

12

King's Bench Walk

Cyclists and Claims Under Section 41 of the Highways Act 1980

Daniel Tobin

I2KBW

18th May 2021

www.i2kbw.co.uk

 @I2KBW

Overview

- ▶ Basics
- ▶ Some Cases
- ▶ Tips
- ▶ Questions

Basics

Three Questions

- (1) What caused the accident?
- (2) Was what caused the accident dangerous?
- (3) Did the highway authority take reasonable steps to avoid the accident?

Basics

Otherwise known as:

(1) Factual Causation

(2) Section 41 of the Highways Act 1980

(3) Section 58 of the Highways Act 1980

Cases

- ▶ Thomas v. Warwickshire CC [2011] EWHC 772 (QB)



Cases

Experienced cyclist out on a club run with 17 others;

No independent recollection of the accident;

Did not know whether on drops or hoods;

Speed was about 25 to 30mph, and it was downhill;

5" or 6" from bike in front and two abreast;

Hit a patch of solidified concrete about 1m long, 10cm wide and 25mm high;

Evidence suggested that it had been there for some considerable period;

Suffered a brain injury – no helmet;

Cases

- ▶ D did not consider the concrete lump a 'defect';
- ▶ Condition assessment surveys undertaken every two years
- ▶ Safety inspections every 24 weeks (i.e. 6 monthly) although Code recommended quarterly for this category of carriageway

Cases

- ▶ Inspector said that it would have had to have measured b/w 30mm and 50mm (depending on its location in the c'way) before he'd take action in respect of it;
- ▶ D's evidence emphasized the “*resource implications*” of taking action (remarkably, this case was decided 2 months *after* Wilkinson in the CA);
- ▶ Inspector didn't think a group of cyclists were “*normal traffic*” on a road such as this!

Cases

- ▶ In response to the accident a 1hr work ticket was raised and the concrete was removed, probably with a shovel, at virtually no expense whatsoever
- ▶ Expert evidence was called from civil engineers (as to whether the concrete was part of the highway) and from a highways engineering consultant regarding the inspection regime;
- ▶ In terms of s.41, D argued that the concrete was not part of the highway, i.e that it was akin to a transitory defect like mud, ice or snow;.

Cases

- ▶ Moreover, D contended that if it was s.41, it nevertheless had a s.58 defence
- ▶ As to the cause of the accident, Wilkie J was satisfied on basis of what one of the other witnesses heard that the concrete had been the cause of the accident;
- ▶ D's suggestions that there was another cause were either not supported by the contemporaneous evidence or satisfactorily addressed by C's witnesses;

Cases

- ▶ In terms of s.41, the concrete was a part of the highway; it was more than a mere contaminant like oil, mud or snow, and how it got there (i.e. accidentally) was irrelevant;
- ▶ Wilkie J's approach to s.58 was particularly interesting – he appears to have asked himself again whether the defect posed a reasonable foresight of harm which, of course, was the s.41 question;

Cases

- ▶ However, a significant aspect of the evidence had been the inspector's concession that had the defect been in "*the normal wheel track path*" he'd have reported it. It is clear that this significantly influenced Wilkie J's view on the s.58 defence;
- ▶ He considered the inspector had erred in not considering this a defect to a cyclist;

Cases

- ▶ He did find that D had met the requirements of s.58 in terms of the frequency and manner in which the inspections were undertaken;
- ▶ However, having found that the defect was dangerous, and present at the last inspection, he did not consider the s.58 defence available to D;

Cases

- ▶ But, having given with one hand, Wilkie J took back with the other;
- ▶ C's evidence was that he was going downhill and in excess of 20mph but only some 5' to 6' from the back wheel of the bike in front;
- ▶ Wilkie J considered that this was a failure "*to exercise due care for his own safety*" by reason of the fact that it removed any meaningful ability to see what was coming up on the road ahead or to take evasive action;
- ▶ He made a finding of 60 per cent contributory negligence!

