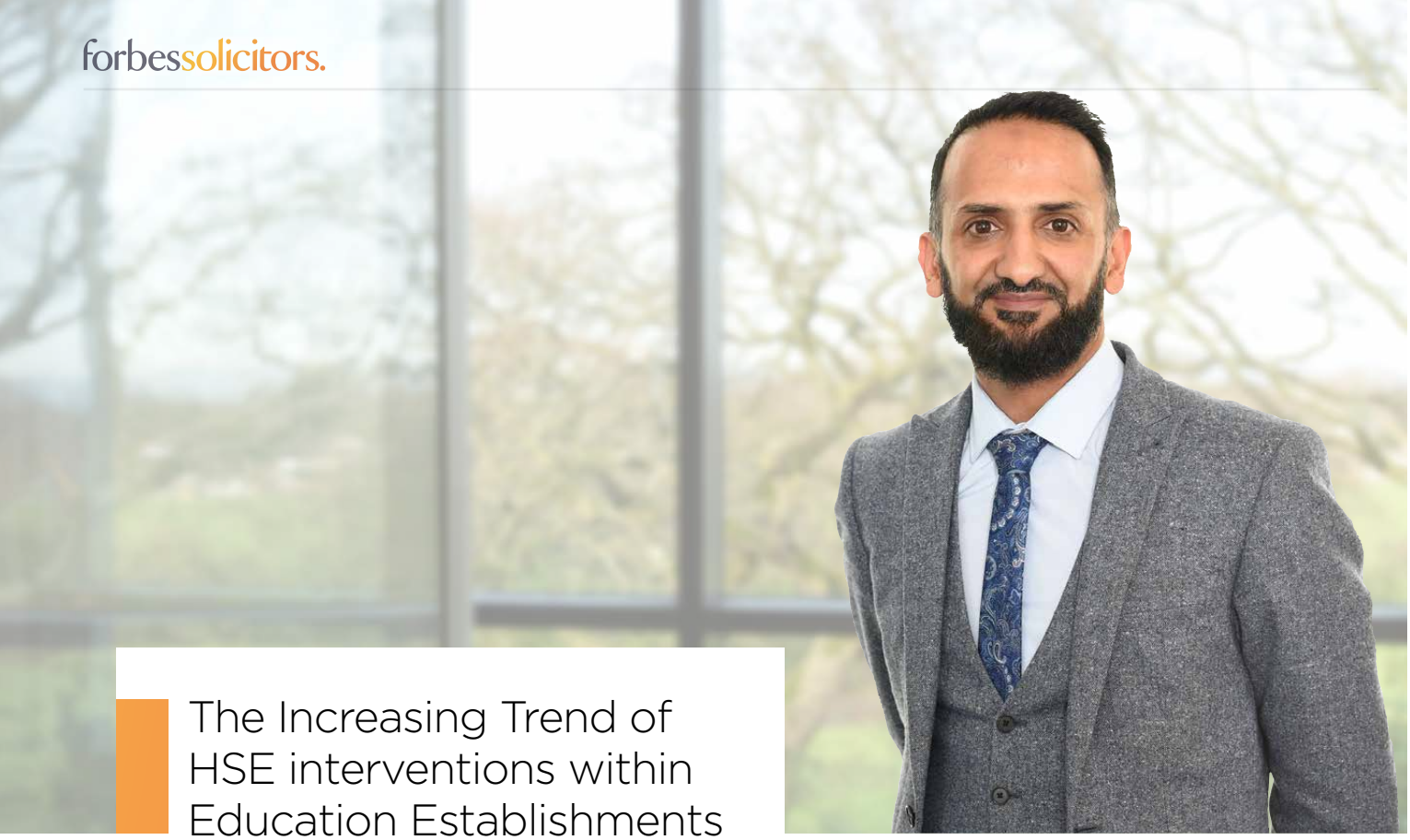
“ The personal injury discount rate is used to determine lump sum damage awards to claimants who have suffered a serious personal injury. ”



The Increasing Trend of HSE interventions within Education Establishments

Since the introduction of the new Sentencing Guidelines for health and safety in February 2016, it has been reported that there has been an 80% increase in fines from the previous year (end of March 2017). Notably, there has also been a significant increase in the number of prosecutions resulting in fines against educational establishments.

The primary health and safety legislation applicable to educational establishments is contained in sections 2 and 3 of the Health and Safety at Work Act 1974. Section 2 imposes a duty to act reasonably to ensure health and safety in the workplace and section 3 legislates the duty towards others not in your employment including pupils, visitors and parents. The central duty under health and safety law is not to expose persons to risk. Health and safety law applies where there is a risk of harm irrespective of whether there is any actual harm, therefore the HSE may get involved, even if an accident has not actually occurred.

