Neutral Citation Number: [2020] EWHC 2517 (QB)

Case No: E90LV053

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Combined Court Centre
Oxford Row, Leeds

Date: 16 October 2020

Before:

HIS HONOUR JUDGE GOSNELL
(sitting as a Judge of the High Court)

- -

Between:

MICHAEL SMITHSON	**Claimant**
- and –	
BRADLEY LYNN	**First Defendant**
-and-	
NORTH YORKSHIRE COUNTY COUNCIL	**Second Defendant**

Mr Michael Rawlinson QC (instructed by BLM LLP) for the First Defendant
Mr Nigel Lewers (instructed by DWF LLP) for the Second Defendant

Hearing dates: 14th -16th September 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE GOSNELL

Bundle References shall be shown as: Bundle Number/ Divider Number/ Page Number

His Honour Judge Gosnell:

1. **Introduction**

This claim arises out of a road traffic accident which occurred on 22nd November 2015. The original Claimant Mr Smithson was a passenger in a Fiat Punto motor vehicle driven by Mr Lynn, the First Defendant. The accident happened when the First Defendant lost control of his vehicle and collided with a tree on Rascelf Road between Easingwold and Rascelf, North Yorkshire, he would say due to the presence of ice on the road. The First Defendant blamed the Second Defendant for failing to prevent the formation of this ice on the road and issued Part 20 proceedings against it for a contribution/ indemnity. The Claimant in turn added the Second Defendant to the claim. Relatively shortly before trial the First Defendant settled the Claimant's claim for an agreed sum and so this trial is solely about whether the First Defendant is entitled to an indemnity or contribution from the Second Defendant. In this Judgment I will describe the Second Defendant as such rather than as Third Party to the additional claim.

2. Over the course of two days I heard oral evidence from seven lay witnesses and two expert witnesses. I also read the reports of two further expert witnesses who in the end were not called to give evidence due to very sensible concessions being made by both trial counsel. It is accepted by both parties that the essential cause of the accident was the First Defendant's vehicle skidding on ice and losing control (although the Second Defendant contends that the First Defendant was also negligent). It is also accepted that overnight on 21st /22nd November 2015 the Second Defendant received two requests from police officers to salt Rascelf Road (the Second Defendant would submit at different locations to the index accident). The Second Defendant refused to arrange any ad hoc or spot gritting of Rascelf Road before the accident notwithstanding these requests. The first issue is whether that refusal amounted to a breach of statutory duty by the Second Defendant. If the answer to the first question is in the affirmative the second issue is whether the First Defendant is entitled to a complete indemnity or in the alternative a contribution in a proportion to be fixed by the court.

3. **The factual background to the accident**

The accident happened on Rascelf Road. Rascelf Road is a country road which connects the villages of Easingwold and Rascelf in North Yorkshire. It is approximately three miles long and runs from Easingwold in the east to Rascelf in the west. On the night of 21st / 22nd November 2015 there were five incidents which occurred on Rascelf Road. The last of those incidents was the one which involved injury to the Claimant ("the index accident").

4. A photograph of the relevant part of Rascelf Road appears below

5. The First Incident took place at around 16:59 hours on 21st November 2015. According to North Yorkshire Police Storm Report (the police database) a reporting party reported *"treacherous road conditions between Easingwold and the bridge over the A19.*" She had "*gone round a corner and was hardly able to stop as she came across a road traffic collision between a car and two motorbikes*" [7/5/1956]. The Police Control Room contacted the Second Defendant's out of hours service known Selby Swing Bridge to request gritting of the road. There is no record of what Selby Swing Bridge were told or what they said to the Second Defendant's Duty Manager Jayne Charlton, but she made a written record in a diary which read:

> *"1710 Swingbridge range report road to Rascelf was icy. I responded to say not a P1 but P1's commencing at 1800. NFA (no report of accident or incidents"* [1/13/168]

This decision was then reflected in the Storm Report as "*they will not grit this road as it is not a priority route"* [7/5/1957]. Given the location described this accident did not occur at the same location as the index accident which was west of the bridge over the A19.

6. The Second Incident took place around 18:40 hours on 21st November 2015. This was a road traffic accident which occurred on Rascelf Road near to the garden centre known as Bata. This is just to the east of the A19. The vehicles were recovered by local farmers before the police arrived. The Storm Report however records "Road *is*

icy, req Highways called. However this has not been done as their response is always that they have a standard route and they will cover those" [7/5/1961]

7. The Third Incident took place at around 20:06 hours and the Storm Report records:

> *"Caller reports a Land Rover on its Side in a Ditch...between Rascelf and Easingwold. Location is half way between the two locations…Are also a number of skidmarks on the road nearby as if another vehicle may have been involved …its very very slippery that road at the minute…..there's no salt at all and its minus 1….. . This is the 2nd time vehicle has gone off the road tonight in this area…. Give location as half a mile from the Bridge that runs over the A19…. Will put signs out advising drivers to slow….Signs are out"*

8. The latter entries were made as a result of a conversation with the officer on the scene PCSO Warby. He gave evidence at the trial and was an entirely straightforward individual. He was familiar with the location and said it had occurred on a bend which was the same bend where the index accident occurred about half a mile west of the A19 flyover. He was subsequently asked to provide a plan showing where the accident occurred (Third Incident) which appears at [1/10/83]. He felt the accident had been caused by black ice, so he put two signs ("Police Slow") at either side of the bend to warn motorists of the potential danger. I am satisfied on balance of probability that Incident Three took place at the same location as the Index Accident.