Cases

- ▶ Griffiths v. Gwynedd CC [2015] EWCA Civ 1440



Cases

- ▶ Mr Griffiths was cycling along a country track;
- ▶ The road was described as remote, and was inspected twice a year;
- ▶ The defect appears to have been a pothole caused by the wearing away of the wearing course such that the base course was exposed – it was "*at least 80mm in depth*";

Cases

- ▶ At first instance, HHJ Seys-Llewellyn QC found that it was visible 21 metres away;
- ▶ He also found that the defect was not a breach of s.41 and C appealed to the CA;

Cases

Remarkably (in this day and age), it seems that D did not have an express intervention level – the evidence suggests that its inspector worked to a “*rule of thumb*” of 60mm and his “*experience and common sense*” – not surprisingly, D accepted (albeit not just for this reason) that it had no s.58 Defence;

Cases

Judge was influenced by three factors:

- (1) defect on far left of the road;
- (2) evidence given by a local who said it had given him a “*hell of a bang*” but he’d not reported it and would have done so had he considered it dangerous;
- (3) Although C had photographed it (monthly for a year!), he’d not reported it to the Council.

Cases

- ▶ The Court of Appeal rejected C's appeal.
- ▶ It found that it was open to the Judge to find that the possibility of a cyclist coming into a defect on the side of the road was remote, especially when a cyclist coming around the corner could be expected to be going not too fast and watching where he was going;

Cases

- ▶ Moreover, the nature of the road and the extent of its use by persons in the same category as the claimant was relevant in analysing dangerousness. What may well be dangerous in a much frequented thoroughfare may not be so in a little frequented carriageway where the highway is reasonably passable without danger. A defect on a remote mountain road, which was a wholly unremarkable and commonplace feature of such a location, could in the ordinary course of human affairs be regarded as something not properly classified as a danger to persons likely to use it.

Cases

- ▶ Hilliard v. Surrey County Council [2018] EWHC 3156 (QB)
 - ▶ accident during Ride London
 - ▶ appeal to the High Court from a DJ's decision that the HA was liable under s.41
 - ▶ depression in road adjacent to a water hydrant cover
 - ▶ at least 30mm deep
 - ▶ SCC's intervention criterion was 40mm

Cases

- ▶ various pre-event inspections had detected the defect but the event organisers did not request a repair, the HA sent a s.81 Notice and the statutory undertaker denied that it was their responsibility;
- ▶ at the time of the accident, 12,400 cyclists had passed the defect;
- ▶ on appeal D argued that the DJ had applied the wrong test;
- ▶ Slade J held that in the DJ had applied the test correctly – basically the two-stage test enunciated in Mills v. Barnsley MBC (1992) PIQR P291.

Cases

- ▶ However, D's other ground were that the DJ had not evaluated the evidence correctly, in that he had failed to have regard to the fact that 12,000+ other cyclists had avoided the defect and that it was not therefore dangerous;
- ▶ In addition, it was said that the DJ had given undue weight to a report by the statutory undertaker;

