

Well-managed Highway Infrastructure – What the New Code Means

INTRODUCTION

1. October 2018 heralds the dawn of a new era for local authorities as ‘Well-managed Highway Infrastructure’ (“**the New Code**”) comes into force, replacing the 2005 ‘Well-Maintained Highways Code of Practice for Highway Maintenance Management’ (“**the Old Code**”). Most authorities will already have adopted the New Code into their own code or policies. The degree to which the litigation of claims will be impacted by the shift from old to new is a question on the lips of many. This article considers the New Code and is intended to be guidance only.

LEGAL STATUS OF THE CODES

2. The Old Code was, at its highest, evidence of ‘well-informed guidance’ or ‘general good practice’, having no statutory force.
3. Departure from the recommendations of the Old Code were persuasive but not determinative in deciding whether the section 58 Highways Act 1980 defence had been made out.
4. Consider Devon County Council v TR [2013] EWCA Civ 418, in which Devon had departed from the recommendations within the Old Code, by providing six-monthly inspections rather than one-monthly inspections of the road in question. Hughes LJ held that the judge had fallen into error by approaching the code as a mandatory standard requiring a positive reason to depart from it. He set out the paragraphs of the Old Code which stated that it was ‘explicitly non-mandatory’ (Old Code 1.3.1). The essence of the judgment is that the importance of the code should not be overstated and that while a positive reason from departure would be preferable (not least in respect of litigation), the absence of a positive reason did not mean that the section 58 defence must fail. To approach otherwise would *in effect* render the Old Code mandatory.
5. Similarly but on the other side of the coin, in Crawley v Barnsley Metropolitan Borough Council [2017] EWCA Civ 36, it was held that while the authority had a system in

place for complying with the Old Code, the section 58 Defence was not made out as that system, despite on its face complying with the Old Code, was not in fact adequate in the circumstances.

6. Thus, on a brief but sufficient review of the authorities, the status of the Old Code is very clear. Neither departure from it, nor compliance with it, is determinative.

7. The status of the New Code is set out at A.1.2 and states:

*“This Code of Practice is not statutory but provides **Highway Authorities with guidance** on highways management. Adoption of the recommendations within this document is a matter for each Highway Authority, based on their own legal interpretation, risks, needs and priorities.”* (emphasis added)

8. Status-wise, nothing has changed. As such, departure from the New Code should not be determinative. However, as compliance with the Old Code was nevertheless strongly persuasive, compliance with the New Code will remain strongly persuasive. Given that the New Code is more subjective in comparison to the Old Code’s more black and white approach, demonstrating positive consideration of the recommendations of the New Code will be crucial for authorities when it comes to litigation, and making out a section 58 Defence.

9. On the face of it, given the interpretative nature of the New Code, there is more scope for Claimants to challenge whether the authority had done what was ‘reasonably required’ to secure that the relevant part of the highway was not dangerous but, equally, there is more scope for the authority to justify whatever decision it had come to providing positive consideration of the terms of the New Code can be demonstrated. Therefore, demonstrating consideration and positive action in respect of the recommendations of the New Code will be crucial in establishing that the authority had done what was reasonably required.

10. Bearing in mind the usual disclaimer – that the below is evidently not to be relied upon and formal advice should be taken – demonstrating consideration of the following aspects of the New Code will go a long way in establishing a section 58 defence.

THE RISK-BASED APPROACH (“RBA”)

11. Central to the New Code is the RBA. Previously, the category of road and size of the defect was largely determinative of the inspection (frequency and duration) and response required. Thus, at trial, evidence would confirm the category of the road, the required inspection frequency, the actual inspection history and submissions would be made on this as evidence of a safe system.
12. Now, evidencing a positive consideration of characteristics of the highway is crucial. This RBA goes to all aspects of the system in place, from the training of inspectors to the type of response recommended.
13. As the New Code reads (emphasis added):

*Authorities should adopt a **risk-based approach** and a risk management regime for all aspects of highway maintenance policy. This will include investment, setting levels of service, operations, including safety and condition inspections, and determining repair priorities and replacement programmes. It should be undertaken against a clear and comprehensive understanding and assessment of the likelihood of asset failure and the consequences involved. [A.2.5.1]*