9. Incident Four took place at around 22:13 on 21st November 2015. The relevant entries on the Storm Report are as follows:

> *"RP has skidded, and his car is in a ditch. Just before Rascelf Village on a bend…. There is another car in a ditch on the opposite side which has 'Police Aware' stickers on….RP has skidded on black ice…. Unknown why there is black ice on particular part of road – investigating possibility of water leak…. Will ring Selby Swing with regards to the ice…The road is a complete ice rink – unable to stand – never mind drive on it…..Have contacted Selby Swing they will try to get a gritter out"* [7/8/1966-8]

10. Evidence about this accident was given by PC Groom and PC Hutchinson. They were straightforward witnesses who had a fairly good recollection of the incident they were called out to. It was clear from both witnesses that Incident Four took place on the same bend as Incident Three and the Index Accident. Both officers attended the index accident in addition, so they were well placed to give this evidence. When they arrived there were two vehicles off the road one on each side of the carriageway. One of those two vehicles was likely to be the vehicle left on the scene after the Third Incident. They notified the control room who would have made entries on the Storm Report. PC Groom could not explain why staff at the control room appeared to think that the accident took place in Easingwold rather than west of the A19. They both remembered either placing "Police Slow" signs on the ground either side of the bend or alternatively taking the existing signs and moving them further away from the bend to give more

notice to motorists of the hazard. They thought they had put the signs between 20-50 yards further away from the bend. I find as a fact that it is more likely that they moved the signs which had been placed by PCSO Warby rather than used their own signs. The extent of the ice was all across the road more or less right across the bend PC Groom recalled. I find as a fact that Incident Four occurred at the same location as the Index Accident.

11. There was in fact a transcript of the conversation between the police control room and Selby Swing Bridge. Relevant entries are as follows:

> *"Police:…We've attended an RTC on Rascelf Road…just before you get into Easingwold…Rascelf Road and Alne Road…we've got quite a large patch of black ice; it is right in front of some residential properties. My officer thinks it is some sort of water leak somewhere but we can't find where……Obviously he is asking if we can ring you to get some gritter or something down there….*
>
> *Council. Right. Err, hmmm I'll see what they'll do. I don't what they'll do …but I'll ring it into them*
>
> *Police…Like I say its caused quite a bad accident so…*
>
> *Council Oh right…Ice over the road due to a …we're presuming …a water….Righteo I'll ring it through to them…"* [7:17:2007-2008].

12. There is no record of what Selby Swing Bridge said to the Duty Manager Jayne Charlton, but she recorded as follows:

> *"2316 hrs, Call from Swingbridge to say that there was a water burst on Rascelf Road at junc with Alne Road. Police had informed Yorkshire Water. Police request the road to be gritted. I informed Swingbridge that it was a P2 route and would be treated in the morning and would speak to Inspector before treatment to advise him."* [1/13/168]

PC Groom was told *"they would not come unless there was a serious or fatal accident"*. The junction of Rascelf Road and Alne Road can be seen on the plan above on the outskirts of Easingwold. It is clear that this location was given by the police control room in error as the evidence shows that the Fourth Incident took place in the same location as the Index Accident.

13. **The Index Accident**

The Claimant has no real recollection of the accident due to the injuries he suffered. The First Defendant Bradley Lynn was able to give evidence, however. At the time of the accident he was nineteen years of age having passed his driving test in January

2015. He had been working in a bar on the evening of 21st November 2015 and finished around midnight. He returned to his accommodation in Leeds where he met the Claimant and after some refreshment, they decided to go out for a drive in the First Defendant's Fiat Punto car. He recalled they had no particular destination in mind but drove around the Ripon and Thirsk area of North Yorkshire. He recalled it was a cold, clear night and there was a warning light showing on his vehicle suggesting the risk of frost / ice. It was suggested to him that at some point during his drive from about 1 am to 4.20am he must have seen some ice on some of the roads he had travelled on, but he denied this.

14. At some point on the journey they found themselves on Rascelf Road travelling from the Easingwold area towards Rascelf (from right to left on the plan above). He crossed the A19 and the speed limit was the national speed limit. He gave evidence that he was doing about 50 mph and his lights were on full beam. He was travelling down a straight section of road when he saw a sign saying: "Police Slow". As he passed it he braked slightly and could feel the car starting to skid. The front of the car skidded to the right, so he steered left. He started to brake more harshly and could hear a crunching sound underneath the wheels. He said up to this point he had not noticed any ice on the road. The next thing he remembers is waking up in the driver's seat of the car which by then was facing the opposite direction he had been travelling in, having hit a tree to the offside of the carriageway.

15. Although he remembered seeing the police sign, he did not recall having seen a warning sign that he was about to approach a bend. He was shown some photographs taken by Sergeant Lumbard after the accident [3/6/707-709] but he said that the road did not look like the photographs when he first drove over it. The suggestion was that perhaps the ice had been churned up by the several emergency vehicles which had been called to the scene. He denied that he had been driving too quickly.

16. The accident was attended by PC's Groom and Hutchinson, the same officers who had attended the Fourth Incident. They were the first of the emergency services at the scene. PC Groom described the road surface as treacherous and he was struggling to stand on the ice. They were unable to remember what the road looked like on this second occasion given the passage of time.

17. The Storm Report entries were as follows:

> *"This appears to be the same area where ice was reported earlier – highways were made aware… It is exactly the same place as the previous RTC. Highways are aware and are going to get on to the approx. Immediately… The road needs to be closed due to the conditions – please inform highways…Highways OOH contacted for road closure…Highways are …putting a full road closure on" [7/4/1950-55]*

18. **The Second Defendant's Winter Services Manual**

The following description is taken from the Skeleton Argument of counsel for the Second Defendant. I believe it to be uncontroversial:

> *"a) The roads of North Yorkshire are divided into 7 areas and categorised according to priority as P1, P2 and P3 for the provision of winter services. Rascelf Road was in Area 2, Thirsk, and was a P2 route. It was a minor rural road running between Easingwold to the East and Rascelf to the West. It was part of the salting route 6S. The appropriateness of this categorisation is not challenged by D1.*
>
> *b) Under D2's Winter Service Manual for 2015/2016 [1/12/109 at 113], P1 routes received pre-salting (gritting) in the evening unless the forecast was for extreme weather conditions, in which case evening salting for P2 routes could be considered. P2 routes were treated in the morning after salting of the Priority 1 routes had been completed. Salting usually took place prior to 11pm and after 5 am.*
>
> *c) In Area 2 there were routes on higher ground. They could be given priority and treated first or with an increased spread rate. Route 6S was not one of them.*
>
> *d) D2 utilised various 24 hours weather forecasting sources and road temperature data which were monitored throughout the day by the Duty Manager. There are 11 weather forecasting domains. Rascelf Road is nearest the weather domain of Carlton Miniott [1/12/132].*
>
> *e) The Duty Manager would draw up a Daily Weather Forecast and Action Report at 12 noon which was distributed to the Area Offices, neighbouring authorities, Highway Officers, Ringway Infrastructure Services ("RIS", D2's contractors) and the police. If the forecast changed, an updated Forecast and Action sheet would be distributed. RIS drivers were "stood to" by 14:00 hours.*
>
> *f) Before the morning post-salting was undertaken, a duty Highway Officer would visually inspect part of the network between their home base and the area office to provide an accurate picture of the conditions before confirming that the previous day's forecast is still appropriate.*
>
> *g) The policy could be departed from in exceptional circumstances in order to minimise the impact on the implementation of planned treatment. This was a matter of judgment for the Duty Manager; for example to allow access for emergency vehicles."*

19. The last sub-paragraph is uncontroversial in the sense that the First Defendant accepts that this accurately describes the policy which the Second Defendant's officers applied in practice but the First Defendant does not accept that the Second Defendant was entitled in law to do so. Both of the Second Defendant's witnesses were extensively cross-examined about how the test of "exceptional circumstances" came

about given that it was not set out in the Winter Service Manual which was subject to intensive consultation with interested stakeholders.

20. The reference in the Winter Service Manual to requests for ad hoc or "spot" gritting is in paragraph 11.0:

> *"Requests for alleviation of bad road conditions*
>
> *Such requests received at County Hall will be passed to the appropriate Area. It will be the responsibility of each Area to determine the priority of individual requests relative to the prevailing situation*."

The First Defendant emphasises the absence of an "exceptional circumstances" test in this part of the Manual.

21. In 2015 Nigel Smith was employed by the Second Defendant as the relevant Area Manager in the Highways Department (there were two others). His witness statement dealt extensively with the Winter Service Manual and the way planned gritting services are intended to operate. In terms of ad hoc requests for gritting his witness statements says:

> *" It would not be in accordance with NYCC policy to respond to an individual request for gritting save for exceptional circumstances , such as where treatment was required to enable access for emergency vehicles to the scene of an accident"*

22. In cross-examination he accepted that there was no reference to the exceptional circumstances test in the Winter Service Manual. He also accepted that it was not documented anywhere, nor was it specifically set out in any training programme for Duty Managers. When asked where the policy came from, he said it evolved over a number of years. He thought it was part of the training he received as he evolved in the role (of Duty Manager). He felt he would have been mentored by a more experienced decision maker in the same way that he, over the years had mentored Mrs Charlton with whom he had worked for sixteen years. The Second Defendant has 86 gritters and 150 drivers available. He could not say on the night in question that no gritter or driver could have been found if instructions had been given to spot grit Rascelf Road. He confirmed that Mrs Charlton's decision on the night to refuse to grit Rascelf Road was in accordance with the Second Defendant's policy as it was a priority 2 route which would have been gritted the following morning after the priority 1 routes had been completed.

23. Mrs Jayne Charlton was the Duty Manager that night and she confirmed her understanding of the policy in the same terms expressed by her then Line Manager Mr Smith. She was asked for examples of exceptional circumstances and she gave three examples: an emergency vehicle being unable to reach the scene of an accident; an emergency vehicle being unable to reach the home of a patient requiring urgent treatment and the road being blocked by a vehicle and a recovery truck being unable to reach it.

24. **Mrs Charlton's reasons for declining to spot grit Rascelf Road on 21st/22nd November 2015**

Mrs Charlton dealt with this is paragraph 63 of her witness statement. In summary here reasons were:

- Rascelf Road is a priority 2 route and undertaking treatment would be against policy. It would be done after priority 1 routes the next morning. If treatment was ordered, it would have used up valuable resources preserved for post-salting the following morning;

- No exceptional circumstances were reported. Whilst there had been an accident there was no report that the emergency services had difficulty accessing the scene;

- Save for a previous report that the road was icy, this was reported as an isolated accident. This is not indicative of dangerous road conditions. Other vehicles must have successfully negotiated the scene;

- The police suggested that there was a water leak. Limited options would be available as salt application on the carriageway may have washed away. Hessian bags filled with salt may have helped but would have limited impact;

- Yorkshire Water were being asked to attend the scene.

25. In cross-examination she accepted that her note of the conversation with Selby Swing Bridge at 23.16 contained no note that an accident or incident had taken place. If she had been told that there had been an accident, she said that it would not have been a good reason to either send the gritters out earlier to do the P1 routes or spot grit the area. She accepted that she received three phone calls that night and all three were about Rascelf Road, she claimed that it would not be unusual to receive several calls about one location. She was asked what she would have done if she had been told there had been an accident. According to my note she said:

> *"If I had been told there had been an accident, I would have to give consideration to the weather forecast and potentially I would have spoken to the police officers to see what the situation was. I wouldn't have gritted the road unless the emergency services had said that they couldn't access the situation without gritting the road"*

26. Mrs Charlton was then asked what she would have done if she had spoken to the police officers and they had said the conditions were treacherous and that there had been multiple accidents. She said that if this were the case, she would have to consider all the other Priority 2 routes all across the network. She said it would not be appropriate to spot grit Rascelf Road and not consider the rest of the Priority 2 network. She could not consider that road in isolation she felt. She said she might have had a conversation with the police officers to remind them that they had an option to close the road if they felt that was appropriate. She accepted that there was an Inspector available that night who was on call and could have been asked to go to Rascelf Road to make an assessment. In answer to a question from the court she

seemed concerned that if she agreed to spot grit Rascelf Road that there might be complaints from residents on other Priority 2 routes who hadn't had their area spot gritted. She confirmed that she believed that on that night she had carried out the policy of the Second Defendant to the letter.

