

Department of the Environment

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The Clerk of the Council	Your reference
The Town Clerk	
The Greater London Council	Our reference
County Councils	HM 65/001
County Borough Councils	Date
Non-County Borough Councils	5 October 1972
The Common Council of the City of London	
London Borough Councils	
Urban District Councils in England	

Sir

ACCIDENTS ARISING FROM ALLEGED DEFECTS IN THE HIGHWAY

1. In the course of a judgement given recently in the High Court it was suggested that guidance might be given to highway authorities generally on the appropriate procedures to be followed when accidents involving personal injuries on the highway were reported.
2. There are often marked discrepancies between evidence given by claimants and that given on behalf of highway authorities. These could in some cases be avoided if, where defects in the highway are alleged and a claim has been intimated or could reasonably be anticipated especially in cases of serious personal injury, the injured party and/or his representatives are given an opportunity of a joint site meeting so that the defect can be identified and where necessary the appropriate measurements agreed. It is recognised that this may not be practicable in all cases, eg in identifying the precise spot: and in other cases it may not even be desirable, eg where the general state of the road is or is liable to be alleged as a cause of a further injury or fatality. It is therefore a matter for the discretion of the highway authority when to initiate joint inspections which should in any event be confined to establishing the facts, ie identification and measurements of the alleged defects. Where the nature of the defect makes it necessary in the interests of public safety to proceed quickly with the repairs and a site meeting is not possible, photographs of the defect could be taken, if the injuries sustained by the claimant justify such action. Highway authorities who are agent authorities for trunk roads are asked to bear this procedure in mind when claims are received on those roads on which they act on behalf of the Secretary of State. Both they and other highway authorities will wish to consider how best to adapt these proposals for use on roads for which they are the highway authority.
3. In reaching a decision on whether to arrange a joint inspection highway authorities will also wish to have regard to the further comment from the Judge that, after this matter has been brought to the attention of highway authorities, the Courts may well take account of the absence of evidence of such joint inspection and measurement or the opportunity thereof in considering cases brought before them. It is essential therefore that whilst the need for flexibility in procedure is recognised particularly in cases of serious personal injury, highway authorities should exercise their discretion most carefully before dispensing with a joint inspection.
4. A copy of extracts from the transcript of the Judgement is attached for information.

5. The notes at the head of form TR 137 about securing additional information from claimants or his agents are being revised to accord with the modern legal situation and also to take account of the present problem.

6. Circulars 52/71 and 13/72 are hereby cancelled.

I am Sir
Your obedient Servant

J L HAMMOND
Assistant Chief Engineer
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ASSOCIATION LAW SERVICE

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Transcript provided by John Aldous
c/o P. A. Law Service
Room 417,
Royal Courts of Justice
Strand, London.

Westphal v Haringey Borough Council

Wednesday, May 12, 1971

Before Mr Justice Cumming-Bruce

After holding that the plaintiff had failed to establish the gap was of such dimensions as to give rise to any foreseeable danger on the highway his Lordship said:

"I would add this. I have had to decide a great many highway cases over the years and time and time again the courts are confronted with the perfectly absurd situation a subject complains that there was a bad alignment in the pavement, or a gap, as in this case in November, 1996. Then, nearly five years later witness follows witness into the witness box to try to remember whether the gap was an inch, or half-an-inch, or quarter-of-an-inch or two inches years after the event.

"It is all, at first sight, totally unnecessary because, at first sight, if a highway authority receives news of a serious accident - this on any view was a serious accident, though in the early days nobody realised how grave the long term results were going to be - I would have thought it was obvious that the procedure ought to be to take some trouble to get hold of a representative of the plaintiff and go along and have a look, together with a ruler.

"Such a confrontation, in a vast number of cases, would mean that the claim would either be paid or that the plaintiff, after advised, would realise it was hopeless.

"I would like to hear from Mr O'Brien, who I asked to take instructions over the matter, why that simple solution is not done or cannot be done. Because if it can be done though it won't help the plaintiff, if something were to be published in the books to that effect and if it became standard procedure it might save injustice, unnecessary lawsuits, immense expense and the risk of injustice, which I am perfectly well aware is a risk present in this case as a result of the passage of time.

"What have you got to say Mr O'Brien?

Mr O'Brien said he has taken the matter up and his Lordship's remarks would be carried to the authority to see whether anything could be done.

So far as the past was concerned his instructions were that in fact this was very frequently done. Where there was a report - which very often came through the police - 'lady fell on uneven paving' - and though the nature of the complaint might not be clear efforts were made to see what the complaint was and where it had been made in respect of. Very often one was quite unable to tell exactly where it was an accident had occurred. That was the first point.

Secondly, it was the council's practice to repair as soon as there was a complaint. Of course, if one was to spend any great length of time arranging for a representative of perhaps an injured party in hospital to attend on site one would not like that practice to be at the expense of a policy of instant repair.

His Lordship interposed to say that was all very well, but he had been told there was really no particular point in having instant repair in a case like this.

Mr O'Brien said it was better to get a repair made as arrangements for a joint inspection might pose difficulties. There were many hundreds of complaints and it was not always apparent whether a complaint related to a serious injury and was likely to result in a lawsuit, but simply stumbling and coming to no harm.

His Lordship: "I am only concerned with determining this case, but I will say this.

"Having tried a good many of these cases now I have noticed that there is commonly no standard procedure designed to confront the injured person, or his or her representatives with the highway authorities at the site of the alleged accident.

"Where it is practicable in any case in which there is an indication of an injury of any severity, it appears that such a procedure ought to be part of the normal procedure subject to considerations of the necessity for urgent repair.

"I hope that these observations will be transmitted by this highway authority to the central highway authority in order that consideration may be given to a proposal and guidance given if it is thought appropriate.

"I see no reason why, after the matter has been brought to the attention of highway authorities, if they choose to take the risk of not following some such simple procedure, where there are no difficulties, why they should not in the future expect the courts to take into account that the highway authority has proceeded to cover up without giving the complainant or his representatives the opportunity for a joint inspection.

"I should be obliged Mr O'Brien, if the highway authority for whom you appear would have the courtesy, after considering these observations and decided what they are going to do, if anything, if they

would be so kind by their clerk or other appropriate official, to communicate with me in these courts and tell me what action, if any, it is proposed to take and whether any communication, and if so what communication, is being sent to the central Government on the subject.

"All of which I am afraid is no help to the plaintiff."

Judgement was duly given for the defendants.

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