This article examines a number of different cases where the HSE has taken enforcement action against schools/colleges (separate to any civil claim, which may be brought if an injury has also been caused by an incident). On public policy grounds, fines and prosecution costs imposed by the Courts are not covered under any insurance policy arrangements; cover normally extends to the cost of defending regulatory breaches only.

No actual harm

In August 2018 Kent County Council was fined £200,000 after an investigation concluded that asbestos had been disturbed at a primary school. The HSE had found that a flue and gasket rope had been removed by a caretaker, some eighteen months before the discovery in November 2014. There were also findings that neither the caretaker nor the head teacher had received any asbestos awareness training. The Judge found the dangers of asbestos had been identified in reports dating back to 2010 and 2012.

The school pleaded guilty to breaching regulation 10(1) of the Control of Asbestos Regulations 2012. No actual harm was caused and evidence was given to the judge that the risk of persons being exposed was 0.0009%! Despite this a substantial fine was imposed with costs.

School traffic management

A more recent case in the headlines and a truly tragic case, involved a school minibus being driven at a safe speed by a teacher. In 2014, a pupil had finished school and was crossing the road to board his bus home when the collision with the minibus took place. The HSE found that a layby created before the school opened in 2008 was not large enough to accommodate all the school buses at home time. As a result, some of the school buses had to park on the opposite side of the road, which had no pavement, leaving children to board in the middle of the road while other vehicles were able to travel in both directions between the waiting buses. Coach drivers described the area as a “free for all”, with others describing it as “chaos”.

Sadly, the Council's health and safety advisor had identified this risk in 2008, but the advice had not been acted upon. There had also been a number of near misses involving pupils, but the incidents had not been officially reported or discussed by the school.

Following the accident, the HSE ordered the Council to modify the bus layby to make it big enough for all children to board buses from the pavement. HSE guidance clearly states that transport safety at every workplace should start with the creation of a "safe site". Children may not always be risk aware, and the rush of children all leaving school at once makes it all the more important that transport risk is properly managed, and regularly reviewed.

The HSE brought a prosecution against Bridgend County Borough Council. The Council was fined £300,000 and ordered to pay costs of £29,228.

Supervision of pupils during classes

In March 2014, a twelve-year old pupil was in a design and technology class making animal shapes out of plywood. The court heard the pupil attempted to use a belt-sanding machine. He had never used one before and was shown how to use it by a fellow pupil who was unaware of the purpose of the raised metal guard. When the pupil put the shape to the belt, the guard flipped down and trapped his left middle finger, which subsequently had to be amputated down to the knuckle.

The HSE alleged the teacher had not received adequate training to recognise that the machine was in an unsafe condition or to recognise the risk of allowing pupils to use the machinery unsupervised and without suitable training. The design and technology class had been without a technician for eight weeks prior to the incident; and on the day of the incident, the teacher was supervising the class alone.

The school pleaded guilty to a section 3 Health and Safety breach and was fined £200,000 and ordered to pay full costs.

Failure to adhere to risk assessments

A failure to adhere to a risk assessment or health and safety policy is best demonstrated by yet another tragic case. In January 2016, a school was prosecuted for safety failings after a pupil suffered permanent paralysis when a swing collapsed. The thirteen year old pupil was playing on a wooden swing in an adventure playground located within the school grounds. An HSE investigation found the swing had collapsed because the supporting timbers had rotted. The heavy wooden crossbeam of the swing fell onto the pupil's head and neck causing spinal injuries that resulted in permanent paralysis. The school was fined a total of £50,000, and ordered to pay £90,693 in costs after pleading guilty to an offence under section 3(1) of the Health and Safety at Work etc. Act 1974. Speaking after the hearing, the HSE inspector said: "this case shows how important it is that schools and other providers of play equipment maintain them in a safe condition. This tragic accident could have been avoided had the school implemented the findings of its own risk assessment".

In another example, a historic private school was prosecuted by the HSE when an investigation revealed that stonemasons employed to repair the building structure had been exposed to more than 80 times the daily limit for silica dust. An HSE investigation found there was a failure to take any measures to monitor or reduce the exposure of workers to silica dust or even recognise the risks created by the use of tools in the work place. Even after being informed that a worker had developed silicosis they failed to take any action or monitor exposure levels. The school's own Health & Safety Consultant had identified the risks a few years earlier. The school received a substantial fine of £100,000 for the blatant failure to undertake adequate risk assessments or to take preventative action.

Forbes comment

As well as civil actions, education establishments also face the risk of action by the HSE for health and safety breaches. Whilst most education organisations have systems and procedures in place to prevent accidents, recent case law demonstrates the importance of keeping those systems and procedures under review. Risk assessments should be performed on a regular basis and a system for reporting and discussing health and safety incidents is recommended to ensure that incidents are investigated so that risks can be eliminated or reduced to avoid future accidents.

Forbes regularly advises on health and safety and regulatory issues.