27 **The Expert Evidence**

The first issue on which there was expert evidence in this case was from Accident Reconstruction Experts. Both counsel sensibly decided that there was no need to call the experts to give oral evidence. The experts agreed that: the Index Accident occurred on Rascelf Road 491 metres west of the road bridge over the A19; the road was straight for 200 metres prior to the tree that the First Defendant collided with; there was a bend sign located about 110 metres prior to the tree; the right hand bend located beyond the accident scene would probably have required a reduction in speed below 50 mph for comfortable negotiation in the absence of ice; and the weather was fine at the time but the temperature was such that ice was likely to form on untreated wet roads.

28. The experts also agreed that the co-efficient of friction between the tyres of a vehicle and a surface coated with ice is very low compared with a co-efficient of friction for dry or damp conditions alone. The experts' opinion as to the speed of the vehicle when it hit the tree varied in a range from 25-50 mph with 30-40 mph being probably uncontroversial. The experts were not able to agree whether Mr Lynn should have seen the ice before he lost control. They did agree, however, that if the ice affected the road for a distance of about 100 metres, as the police records indicated it may have done, and if the speed of the Fiat Punto had been around 30 mph at the beginning of the ice, and the brakes were applied at that point, then the Fiat Punto would probably have stopped short of the tree, avoiding the injury to the Claimant. The expert for the First Defendant Mr Green gave written evidence that he was surprised that the Second Defendant refused to respond to a police request to grit the road which he said, in his experience, were usually responded to.

29. The second issue on which expert evidence was called was on Highways. There were three experts initially but at trial only Mr Dixon for the First Defendant and Mr Hopwood for the Second Defendant gave evidence. The experts' joint statement runs to some nineteen pages. The experts agreed that overnight on 21st /22nd November 2015 the temperature was forecasted to fall to about minus five degrees Celsius. There had been significant rainfall in the previous few days. The experts were unable to agree whether it was appropriate to categorise Rascelf Road as a Priority 2 route, but it was no longer an issue at trial. In general terms all the experts agreed that the Second Defendants Winter Service Manual was in keeping with the service offered by other comparable highway authorities. It was also agreed that Mrs Charlton's prospective action plan for the evening of 21st /22nd November 2015 was reasonable involving the pre-salting of Priority 1 routes and the post-salting of Priority 1 and 2 routes.

30. The experts disagreed about Mrs Charlton's response to the two phone calls she received about ice or accidents on Rascelf Road on the evening of 21st November 2015. Mr Dixon felt that it may have been appropriate to spot grit the road following the police request to do so depending on what knowledge could reasonably have been acquired about the condition of the road and assuming physical resources were

available to do that. Mr Dixon felt that sending an inspector to examine the condition of the road as an initial step would have been the appropriate response. Mr Hopwood disagreed and felt it very unlikely that any highway authority would send out an inspector out of hours to examine the condition of the road. He also felt that most authorities would not send out a contractor to spot grit the area as this could have a "knock-on" effect on the overall gritting programme.

31. Both experts were robustly but fairly cross-examined during the course of the trial by counsel. Mr Dixon conceded that a policy to only respond to requests for ad hoc gritting in exceptional circumstances was within the range of responses normally applied by highway authorities, although other authorities often responded to requests by the police. Whilst he felt that a single report of ice on the road would not normally be treated as exceptional circumstances it would be different if there had also been a road traffic accident and a history of a water leak or burst water main (even though with the benefit of hindsight we know there was no burst water main). He felt the combination of this history with a previous report of ice on the road made it reasonable to investigate further.

32. Mr Hopwood revealed that he had actually been employed as a Duty Manager for Cheshire County Council approximately fifteen years ago. He opined that in Mrs Charlton's situation when faced with the same information he would have done exactly the same as she did. He warned that resources sometimes meant that a gritter may not be available and it would prejudice the planned programme if gritters were called out ad hoc to individual roads or areas. He also felt the police perception of when gritting was required was different to the Highway Duty Manager's view often. He also felt in the present case that if an inspector was sent out, he would have gone to the junction of Rascelf Road and Alne Road rather than where the index accident occurred.

33. **Legal Principles**

The First Defendant's claim for contribution arises pursuant to s.1(1) of the Civil Liability (contribution) Act 1978:

> *"Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."*

34. If the Second Defendant is found to be liable to the Claimant the Court has to examine the extent to which the First Defendant may also possibly be liable for causing the same damage in which case an apportionment should be carried out by the court pursuant to s 2(1) of the Act:

> *"… in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and*

> *equitable having regard to the extent of that person's responsibility for the damage in question."*

35. Such an apportionment would be informed by the relative fault of the parties and the causative potency of their contribution to the damage. I accept that the Court may find that the First Defendant is not responsible at all in which case he is entitled to a complete indemnity. Conversely if the Second Defendant is not liable at all the claim for indemnity and contribution should be dismissed.

36. Both Counsel agree that the only claim available to the Claimant against the Second Defendant (and hence the only manner in which the Second Defendant could then be held to be liable for same damage alongside the First Defendant) is under s41 of the Highways Act 1980. This reads as follows so far as relevant to this claim:

> *"41.— Duty to maintain highways maintainable at public expense.*
>
> *(1) The ....highway authority … are under a duty…to maintain the highway.*
>
> *(1A) In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice"*

> S58 states *"(1) In an action against a highway authority in respect of …their failure to maintain a highway.. it is a defence …to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic".*

Both counsel agree that section 58 has no application in a claim made under section 41(1A) because that section contains its own limitation in terms of reasonable practicability.

37. Counsel however disagree about who bears the burden of proving whether the highway authority has taken reasonably practicable measures to ensure that safe passage along a highway is not endangered by snow or ice. Mr Lewers for the Second Defendant argues that the burden of proof is on the First Defendant in that the failure to do what was reasonably practicable is part of what a Claimant has to prove in order to justify a finding of breach of duty under the Act. He submits that, in this respect, highways cases are different to employers liability cases where the onus is placed on a Defendant to prove that they have acted with reasonable practicability by statute, for example in section 40 of the Health and Safety at Work Act 1974:

> *" In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is*

> *practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not reasonably practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement"*

38. Mr Rawlinson QC argues that "*Reasonable practicability"* has a venerable history within Factories Act legislation. In *Nimmo v Alexander Cowan & Sons [1968] AC 107* the House of Lords held in the context of the Factories Act 1961 that where the phrase was encountered it was for the Defendant to plead and prove that it had taken all reasonably practicable steps. There is absolutely no reason to suppose that the identical wording, doubtless deliberately chosen by Parliament, has anything other than the same effect under the Highways Act 1980. In short, there has to be an assessment of the quantum of risk (likelihood of occurrence and likely severity of outcome) against the inconvenience of carrying out remediating steps.