Cases

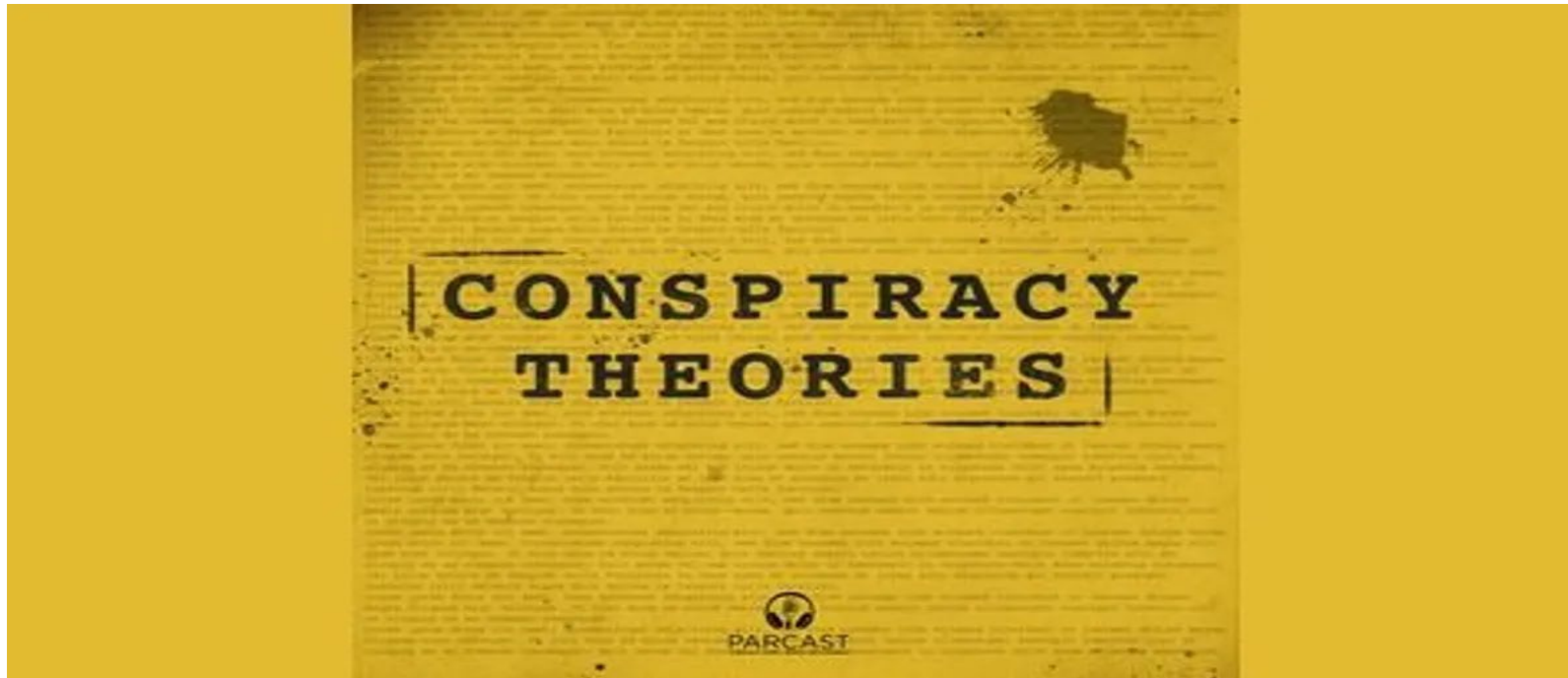
- ▶ These grounds found favour with Slade J.
- ▶ Slade J held that the fact that 12,400 cyclists had passed the spot without incident was “*of great importance in determining whether the carriageway was dangerous*”;
- ▶ Moreover, Slade J also held that the DJ had given undue weight to the s.81 report and insufficient weight to the evidence of the organisers and HA
- ▶ the appeal was allowed and the claim was dismissed as s.41 was not made out.

Cases

- ▶ Some other cases:
 - ▶ Da Silva v. TfL – worn metalwork (very recent case - motor scooter, but no reason why it should not apply to a bicycle – work metalwork in carriageway)
 - ▶ Wilkinson v. York Council – application of the Code;
 - ▶ Curtis v. Hertfordshire CC – linear defect in road;
 - ▶ Garwell v. North Yorkshire CC – bump in road;
 - ▶ Nash v. Hertfordshire CC – photos, photos, photos!