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EXTENSION OF FIXED RECOVERABLE COSTS

Moves a Step Closer

Earlier this year, the Ministry of Justice launched a Consultation on extending Fixed Recoverable Costs in civil cases in England and Wales. The Consultation seeks views on the implementation of the recommendations made by Sir Rupert Jackson in his Report on Fixed Recoverable Costs published in July 2017.

Fixed recoverable costs

Fixed recoverable costs ("FRC") operate in most low value personal injury claims. FRC prescribe the amount of costs the winning party can recover from the losing party. Sir Rupert Jackson proposed extending the fixed costs regime as a means of ensuring proportionate costs, he remarked "...Controlling litigation costs is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work."

The Consultation

The Consultation invites views on the following issues:

- The extension of FRC to all other cases valued up to £25,000 in damages in the fast track.
- A new process and FRC for noise induced hearing loss claims.
- The expansion of the fast track to include the simple "intermediate" cases where damages are valued between £25,000–£100,000.

Sir Rupert originally recommended establishing a new and separate "intermediate track" to handle the cases to which the new FRC apply. The government does not see the need for this, and instead advocates expanding the fast track to include 'intermediate' cases. Sir Rupert suggests the following criteria for suitable intermediate cases:

- The case is not suitable for the small claims track or the fast track.
- The claim is for debt, damages or other monetary relief, no higher than £100,000.
- The trial will not last longer than three days.
- There will be no more than two expert witnesses giving oral evidence for each party.
- The case can be justly and proportionately managed under an expedited procedure.
- There are no wider factors, such as reputation or public importance, which make the case inappropriate for allocation as an intermediate case.
- The claim is not for mesothelioma or other asbestos related lung diseases.
- There are particular reasons to allocate it as an 'intermediate' case.

For FRC to work in intermediate cases the Consultation acknowledges that a streamlined procedure would be required, including statements of case no longer than 10 pages, a party's statements limited to 30 pages, standard disclosure, oral evidence limited to one expert witness per party with each expert report limited to 20 pages and oral witness evidence will be time-limited.

The proposals outlined in the Consultation will inevitably prompt arguments over allocation, with claimants wanting to avoid FRC by pursuing allocation to the multi-track. The Consultation therefore seeks views on how the rules can be strengthened to ensure that unnecessary challenges are avoided, and, where appropriate, cases stay within FRC. Interestingly, the Consultation moots the possibility of a financial penalty for unsuccessful challenges to allocation.

The Consultation also proposes amending the Part 36 regime to encourage early settlement of claims. It is noted that an uplift on FRC is preferable, as indemnity costs would undermine the principle of FRC by requiring detailed costs assessment. An uplift would also provide more certainty for litigants. A figure of 35% is proposed on the FRC for the purposes of Part 36.

Sir Rupert recommends that where costs are subject to FRC, the Court should be able to make an order for indemnity costs where there has been unreasonable litigation conduct. The Consultation seeks to canvas views on whether the court should be able to either award a fixed percentage uplift on costs, or to make an order for indemnity costs in cases of unreasonable litigation conduct. The government, however, does acknowledge that there is a distinction between not accepting an appropriate offer and seriously unreasonable behaviour, and notes that it is therefore reasonable to make a distinction and to allow higher costs to be awarded in more serious cases.

Forbes comment

It is clear that the government intends to press ahead and implement the majority of Sir Rupert's proposals. The extension of fixed recoverable costs is likely to make litigation more certain, transparent and proportionate for those involved in the litigation process. Greater clarity over costs will make it easier for parties to make informed decisions as to whether to pursue or defend a claim.

The Consultation closes on 6th June 2019 and the government has already confirmed that it will commence discussions with the Civil Procedure Rule Committee at an early stage to discuss potential rule changes necessary to implement the proposals. The government will publish a response to the Consultation later in the year.

Source: Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals.

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The Glorious Summer of 2018

Last summer saw an unprecedented period of warm temperatures over a sustained period across the country. Many previous temperature records were broken as the country basked in warm weather under clear sunny skies for most of the summer.

The impact

Whilst the country enjoyed a significant period of dry and warm weather, the land temperatures increased and moisture content within the soil reduced. Underfoot, the soil strata dried out and in the absence of any significant rainfall, the lack of rehydration resulted in the shrinkage of soils. The clay-based areas were particularly affected and ultimately movement of the strata occurred. In addition, trees and other flora actively searched out alternative water sources, which is likely to have further exacerbated the position as root systems undermined building foundations and drainage systems, ultimately increasing the risk of causing structural movement and damage to buildings.

The full effect of the summer temperatures and weather has yet to be fully ascertained, but early indicators are that cases of subsidence will increase significantly and claims against third-party tree owners, inevitably including local authorities, for property damage will increase. These types of claim can be complex from a causation perspective and normally involve a number of experts including building surveyors/engineers, arboriculturalists and soil analysis experts. The legal and repair costs are often significant and early expert legal advice is strongly recommended.