There are no prescriptive or minimum standards in this Code. Adoption of a risk based approach, taking account of the advice in the Code, will enable authorities to establish and implement levels of service appropriate to their circumstances. [A.2.5.2]
14. There is debate over whether considerations of affordability take on a new relevance under the New Code. Wilkinson v City of York Council 2011 [EWCA] 2017 is authority against the argument that the allocation of resources to more pressing needs can overcome circumstances where an authority had not done what was reasonably required to make the highway safe. That remains good law, and for the purposes of litigation it would be unwise for any authority to raise issues of resource allocation in an attempt to justify decisions made. It is to be noted, however, that under the New

Code, in which ‘Network Safety’, ‘Customer Service’, ‘Network Serviceability’ and ‘Network Sustainability’ are all core objectives informing the decisions made within the holistic RBA, there is an argument that economic considerations cannot be ignored.

15. Specific reference is made to this, for this first time, within the New Code:

*The principle of this Code is that Highway Authorities will adopt **a risk-based approach in accordance with local needs (including safety), priorities and affordability**. This is consistent with ISO 55000, which states that “asset management translates the organisation’s objectives into asset-related decisions, plans and activities, using a risk based approach.” The Code will not therefore outline any minimum or default standards, but includes guidance and advice to support development of local levels of service. [A.5.1.3]*

16. The reality is that if a certain system is shown to be wanting in respect of doing what is reasonably required to make a highway safe, reliance upon economic considerations as a justification is still going to fail. I am of the view, however, that within the melting pot of demonstrating considerations that have gone into the risk based decisions made in respect of a particular highway, providing there is very strong and substantiated evidential justification, affordability has a more prominent seat at the table. While it may not justify a system which has been deemed not to be reasonably safe, it may mitigate against that system being deemed so in the first place.

17. The New Code leaves the delivery of a safe highway network to each authority, and states that the same will rely upon ‘*good evidence and sound engineering judgment. The intention of this Code is that Authorities will develop their own levels of service and the Code therefore provides guidance for authorities to consider when developing their approach in accordance with local needs, priorities and affordability*’ (note another reference to affordability). [A.1.1.5]

18. While leaving the development of each authority’s approach to the authority, the New Code gives specific guidance on matters to be considered [A.5.2.1]:

The risk-based approach to highway infrastructure maintenance should be documented, and essentially be based on:

- *An understanding of and alignment with the authority's corporate objectives, legislative requirements, and corporate approach to risk and management of risk;*
- *An understanding of risk in a highways service and its application to all areas of operations, including people, infrastructure, data, finance and suppliers;*
- *An understanding of the potential risks and their likely significance to users, stakeholders, the authority and to the data and information held;*
- *An understanding of the inventory, function, criticality, sensitivity, characteristics and use of the various assets comprising the highway network;*
- *The establishment of hierarchies and levels of service with appropriate funding;*
- *The implementation of the agreed levels of service;*
- *The competency required in development and implementation of the risk-based approach; and*
- *Regular evidence-based reviews.*

19. While that may appear to be as clear as mud, having considered the New Code in some detail, I am of the view that the following are key to an authority demonstrating compliance with the code, and therefore increasing the likelihood of substantiating a section 58 Defence under the new regime.

Functional Hierarchy

20. In a move away from objectively based categorisation of highways, it is now the case that consideration of the 'asset function' is not only important, but is 'the foundation of a risk-based maintenance strategy'. [A.4.3.1]

21. Thus, in order to demonstrate compliance with the New Code, the authority will need to be able to positively demonstrate the consideration given to each particular highway. I have distilled the following as being of factors which should be demonstrably considered:

A. *Functionality*

- The needs, priorities and use of the highway - specifically and among other things the traffic volume, local importance, social and economic factors and pedestrian / cycle usage. [A.4.3.2]

B. *Desirability of continuity / consistency*

- Each type of highway may have its own hierarchy, but all should be related and relatable to each other. Hierarchy should consider, for example, whether a walk / cycle route continues between highways. [A.4.3.3]

C. *Neighbouring Authority*

- Consider consistency between boundaries. [A.4.3.6]

D. *Consultation*

- Consideration of the users and needs of certain groups will go a long way in demonstrating positive consideration of functional hierarchy. [A.4.3.7]

E. *Review*

- Hierarchies should be 'dynamic'. Demonstrating periodic and adaptive reviews is necessary, and as time progresses will be central to demonstrating an active RBA. [A.4.3.8]

Effective Regime of Inspection, Survey and Recording

22. Establishing an effective regime of inspection, survey and recording is described as '*the most crucial component of highway infrastructure maintenance*'. [A.5.4.1]
23. It is within this component of the RBA that authorities, under the New Code, have considerably more scope to develop and justify their own standards [B.5.2.1]. Therefore, what is required is largely undefined. What is necessary, however, is the

ability to demonstrate a RBA to the regime, rather than an Old Code style based formulaic approach.