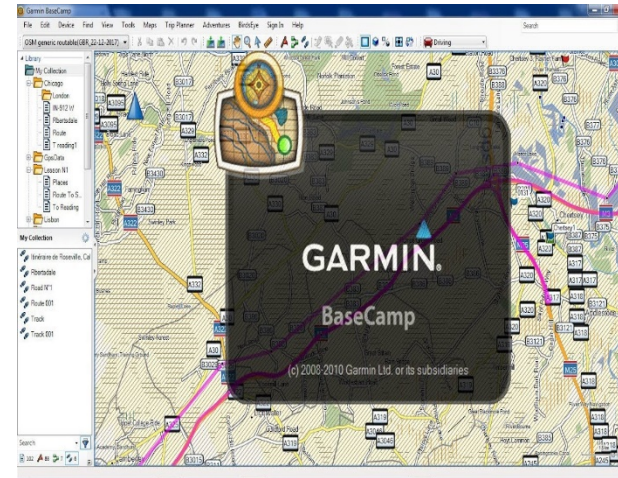
Tips

- ▶ Be nice – it isn't a conspiracy



Tips

- Strava, Training Peaks, MapMyRide, etc



Tips

- ▶ Records – understand them, different inspections, ad hoc v. scheduled;
- ▶ the Code and it's relationship to the Defendant's policy;



Tips

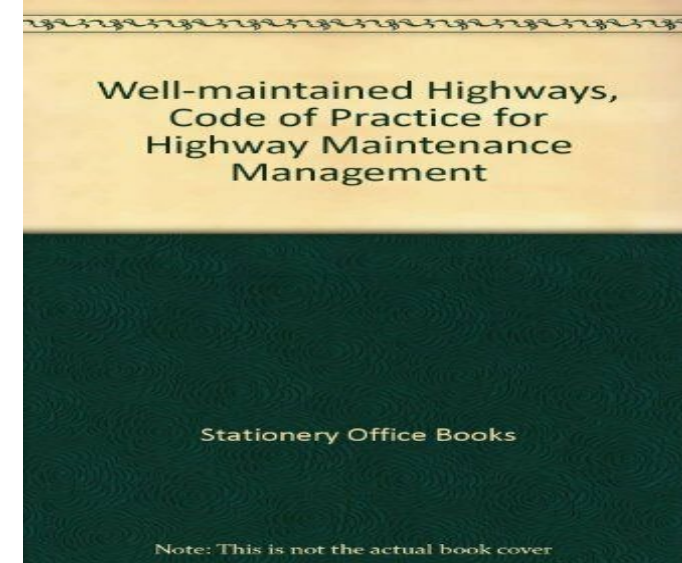
- ▶ Excel Spreadsheets, Google Maps, Basecamp

▶ Report on next report?



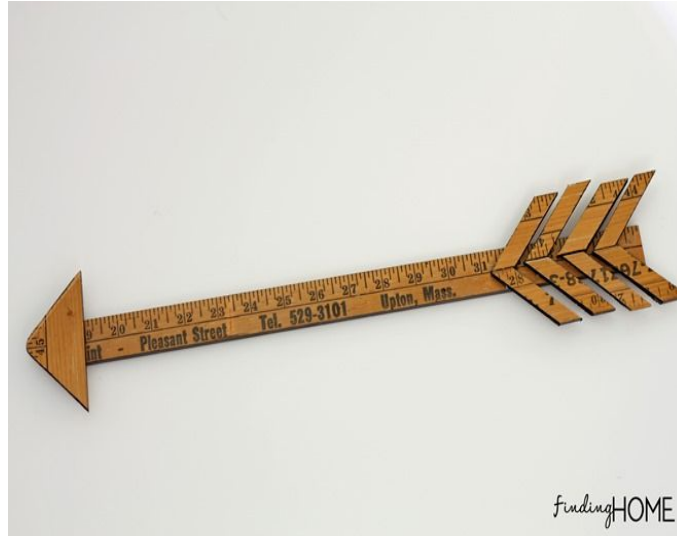
Tips

- ▶ Expert evidence?
 - ▶ Accident reconstruction
 - ▶ Highways Policy



Tips

- Photographs, photographs, photographs – measurements – Spirit level and gradient gauge - don't use a golf club!



Questions

- ▶ If time permits
- ▶ or
- ▶ email me – tobin@l2kbw.co.uk