In addition, in October 2018 the Court of Appeal determined the case of **Witley Parish Council –v- Andrew Cavanagh [2018] EWCA Civ 2232.** The case concerned a tree, which fell across the A283 Petworth Road in Witley, Surrey, crushing a single decker bus and causing serious personal injury to the claimant driver. The Court were asked to consider a number of points relating to the inspection regime put in place by the defendant council for trees on their land and the pre-incident recommendations provided by a third-party Consultant. Ultimately, the council were found to be in breach of their duty of care. The case serves as a reminder for land owners, such as local authorities, to regularly review inspection reports and tree management policies, albeit the case was predominantly decided on a failure to act on recommendations provided by a third-party consultant for this particular tree as opposed to any systemic failings of the council's overall tree management policy.

“ The full effect of the sustained period of warm weather in 2018 has yet to be fully determined, but from discussions with a number of local authorities, it is apparent that tree-related claims are on the increase. ”

The future

The full effect of the sustained period of warm weather in 2018 has yet to be fully determined, but from discussions with a number of local authorities, it is apparent that tree-related claims are on the increase. In addition, given the fixed costs regime in place for low value personal injury claims, it seems likely that claimant solicitors will actively pursue other areas of litigation, which are potentially more beneficial from a financial perspective.

Furthermore, the **Cavanagh** case allowed the Court of Appeal to consider and review a number of issues relating to tree management and inspection regimes for landowners, including local authorities. As discussed previously, the case related to tree failure above ground, but the broad principles considered by the Court may also be of interest to local authorities in dealing with tree root related claims.

Forbes regularly advises local authorities and other groups on a range of environmental cases, including tree related matters.

For further information or advice please contact Tim Smith on 0113 386 2687 or email tim.smith@forbessolicitors.co.uk.

Forbes will be presenting a conference to local authorities on tree root claims in September 2019.

If you would like information about the conference please contact our marketing team at events@forbessolicitors.co.uk.

GRENFELL TOWER

Two Years On

WHERE ARE WE NOW?

It is now two years since the terrible tragedy that took the lives of 72 Grenfell Tower residents on the 14th June 2017. So where are we up to with the fallout, and what happens next? The press and public were quick to criticise. In the months following the incident, numerous companies and bodies were scrutinised for failures which, it was perceived, contributed to the fire itself, and the catastrophic loss of life.

There were the obvious and less controversial targets, of course; firms that manufactured, supplied and fitted the cladding that caused the fire to spread so quickly, those that were involved in the refurbishment of the tower, and the Local Authority overseeing that process. Around 500 private companies are said to be under investigation, but there were also criticisms of a number of other bodies involved in the handling of the fire itself.

The Fire Service, for instance, was accused of failing to have any coherent tower evacuation plans. Government guidelines recommend a "stay put" policy to try and contain tower block fires and, ultimately, make them more manageable. However, the same guidelines also recommend contingency plans for situations where the standard "stay put" advice needs to be abandoned when it is no longer tenable. On the night of the blaze, residents were kept in place under the standard policy for around two hours until an evacuation was ordered at 2.47am, somewhere in the region of 80 minutes after the policy had "substantially failed".

The London Fire Brigade ("LFB") and Fire Brigades Union hit back by stating that there had been "no obvious and safe alternative strategy" and that mass evacuation of Grenfell Tower was not possible, as the brigade lacked the training and procedures to deal with the "highly combustible death trap" that had been created by the refurbishment. There was also said to be a "fundamental misunderstanding" that fire commanders could simply change government policy on the spot where a building was not designed for simultaneous evacuation. Since then, the LFB has created a High Rise Task Force to review the risks associated with high-rise residential premises, which has since instigated a programme of guidance and advice for building owners on the implementation of the Government's interim arrangements for aluminium composite material clad buildings.

A number of Fire Safety Regulation posts were also established following securing of funding to enhance the LFB's building inspection regime, and the policy for responding to high-rise fires has changed from four fire engines to eight, plus one aerial (high reach) appliance, or ten where the building is reported as cladded.

It is not just the bodies which are under scrutiny. Dany Cotton, who had only been in post as the Commissioner of the London Fire Brigade for six months when the incident occurred, is said to have been under direct and personal scrutiny for potential breaches of the Health and Safety Act 1974. Other CEOs, Managing Directors and corporate leaders will also be nervous.

Since the Grenfell Tower disaster we now have new guidelines for the sentencing of Gross Negligence Manslaughter, which are predicted to increase the penalties handed down by judges. The Sentencing Council Guidelines oblige the court to determine the offender's culpability with reference to various factors in each category of severity. Category B culpability, for instance, may involve "continued or repeated negligent conduct in the face of obvious suffering", or where there was a "blatant disregard" for a very high risk of death resulting from the negligent conduct". Category A would include more extreme forms of the same behaviour.