39. The statutory provision in Nimmo (above) was section 29 of the Factories Act 1961 which was an obligation by an employer so far as is reasonably practicable to provide a safe means of access in the workplace for employees. The majority view was that the burden of proof lay on the Defendant. This is not surprising. A statutory provision may place a wide-ranging obligation on a Defendant to secure the safety of an employee, but where this duty is limited in some way by reasonable practicability it is only fair that the Defendant should bear the burden of showing that, on the facts, it was not reasonably practicable to act otherwise.

40. This principle finds echoes in the Highways Act 1980. Section 41 (1) places an onerous burden on a Highway Authority to maintain the highway. Section 58 of the same Act provides a statutory defence, however, if the highway authority can show that it has taken such care as in all the circumstances is reasonably required. The burden of proving the statutory defence is however on the Defendant. In a case involving ice on the highway section 58 has no application because the limitation of the duty in terms of reasonable practicability is set out within section 41 (1A). In my view, the same principle should therefore apply and the burden of proving the highway authority has in fact acted in accordance with the standard of reasonable practicability rests with the Defendant, in this case the Second Defendant.

41. The First Defendant also submits that the Second Defendant is not entitled to set up a defence of limited financial means as part of the assessment of what is reasonably practicable. It relies on the speech of Lord Hoffman in *Goodes v East Sussex County Council [2000] 1 WLR 1356 :*

> *"The duty is not absolute in the sense that the road has to be perfect. As Diplock L.J. explained in the later case of Burnside v. Emerson [1968] 1 W.L.R. 1490 , 1497, the duty is to put the road:*

> *"in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition."*
>
> *But the highway authority has an absolute duty to maintain the highway in a state which satisfies this objective standard. It must levy whatever rate is necessary for the purpose. If the condition of the highway falls short of the statutory standard, the highway authority is in breach of duty. It is no answer that it took all reasonable care or that its resources were insufficient"*

The First Defendant submits that the effective repeal of Goodes by s 41(1A) does not change the applicability of this passage and the Second Defendant's obligation to meet the objective standard set out in s 41(1A). To be fair to Mr Smith, in his evidence he confirmed that limited resources, whether monetary or asset based, were not the justification for the decision to impose the "exceptional circumstances" test.

42. **Submissions**

The Second Defendant

Mr Lewers for the Second Defendant accepted that the principle that the Winter Service Manual could be departed from only in exceptional circumstances was not laid down in writing. It had, however, arisen over time as a consequence of training, mentorship and shadowing. It was done in order to minimise the impact on the implementation of planned treatment. He reminded the court that Mrs Charlton had said that the phrase "exceptional circumstances" was deliberately not defined to give decision makers maximum flexibility to respond to circumstances as they arose.

43. In terms of the previous notifications to the Second Defendant of Incidents One and Four it was submitted that Incident One took place east of the A19 and Incident Four was said to have taken place at the junction of Rascelf Road and Alne Road. According to the note made by Mrs Charlton they were both reports of icy conditions, but the Second Defendant now accepts that Selby Swing Bridge were told of a road traffic accident as part of Incident Four although that was not relayed to Mrs Charlton. It was submitted that Mrs Charlton was applying the Winter Service Manual policy correctly by finding that there were no exceptional circumstances.

44. Mr Lewers reminded the court that all three Highway experts accepted that overall, the Winter Service Manual represented a reasonable policy, including the requirement for exceptional circumstances before ad hoc gritting was carried out. He pointed out that Mr Dixon's expressed reason for claiming that Incident 4 constituted exceptional circumstances namely a burst water main, was not actually what was reported to the Second Defendant (a water leak).

45. Mr Lewers also relies on a causation argument. Given that Incident 1 and Incident 4 were both east of the A19 and Incident 4 was firmly anchored at the junction of Alne Road, even if Mrs Charlton had either sent out a Duty Inspector, or even a gritter, it

would not have resulted in any difference to the condition of the road at the Index Accident location which was about a mile further west.

46. His alternative submission if the court finds that the Second Defendant is in breach of duty is that substantial fault for the accident lays with the First Defendant. It is submitted that he must have seen some frost or ice during the three hours between leaving Leeds and the accident taking place. If he was driving at 50 mph in these conditions it was too fast given that he was approaching a bend, which was heralded by a warning sign and there was also a Police Slow sign at the side of the road. If he had been travelling at 30 mph instead of 50 mph when he applied his brakes the serious nature of the accident would have been avoided. If there has to be an apportionment between Defendants in his submission it should be 80:20 in favour of the Second Defendant.

47. **First Defendant**

Mr Rawlinson QC place great store on the fact that the existence of the test of "exceptional circumstances" and the very restricted way in which, in his submission, it was applied was something which was completely undocumented. This did not sit well with the Second Defendant's claim that the Winter Service Manual was consulted on and shared with an extensive number of stakeholders each year. According to Mrs Charlton, the whole point of publishing the Winter Services Manual was to prevent inappropriate requests for salting. The First Defendant submits that such requests should have been tested against the statutory requirement of whether it was reasonably practicable to comply with them.

48. It was submitted that when the Second Defendant's witnesses sought to suggest that the Police could have chosen to close Rascelf Road they were suggesting that the Second Defendant could delegate its statutory duty to ensure that safe passage of a highway was not endangered by snow and ice by relying on a police power to close a highway. This is not permitted in the absence of express authority in the enabling statute, which in this case is absent.

