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SQUARE

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Naomi McLoughlin Discusses the Recent Case of Surrey County Council v Hilliard (2018)

The legal test in considering a breach of s41 remains to be found in *James v Preseli Pembrokeshire DC [1993] PIQR P114* and *Jones v Rhondda Cynon Taff CBC [2008] EWCA Civ 1497*. Whilst the appellant was successful on the basis two pieces of evidence had not been considered with the correct weight, the lower Court had nonetheless applied the correct legal test.

Case

The Local Authority were successful in their appeal against a finding of liability and damages award of £38,000. The case reinforced that the correct legal test in considering a breach of s41 remains to be found in *James v Preseli Pembrokeshire DC [1993] PIQR P114* and [*Jones v Rhondda Cynon Taff CBC \[2008\] EWCA Civ 1497*](#).

Background

The Claimant was taking part in a closed road cycle, it was not a race and there were approximately 16,000 participants who occupied the entire road. A defect in the road; a depression of at least 30mm deep caused the Claimant to fall off his bicycle and suffer personal injury.

The organiser had carried out an inspection of the road and anything over 40mm was to be repaired. Other defects were to be monitored for deterioration. Thames Water had also commissioned an inspection of the road which referred to 'trip hazards' including the one which caused the accident. The organiser carried out a further inspection of the highway shortly before the event but the defect which caused the accident was not mentioned.

On the day of the event approximately 12,400 other cyclists had passed without incident. The Judge accepted that he should not impose an unreasonably high standard of repair but concluded that the highway was dangerous to traffic and that there had been a failure to maintain the road.

Appeal

The decision was appealed on three grounds:

1. The wrong legal test had been applied, being the earlier authority of *Rider v Rider [1973] Q.B. 505*. The legal test contained in [*James v Preseli Pembrokeshire DC \[1993\] P.I.Q.R. P114*](#) and [*Jones v Rhondda Cynon Taff CBC \[2008\] EWCA Civ 1497*](#) should have been applied;
2. There had been a failure to evaluate the fact that 12,400 cyclists had gone past the same spot without incident;
3. There had been undue weight placed on the Thames Water report which had been carried out with a different purpose.

Outcome

The Appellant was successful on appeal. The fact that over 12,000 cyclists had passed successfully over the defect was evidence that the road was not dangerous and s41 had been complied with. Additionally, the report from Thames Water had meant the defect was a trip hazard for pedestrians but that was not the test to be applied in determining whether a road was dangerous for ordinary traffic.

The Court found the correct legal test had been applied. It was clear that the legal test in considering a breach of s41 had been explained and developed over the years but the Judge had reviewed all the authorities and applied the later cases correctly.

The Judge however had failed to give sufficient weight to the evidence that over 12,000 cyclists had safely passed over the defect which the Salde J considered to be overwhelming evidence that s41 had been complied with. The report from Thames Water could not lead to a contrary conclusion.

Comment

The correct legal test when considering a breach of s41 remains the test found in *Jones v Rhondda Cynon Taff CBC [2008] EWCA Civ 1497* which states that the highway had to be maintained so that it was reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition. It had to be sort of danger that which an authority might reasonably be expected to guard against. The Judge had also stated it was not permissible to impose an unreasonably high standard and there had

to be a sensible balance between private and public interest as per *James v Presli Pembrokeshire DC [1993] PIQR P114*.

Rider v Rider [1973] Q.B. 505 which said that the question was whether there was a chance that someone would be injured, or whether that chance was so remote that the risk should be dismissed, has not been overruled but Slade J commented that the approach had developed since then and it was not the test for determining whether a defect was dangerous.

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