Having determined the culpability, the sentencing range is established. For category B culpability, the starting point is eight years' custody, with a range between six and twelve years. For category A culpability, offenders are facing twelve years in a range from ten to eighteen years. All brackets are for a single offence resulting in a single fatality, so where others are put at harm as well, the offence is aggravated and the sentence potentially increased.

Where a corporation is identified instead of and/or as well as an individual, the body itself may be prosecuted under the Corporate Manslaughter and Corporate Homicide Act 2007. Sanctions are fines of up to £20 million for category A offenders with a turnover of more than £50 million.

No arrests for health and safety offences have been made as of yet, but there have been other knock-on effects. The tragedy sparked the review of Building Regulations, which was ultimately criticised by the Royal Institute of British Architects for ignoring several recommendations made by them, including fitting sprinklers in existing housing blocks and ensuring all high rise buildings have a second means of escape. From 21st December 2018, we now have the Building (Amendment) Regulations 2018, which ban combustible materials on the external walls of new buildings over eighteen metres in height containing flats, as well as new hospitals, residential care premises, dormitories in boarding schools and student accommodation. Schools over eighteen metres in height built as part of the government's centrally delivered build programmes will also not use combustible materials in the external wall.

Sir Martin Moore-Bick concluded phase 1 of the Grenfell Tower Inquiry with a statement on 12th December 2018. In the forthcoming months, around 200,000 documents will be disclosed to the core participants, and hundreds more witness statements will be taken, particularly in reference to the refurbishment works. He does not envisage that phase 2 hearings will comment until the end of 2019.

Forbes comment

It seems that the answers so sorely needed by the families and friends of the Grenfell Tower victims will be a long way off yet. In the meantime, at least some positive progress is being made to preventing further tragedy, and to ensure that those who can be identified as culpable are made to properly answer for their actions.

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Forbes at trial

Claimant's claim against Calderdale Metropolitan Borough Council hits a major bump in the road

A claimant, who alleged he had sustained personal injury after the wheel of his lorry hit a pothole, has agreed to pay the defendant's costs in full if the council agreed to withdraw their application for a finding of fundamental dishonesty.

In 2015, the claimant alleged that he was driving his HGV lorry when the offside drive axle dropped into a pothole in the road, causing the lorry to jolt violently. Breach of duty was admitted, but the claimant was put to strict proof. The defendant had grave reservations about whether the accident had occurred, as well as severe concerns relating to the extent of the injuries and the legitimacy of the £5,000 claimed by way of special damages.

The robust defence of the case ultimately led to the claimant discontinuing his claim. As this was a QOCS case, both parties would be required to bear their own costs. In the circumstances, this was seen as an unsatisfactory outcome. The defendant therefore applied for the matter to be reinstated to allow the defendant to seek a finding of fundamental dishonesty and to overturn the provisions of qocs.

In an unusual step, the Court listed the matter for a fundamental dishonesty trial. During the trial, the claimant was the subject of cross-examination for over 3 hours. The claimant failed to explain why, with an acceptance of a breach of duty, he discontinued his claim. His evidence was weak and inconsistent; and his answer to every point was to blame his solicitors for their default.

The defendant's biggest concern related to a claim for gardening services. The claimant claimed that before his accident, he used to carry out all his own gardening on a weekend but his injuries prevented him from doing so and had to employ a gardener. No evidence of his losses had ever been produced. At the trial, it was revealed that his company had in fact paid for the gardening expenses, at which point the barrister acting for the defendant informed the claimant that he had potentially committed a criminal offence, by using company funds for personal purposes. The Judge was required to provide the claimant with a criminal warning to advise him that he did not have to answer any further questions on this point for fear of self-incrimination.

A short adjournment promptly followed and the claimant offered to pay the defendant's costs in full if the defendant agreed to withdraw the application. After careful deliberation, the council agreed that accepting the offer ensured the full protection of public funds.

Forbes comment

Calderdale MBC, Zurich and Forbes' anti-fraud team are delighted with the outcome of this matter. The defendant was clearly vindicated in pursuing the application for a finding of fundamental dishonesty. The evidence that emerged during the hearing confirmed the concerns, which the defendant had had during the entire case. The costs order obtained ensured that valuable public funds were preserved and sent a robust message to those considering pursuing fraudulent or exaggerated claims against Calderdale MBC.

Forbes' anti-fraud team's robust approach means that they are regularly successful in fighting fraudulent claims.

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“ in determining whether there has been a breach of duty in these difficult cases, the court should pay close attention to the complexity and delicacy of the decisions that education officers and education psychologists have to make, and should not find negligence too readily ”

Local Authority Defends Pupil Negligence Claims for Bullying at School

Forbes has defended two unusual claims on behalf of a local authority. Two former pupils of a primary school brought a claim against the local authority alleging that they had sustained psychological and minor physical injuries as a result of being bullied by another child.

It was specifically alleged that the two pupils had suffered injury because of the negligence of the school and the failure to take adequate steps to protect the children. The Particulars of Claim contained a long list of purported incidents, many of which lacked any kind of detail or substance.