49. The First Defendant notes that Selby Swing Bridge appear to have failed to tell Mrs Charlton that Incident 4 involved "quite a bad accident". He submits that it is probable that Selby Swing Bridge were also told that Incident 1 involved "*treacherous road conditions*" and an "*RTC between a car and two motorbikes*" [7/5/1957]

50. The First Defendant accepts that the Winter Services Manual as expressed "on the page" appears reasonable but the test for ad hoc salting of "exceptional circumstances" is not of course on the page and its history is shrouded in mystery. The First Defendant submits that neither Mr Smith nor Mrs Charlton could give evidence that the physical resources, whether it be an Inspector, or a gritter and its driver were not available on the night in question. It was submitted that it was reasonably practicable to spot grit Rascelf Road that night, but the Second Defendant was effectively adopting a blanket policy which prevented it doing so.

51. On the causation point the First Defendant submits that if an Inspector had been despatched to Rascelf Road he would not, on balance of probability limited his inspection to the junction with Alne Road. Rascelf Road is only 3 miles or so long in

total. If he travelled a mile to the west, he would have encountered the Police Slow sign and approximately 100 metres of ice across the road on a bend.

52. On the issue of apportionment the First Defendant's primary position is that the First Defendant was driving within the speed limit and the loss of control of his vehicle could not be avoided given the road surface. If the court makes findings of fact which accord with this submission, then the First Defendant is entitled to a complete indemnity from the Second Defendant if it succeeds on breach of statutory duty.

53. The First Defendant's alternative submission is the lion's share of responsibility in this case lies with the Second Defendant. They had a statutory duty to ensure that safe passage was not endangered by ice and snow subject to reasonable practicability which they cannot prove they complied with. The case against the First Defendant is more about momentary inadvertence. The First Defendant submits that liability should be apportioned 80:20 in favour of the First Defendant.

54. **Analysis**

In evidence Mr Smith confirmed that whilst resources, in terms of both finance and personnel and equipment are important in deciding what the extent of the Winter Service Manual should cover the decision to refuse to spot grit on the night in question was not made because the Second Defendant did not have the resources to do it. The annual budget for the Winter Service programme is about seven million pounds and in recent years on average it has cost around eight million pounds. The obligation set out s 41(1A) above to ensure that safe passage along a highway is not endangered by snow or ice is not absolute, as it is qualified by the phrase "so far as is reasonably practicable". This is a phrase which has been repeatedly the subject of judicial interpretation over the years, mainly in the field of health and safety in the workplace.

55. For many years the judgment of the Court of Appeal in *Edwards v National Coal Board* [1949] 1 KB 704 was thought to contain the accepted definition, but this was revisited by the Supreme Court in *Baker v Quantum Clothing Group Ltd* [2011] 1 WLR 1003. The majority view was expressed by Lord Mance as follows:

> *"81.Since it took the view that safety is absolute and unchanging, the Court of Appeal had to consider whether the qualification "so far as is reasonably practicable" enabled the employers to exonerate themselves by showing that reasonable employers would not have considered that there was cause to reduce noise exposure in the workplace below 90dB(A). The Court of Appeal held that the qualification gave no scope for such a defence. It said (para 89):*

"Under the statute, the employer must first consider whether the employee's place of work is safe. If the place of work is not safe (even though the danger is not of grave injury or the risk very likely to occur) the employer's duty is to do what is reasonably practicable to eliminate it. Thus, once any risk has been identified, the approach must be to ask whether it is practicable to eliminate it and then, if it is, to consider whether, in the light of the quantum of the risk and the cost and difficulty of the steps to be taken to eliminate it, the employer can show that the cost and difficulty of the steps substantially outweigh the quantum of risk involved. I cannot see how or where the concept of an acceptable risk comes into the equation or balancing exercise. I cannot see why the fact that a responsible or official body has suggested that a particular level of risk is 'acceptable' should be relevant to what is reasonably practicable. In that respect, it appears to me that there is a significant difference between common law liability where a risk might reasonably be regarded as acceptable and statutory liability where the duty is to avoid any risk within the limits of reasonable practicability."

Smith LJ reiterated the point at the end of para 100, when rejecting the relevance of the Code of Practice to the question whether it was reasonably practicable to provide protection.

82. In the light of my conclusion that safety is a relative concept, the correctness of these passages does not strictly arise for consideration in this case. Had it arisen, I would have regarded the qualification as wide enough to allow current general knowledge and standards to be taken into account. Even the Court of Appeal in its formulation acknowledged the quantum of risk involved as material in the balancing exercise. But this can only mean that some degree of risk may be acceptable, and what degree can only depend on current standards. The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise: see Swanwick and Mustill JJ's statements of principle, set out earlier in this judgment, and also Charlesworth on Negligence (12th ed) (2010), chapter 7, The Standard of Care, both generally and especially at para 7.38. It would be strange if the Court of Appeal was right in suggesting that, under the statutory formulation, this one factor is irrelevant, when the

> *whole aim of the balancing exercise must, in reality, be to identify what is or is not acceptable at a particular time."*

56. Whilst the Supreme Court disagreed with the Court of Appeal about whether it was appropriate to take into account current general knowledge and standards as part of the assessment of what is reasonably practicable they did not disagree with Lady Justice Smith's formulation of the test involving a computation in which the quantum of risk was placed in one scale and the sacrifice, whether in money time or trouble , involved in the measures necessary to avert the risk was placed in the other. In the current case the assessment of the quantum of risk involved the Second Defendant assessing how likely it was that a road traffic accident might occur on Rascelf Road if it was not gritted before the planned post-salting route the following morning and perhaps also how serious that accident might be in terms of the potential for injury. In the other side of the scale would be put how expensive or difficult it might be to arrange an ad hoc gritting of the problem area coupled with any potential impact on the Winter Service programme if that was done.

57. In order to properly assess the quantum of risk the Second Defendant had to take into account the information provided to it by North Yorkshire Police. In relation to Incident 4 the court can be confident about that information because there is a transcript of the telephone call between the control room for the police and Selby Swing Bridge the out of hours service for the Second Defendant. I have set out a summary of this conversation in paragraph 11 above. It certainly involved a large patch of black ice, possibly caused by a water leak, and there had been "quite a bad accident". Surprisingly, the fact that there had been an accident does not appear to have been relayed to Mrs Charlton if her note set out in paragraph 12 above is an accurate summary of what she was told.