The local authority, on behalf of the school, robustly defended the claims. A thorough investigation confirmed that the two girls and the alleged bully were part of a friendship group, and whilst the girls would often fall out, it was nothing more than age appropriate disagreements. The allegations against the school proved to be unsubstantiated and detailed evidence was gathered from staff to confirm that the school had taken suitable and proportionate action to deal with issues as and when they had arisen.

Following the exchange of witness evidence, the two claimants discontinued their claims against the local authority.

Forbes comment

School staff have a duty to take reasonable care to protect the children in their care; this includes protecting children from bullying and other mistreatment. In the case of **Leon Carty –v- Croydon London Borough Council [2005]**, Lord Justice Dyson remarked “in determining whether there has been a breach of duty in these difficult cases, the court should pay close attention to the complexity and delicacy of the decisions that education officers and education psychologists have to make, and should not find negligence too readily.” Whilst Courts will be reluctant to make a finding of negligence in such situations, schools should nonetheless ensure that they are in a position to be able to defend similar claims should they arise.

We recommend that schools should consider what procedures they have in place to prevent bullying. It is, of course, a legal requirement for schools to have a behaviour policy pursuant to section 89 of the Education and Inspections Act 2006. Head teachers have a duty to encourage good behaviour and respect for others and, in particular, prevent all forms of bullying among pupils. A school’s behaviour policy should include measures to prevent bullying and must be communicated to pupils and parents. In addition, schools should ensure that accident slips are completed accurately, that staff are adequately trained to deal with allegations of bullying and that complaints are always addressed in a prompt and proportionate manner.

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Claim Kicked to the Kerb

Oldham Metropolitan Borough Council has successfully defended a claim following a fall on a defective kerb.

The claimant was out walking one evening. She fell when she put her right foot forward onto the kerb, which had a wedge of stone chipped away. The claimant's heel dropped backwards into the missing section of the kerb causing her to fall forwards and sustain an injury.

The locus was subject to an annual inspection regime; the defect had not previously been noted for repair as it fell below the 75mm intervention level adhered to by the defendant as set out in the local authority's Code of Practice. No complaints regarding the defect had been received.

The Judge considered whether a reasonable person would have considered the defect a real source of danger. The Judge described the defect as being of a 'modest size'. He deemed that the claimant was unfortunate to have found her feet in a defect not much wider than the width of a heel. He noted that there was a low footfall in the area and that the defect was not positioned at an obvious crossing point. Having considered the guidance set out in well-established case law, he did not consider that a reasonable person would consider the defect to be dangerous and dismissed the claim.

Forbes comment

This is an excellent result for the local authority, which validates their longstanding approach to kerb defects. There are no national guidelines relating to kerb defects, therefore, each highway authority must apply their own standard. The claimant attempted to compare the defendant's approach to kerb defects with neighbouring authorities. This proved to be a fruitless exercise; neither of the neighbouring authorities would have identified this particular kerb for repair and in any event, the test applied in the case of **Galloway –v- London Borough of Richmond Upon Thames (2003)** was not one of measurements, but whether the kerb defect gave rise to a "real source of danger".

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Scathing Judge Finds Ludicrous Claim for Care to be "Wholly and Grossly Dishonest"

A claimant who presented a grossly overstated and exaggerated care claim against Blackburn with Darwen Borough Council has been found to be fundamentally dishonest by the Court.

The claimant tripped and fell on to her left elbow in 2014 and sustained a fracture. A breach of duty was admitted and the claimant was put to proof in relation to both causation and her claim for special damages. In particular, the defendant was alarmed by the claim for care put forward by the claimant. Following the accident, the claimant had a cast applied and received surgery one week later. She subsequently developed a frozen shoulder and underwent physiotherapy and a second operation. Twenty-one months post-accident the claimant still complained of pain and alleged that she still required help to perform day-to-day tasks. She also alleged a psychological injury. A Schedule of Loss stated that past losses for care amounted to £65,000 and that care was ongoing at over £16,000 per year. The future care claim in total, applying the multiplier for the rest of her life, was pleaded in the sum of £928,631.13!

In response, the defendant adopted a robust stance and filed a defence together with a counter schedule alleging exaggeration and fundamental dishonesty. The defendant also obtained surveillance, which showed the claimant shopping in her local town centre and carrying bags in both hands and on both shoulders.

During the trial, the claimant was cross-examined at length about the care aspect of the claim. According to the Judge, the cross-examination revealed a "wild overstatement" and the explanation for the extent of the care "made no sense whatsoever".

For instance, it was suggested that 2.5 hours per day was required for meal preparation because she was unable to chop vegetables etc. but the injury was to her non-dominant left elbow. The claimant's husband was also cross-examined. The Judge found that his "support for the ludicrous amount of care claimed smacked of sticking to a script rather than truthfulness".

In conclusion, the Judge was not satisfied that the claimant received anywhere near the level of care claimed. He described the Schedule of Loss as "wholly and grossly dishonest". He remarked that it was more care then he would have expected to see if the claimant was paralysed from the waist down. The Judge agreed that section 57 of the Criminal Justice and Courts Act 2015 applied and that the defendant had successfully established that the claimant was fundamentally dishonest.

Forbes comment

We are delighted to have secured a finding of fundamental dishonesty in this matter. The extent of the claim for care was both audacious and completely unbelievable for an injury to the non-dominant arm in an otherwise fit and well 40 year old woman. Section 57 of the Criminal Justice and Courts Act 2015 now provides defendants with a mechanism to challenge greedy claimants who blatantly seek to exaggerate elements of their otherwise genuine claim. Following the trial the Judge disapplied the QOCS rules and ordered the claimant to pay the defendant's costs.

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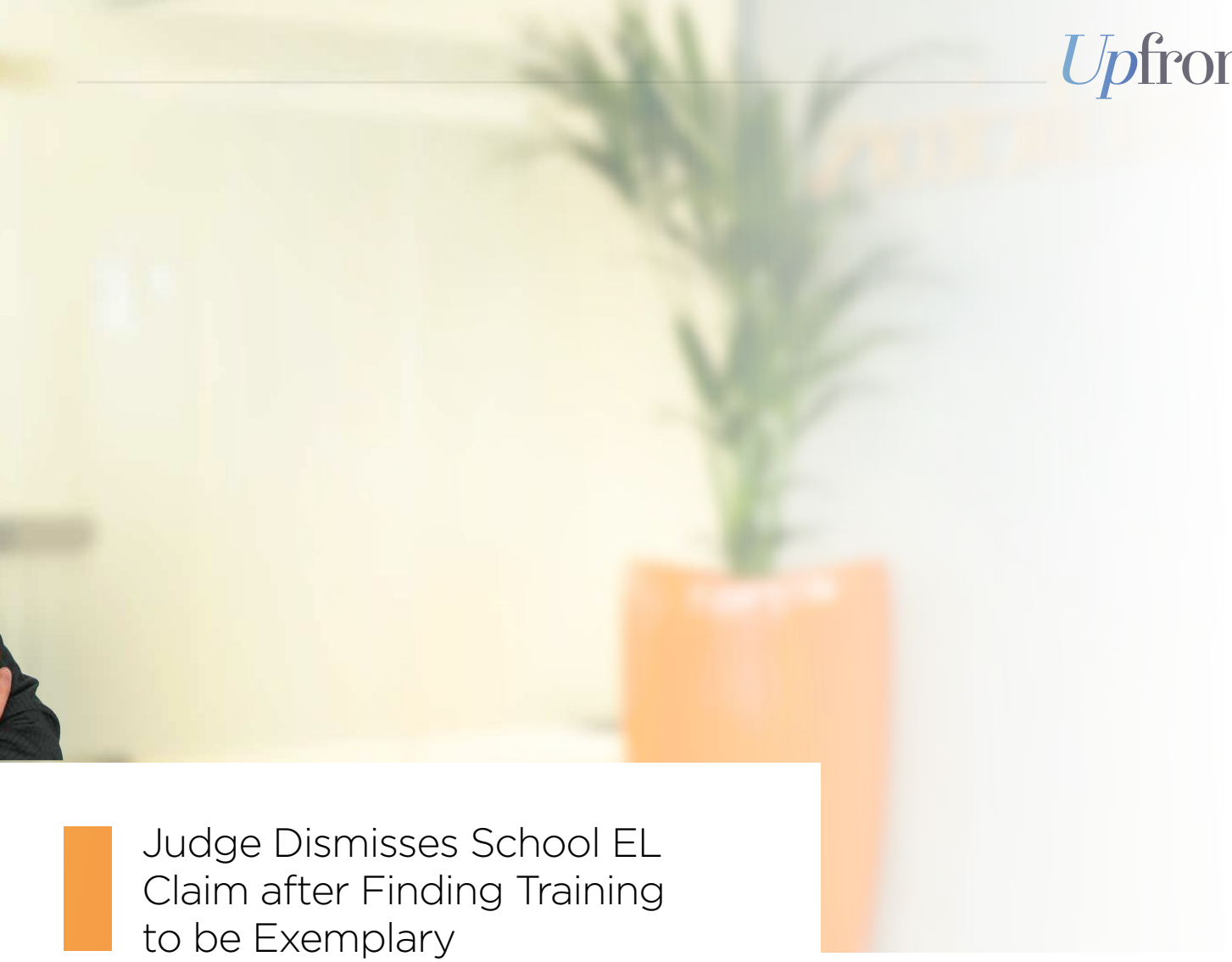

Judge Dismisses School EL Claim after Finding Training to be Exemplary

The claimant alleged that during the course of her employment as a teaching assistant at a special needs school she suffered a serious injury to her right knee whilst trying to retrieve a keyboard that was required for a music lesson from the highest shelf in a storeroom. She therefore brought a personal injury claim against her employer, Wigan Council.