58. This raises the question whether she was also given all the relevant information in relation to Incident 1. The police record of this incident is *treacherous road conditions between Easingwold and the bridge over the A19*." She had "*gone round a corner and was hardly able to stop as she came across a road traffic collision between a car and two motorbikes*". Mrs Charlton was told that the road was icy, but she was not told of any road traffic accident. In my view this is very odd. The purpose of the call from the Police to Selby Swing Bridge was to seek to persuade them to send out a gritter because a police officer had formed the view that the road conditions on Rascelf Road were treacherous. On the balance of probability it seems to me more likely that the fact that there had been a collision between a car and two motorcycles would be part of the information which the police passed on to Selby Swing Bridge as a means of attempting to persuade the Second Defendant to spot grit Rascelf Road. I cannot say whether this information was passed on to Mrs Charlton, but I accept her note suggests that it was not. I find as a fact however that the Second Defendant was told of two road traffic accidents having occurred on Rascelf Road on the evening of 21st November 2015. In terms of the quantum of risk at just after 11pm, Rascelf Road was not due to be gritted until about 7 am the next morning, and so it might be said that it was foreseeable that another accident may occur during the intervening eight hours.

59. In the other side of the scale had to be put what the cost of ameliorating that risk might be in terms of money and physical resources. I had no evidence what the monetary cost might be but I was aware that the Second Defendant had a contract with Ringway

Infrastructure Services who provided the gritters and drivers and there would have been a financial cost to asking them to spot grit in addition to the programmed routes. Similarly, of the 86 gritters and 150 drivers the Second Defendant's witnesses could not say that no-one was available to carry out spot gritting if it had been ordered.

60. Mrs Charlton's reasons for refusing the request are summarised in paragraph 24 above. One of them was if treatment was ordered, it would have used up valuable resources preserved for post- salting the following morning. I accept that it would have used up some salt and grit, but there was no real evidence that the gritter and driver could not have driven their normal route the next morning. I accept that theoretically there may be an issue around driver's hours but there was no evidence either that a driver called out around midnight could not work the next day , or even if he could not, that another of the 150 drivers could not have taken his place.

61. I accept that by hers and Mr Smith's rather constricted definition of exceptional circumstance even a history of two road traffic accidents on one stretch of road did not meet the test. The fact that a water leak had been reported appeared to Mrs Charlton to be another reason to refuse the request because Yorkshire Water had been asked to deal with the leak. I find this puzzling as if there had been a water leak which was spilling onto a road on a night where temperatures were likely to fall to minus 5 Celsius , in my view this would increase the risk of ice on the road forming and the potential for accidents to occur as a result.

62. It is obviously not reasonably practicable for the Second Defendant to grit every mile of public highway in it's area every time temperatures are likely to fall below freezing point. The Highway experts agreed that in general terms the Winters Services Manual represented a reasonable compromise between the duty to keep the highways safe without imposing a rigid obligation to keep all highways free from ice and snow. The Manual does however cater for the fact that ad hoc requests may be made for gritting to take place outside the planned programme in paragraph 11.0

> *"Requests for alleviation of bad road conditions*
>
> *Such requests received at County Hall will be passed to the appropriate Area. It will be the responsibility of each Area to determine the priority of individual requests relative to the prevailing situation*."

63. The manual does not of course set out how the priority of individual requests should be managed. The test of "exceptional circumstances" has arisen over time as a way for the Second Defendant to minimise the effect that such requests might have on the planned gritting programme. Obviously, if every request from a member of the public had to be acted on, I accept that this would place an unreasonable burden on the Second Defendant and might well result in the planned programme descending into chaos. Some sort of value judgment is necessary to separate the serious requests from the trivial ones. The Highways experts agreed that it could be reasonable to have a test of exceptional circumstances depending on the factual situation at the time.

64. This phrase appears in other jurisdictions, in particular where a court is considering whether to exercise the *Barrell* principle to revisit or change a judgment. In *Cie Noga*

D'Importation et d'Exportation SA v Abacha [2001] 3 All ER 513, Rix LJ, sitting in the Commercial Court, referred at para 42 to the need to balance the concern for finality against the "proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order". He went on, at para 43:

> *"Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances". It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."*

65. The warning not to turn the formula of "exceptional circumstances" into a straitjacket of its own is in my view relevant to this case. The way in which Mrs Charlton and Mr Smith interpreted this phrase was, whilst consistent with each other, unduly restrictive. When asked for examples of exceptional circumstances they gave three examples: an emergency vehicle being unable to reach the scene of an accident; an emergency vehicle being unable to reach the home of a patient requiring urgent treatment and the road being blocked by a vehicle and a recovery truck being unable to reach it. In my view, this is too narrow and restrictive view of what fairly could be considered "exceptional circumstances". Whereas a phone call from a concerned resident about ice on a suburban cul-de-sac would clearly not be exceptional two phone calls from police officers about the same stretch of road describing conditions as treacherous and reporting two separate road traffic accidents probably is. I take into account that when a police officer requests a highway department to exercise their discretion to spot grit , he or she is probably doing so because of concern about the safety of the public and the potential risk to life and limb of further road traffic accidents. In my view, requests of this nature from police officers should be given very serious consideration because they are likely to be concerned about potential harm from further accidents.

66. It is clear from the five incidents which occurred on Rascelf Road overnight that the Second Defendant as highway authority had not ensured that safe passage along that road was not endangered by snow and ice. The only issue is whether they had done what was reasonably practicable. I have found that the burden of proving that fell on the Second Defendant and in my judgment, it has failed to do so. It has a system which is prepared to entertain ad hoc requests for gritting outside the planned programme but has then sought to place an unnecessarily restrictive test before being prepared to exercise this discretion. Whilst it is obvious that if too wide a test is applied the planned programme of gritting could be seriously impacted there was no real evidence that there would have been any significant adverse effect from sending a gritter out to spot grit Rascelf Road that night. This was a situation where the quantum of risk was easily identifiable in terms of the possibility that a serious road traffic

accident may occur if the road was not treated but the likely cost in terms of finance and manpower to ameliorate that risk was unspecified in evidence before the court but did not seem to me to be in principle, particularly significant. I therefore find, on balance of probability that the Second Defendant was in breach of their statutory duty under s 41 (1A) of the Highways Act 1980.