The claimant alleged that as she attempted to pull the keyboard down from the top shelf, she lost her grip of it, stumbled and fell. The claimant argued that she was under pressure to collect the keyboard and contended that the storeroom was cluttered and congested, meaning access was difficult and she was unable to get out of the way when the keyboard fell.

During the trial, the claimant accepted that a special needs school requires a lot of equipment and that space is at a premium. Whilst it was clear from the photographs that the storeroom was full, there was no suggestion that there should not be shelving or that items had been stored inappropriately.

The Judge concluded that the accident was not caused by the defendant's negligence. The claimant decided to take a risk; she saw the flap of the box hanging down and pulled on it. The keyboard was not secure so it came down. She was rushing, but she was not under pressure to do so as it was not critical to have a keyboard in the class. It was not a risk that her employer expected her to take. The Judge therefore dismissed the claim.

Forbes comment

The successful defence of this claim saved the local authority in excess of £50,000. The Judge was highly complimentary of the school, describing the risk assessments and staff training as "excellent". The exemplary health and safety documentation provided by the school was key to the defence of this claim and the prompt and efficient post-incident investigation crucially preserved contemporaneous evidence as to the cause of the incident.

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DEFENDING *Depressions*

The claimant alleged that she caught her foot in a depression whilst crossing a road, causing her to fall to the ground and sustain an unpleasant injury involving damage to her teeth and shoulder. She brought a claim for personal injuries against the highway authority, Bolton Council.

At the trial, the claimant claimed not to have seen the depression as the road surface was dark. She relied on the evidence of three witnesses who claimed that the depression had been present for some time, although they all conceded that they had not reported the defect for repair. Interestingly, it was remarked by one of the witnesses that she had not reported the defect as she believed that the defendant would not act upon the complaint. However, when pushed it was revealed that she had previously reported two other defects to the defendant and both had been repaired following those complaints.

The defendant did not deny that the accident had occurred, but argued that the depression was not a defect which caused a reasonably foreseeable danger to pedestrians. The highway inspector who carried out the pre-accident inspection observed that he did not consider the depression to be a defect that required repair, as there was no obvious tripping edge and it was not located at a regular crossing point.

In his judgment, the defendant referred back to the principles set out in **Mills –v- Barnsley MBC [1992] 2 WLUK 76** noting that the appropriate test is one of reasonableness and foreseeability. The Judge concluded that not every defect and unevenness in the carriageway can be said to be unsafe and referred to the much cited quotation from **Littler –v- Liverpool Corporation (1968) 2 All ER 343** that the highway is not to be judged by the standards of a bowling green and that some irregularity is to be expected. The claim was, therefore, dismissed.

Forbes comment

The Court of Appeal warned in the case of **Mills –v- Barnsley MBC** that a Court should avoid imposing an overly onerous duty on local authorities. Whether unevenness in the form of a depression renders a highway dangerous is often the subject of legal argument. When examining highway defects, including depressions, the starting point ought to be whether the defect and overall condition of the highway represents a foreseeable risk to pedestrians. This will often depend on the size of the depression, its location and whether there is a defining trip edge.

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JUMP, TRIP *and Skip*

The claimant alleged that she fell in a pothole whilst walking back from the local off-licence and sustained serious personal injuries. She brought a claim for personal injury against Bolton Council.

At trial the claimant described that she was walking home in the road and as she turned the corner, a van approached her in the opposite direction and the driver gesticulated rudely for her to get out of the way. She jumped out of the road and on to the pavement at which point she fell. She explained that she had been walking in the road because she knew the pothole was there and wanted to avoid it. She alleged that the pothole had been present since November 2016.

Following the trip, the claimant said she used a telephone pole to pull herself up off the floor. The telephone pole was located at the end of the street, and her witness statement suggested the accident occurred on the corner, yet the defect was situated four houses down from this location.

The Judge was unable to fathom the claimant's account of the accident, but in any event, the claim failed due to the section 58 defence. The street was inspected on an annual basis and the Judge accepted the evidence of the highway inspector that, given the size of the pothole, he would not have missed it during his inspection. The defendant was able to put forward compelling evidence to confirm that following the annual inspection on 7th March 2017, a skip permit was requested on 8th March 2017. The Judge found that the damage was consistent with the use of a skip and therefore dismissed the claim.

Forbes comment

By producing the skip permit, the defendant was able to provide to the Court an explanation for the cause of the pothole and proof that the damage to the pavement was sustained following the annual highway inspection. Whilst it is not always possible to find a "smoking gun", in cases where the local authority can provide a possible explanation for the cause of a pothole or the rapid deterioration of a pothole it can only help to support the section 58 defence.

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