67. The Second Defendant raises a causation point. It submits that even if Mrs Charlton had either sent out an inspector or a gritter on the night in question they would have been sent to the junction of Alne Road and Rascelf Road because that is where the police mistakenly told Selby Swing Bridge the Fourth Incident occurred. In paragraph 25 of this judgment I have set out Mrs Charlton's evidence on what she would have done had she given further consideration to spot gritting Rascelf Road. She said she would have spoken to the reporting police officers. I consider that would have been a wise decision because they could have given further information about the situation on the ground as they saw it and how comparatively serious the patch of ice was. If she had done that I find that inevitably they would have corrected the mistake about the actual location of Incident 4. She would also have learnt that at least two, possibly three accidents had already taken place at this location. Even if I am wrong about this and an inspector was sent out to carry out a local risk assessment at the junction of Alne Road and Rascelf Road I find that having found nothing of note there he would have driven further along Rascelf Road where he would have seen the police slow signs and the large patch of ice. The causation argument is therefore not made out in fact.

68. I also believe that the Second Defendant is not entitled to raise this causation point in law. A similar argument was attempted by the Defendant in *Wilkinson v City of York Council* [2011] EWCA Civ 207. The Defendant in that case attempted to argue that even though the court might find that the Highway Authority had not done all that was reasonably necessary to keep the highway in good repair the Claimant still had to show that if due care had been taken the accident would not have occurred. Lord Justice Toulson relied on a much more venerable decision to make his point:

> "Mr Limb's argument amounts to saying that section 58 makes it now incumbent on a claimant in every case of this kind to prove that there was not merely a breach of the duty to maintain but a negligent breach of the duty to maintain. That proposition was rejected by this court in Griffiths v Liverpool Corporation, which Lord Denning cited. In that case, Diplock LJ said at 390-391:
>
> *"Sub section 2 [of section 1 of the Highways (Miscellaneous Provisions) Act 1961, which is now section 58 of the 1980 Act] does not in my opinion make proof of lack of reasonable care on the part of a highway authority a necessary element in the cause of action of a plaintiff who has been injured by danger on the highway. What it does is to enable the highway authority to rely upon the fact that it has taken reasonable care as a defence -- the onus of establishing this resting upon it. A convenient way of expressing the effect of the subsection is that it does not qualify the legal character of the duty imposed by subsection*

> *(1) but provides the highway authority with a statutory excuse for not performing it...*
>
> *Unless the highway authority proves that it did take reasonable care the statutory defence under subsection (2) is not available to it. Nor is it a defence for the highway authority to show that even if it had taken all reasonable care this might not have prevented the damage which caused the incident."*

Whilst the present case concerns s 41(1A) rather than sections 41 and 58 of the Highways Act 1980 it seems to me that the court can apply the same logic.

69. **Indemnity and Apportionment**

I have considerable sympathy with the First Defendant having lost control of his vehicle on what he perceived to be black ice. The photographs taken about an hour and a half after the accident by Sergeant Lumbard are probably not a fair reflection of what the road looked like at the time of the index accident. Several emergency vehicles had driven to the scene and could well have churned up the ice, creating a more slushy granular look to the road than had been present previously.

70. I am unable to accept however that in the three hours he had been driving before this accident occurred, he had not seen any ice on any of the roads he had travelled on. It was a very cold night and there had been rainfall in the days leading up to this accident. He must have covered some mileage in the three hours before the accident and he admitted that he had been driving on some country roads before Rascelf Road. Given the temperature and the warning light on his dashboard he should have been driving very cautiously because he should have known that ice on the roads was foreseeable.

71. The First Defendant was approaching the bend at this part of Rascelf Road at about 50 mph. His headlights were on full beam and the road was straight for 200 yards before the bend. He should have been able to see the upcoming bend at this point and reduced speed. There was a sign warning of the bend about 110 metres from the tree which was the second opportunity to slow down. There was then the Police Slow sign which he would have been able to see perhaps a hundred metres before he reached it. It would appear that he first touched his brakes after he passed that sign and the skid which would result in his eventual loss of control started. I find in the light of these opportunities he was travelling too fast at 50 mph even though he was in fact driving 10 mph less than the National Speed Limit. He should have reduced speed to about 30 mph before reaching the Police Slow sign, and had he done so it is likely that he would not have hit the tree. I therefore find that this is an appropriate case for apportionment.

72. It is clear that the negligence of the First Defendant and the breach of statutory duty by the Second Defendant both have causal potency in this case. If the First Defendant had driven more slowly then it is likely that no injury would have been suffered by the Claimant and if the Second Defendant had spot gritted the accident scene around midnight it is unlikely that the First Defendant would have lost control of his vehicle. Section 41 (1A) of the Highways Act seeks to put responsibility on the Highways Authority for ensuring that roads are kept free from ice so far as practically possible.

It is an obligation with focus on public safety. The First Defendant's negligence can be characterised as an accidental but culpable error of judgment. Against this background it would be right for the Second Defendant to bear more of the blame than the First Defendant. If find that the Second Defendant is two thirds to blame and the First Defendant one third to blame. Liability will be apportioned accordingly.

73. This judgment will be handed down at a remote hearing in accordance with the Covid-19 protocol on a date to be fixed. The time for appealing the Judgment shall not start to run until it is handed down. CPR Practice Direction 40E shall apply. If the parties can agree the form of an order and any consequential directions arising from this judgment, then the attendance of counsel and solicitors will be excused. Both parties should file a list of participants and their email addresses if they would like to attend the remote hearing which is likely to be conducted by Skype for Business.