24. The following will be of relevance:

A. Whether consideration of the following parameters be demonstrated

[A.5.7.4]:

- i. Frequency (see 'B' below);
- ii. Items for inspection;
- iii. Type of traffic and intensity;
- iv. Method of inspection;
- v. Nature of response.

B. Whether the frequency of inspection by reference to RBA can be demonstrated, accounting for the characteristics of the highway and its position in the hierarchy [A.5.7.2]. This will include consideration of

[A.5.7.6]:

- i. Category within the network hierarchy;
- ii. Type of asset, e.g. carriageway, footway, embankment, cutting, structure, electrical apparatus, etc;
- iii. Critical assets;
- iv. Consequence of failure;
- v. Network resilience;
- vi. Use, characteristics and trends;
- vii. Incident and inspection history;
- viii. Characteristics of adjoining networks elements;
- ix. The approach of adjoining Highway Authorities;
- x. Wider policy or operational considerations.

C. Whether the regime is capable of identifying all defects likely to create danger or serious inconvenience to the users of the network or the wider community. [A.5.5.2]

- D. Whether it can be shown that the approach of the regime is ‘practicable’ and ‘reasonable’ *with respect to the risks and potential consequences identified?*
All risks, including to the most vulnerable, must be identified. [A.5.7.5]
- E. Whether it can be demonstrated that consideration of more frequent inspection has been given in circumstances where swift deterioration has been shown. [A.5.7.7]
- F. Whether it can be shown that the RBA has led to increased levels of scrutiny for highways identified as being of higher risk. [A.5.5.8]
- G. Whether a response, or ability to respond, to monitoring be demonstrated. [A.5.7.3]
- H. Whether there is a policy for community reporting and if so whether that policy has been made public and such that it ensures that contributions are acknowledged with feedback [A.5.5.6, see also A.5.9.1 and A.5.9.2]

25. A useful illustration of the shift heralded by the New Code can be seen by considering the Judgment of Hughes LJ in Devon, above, at paragraph 20, in which when commenting on the Old Code he stated that:

“The advice in 1.3.2, to make explicit reasons for adopting different policies is clearly wise, given the exposure of highway authorities to the possibility of litigation. But it is advice, not a rule. It cannot amount to a rule that it will of itself be a want of reasonable care to adopt a different inspection interval unless some particular process of reasoning is passed through, and set out somewhere in writing...”

26. Considering the New Code, it is precisely that, the ‘process of reasoning’ and coming to a particular policy/decision, while being able to demonstrate the same and the reasons behind that decision, that will be determinative in demonstrating compliance with the New Code and thus more likely to be taken as evidence determinative of whether reasonable care has been taken.

Defect Investigatory Level

27. This sub-heading is mis-leading, insofar as the New Code steps away from prescribing or encouraging a set level. While it still appears to be acceptable to have a reference level, the importance of being able to demonstrate consideration of the risk, not simply the size of the defect, cannot be overstated.
28. Thus, previous approaches in which during the course of litigation inspectors would rely upon the defect as being beneath an intervention level to justify whatever action was taken, or not taken, simply will not wash.
29. All defects observed during safety inspections that provide a risk should be recorded, and the response must be determined based on a risk-assessment. On-site judgment is key. [A.5.8.1]
30. This, combined with the risk-based hierarchy and risk-based inspection regime, are in many ways the three crucial components of the RBA. However, given that on-site judgment is key, and that the RBA permeates the whole regime, demonstrating competency at all levels has arguably taken on a heightened importance.

Competence and Training

31. While it is not new to require inspectors and managers to be suitably qualified and trained, it will now be necessary to demonstrate, at all levels, training and competence in a RBA to highway maintenance.
32. A failure to be able to demonstrate a working understanding of the RBA and up-to-date competency, in circumstances where, for example, a defect has arguably been missed, or not prioritised appropriately, will weigh heavily in the balance of assessing compliance with the New Code and establishing a defence.

33. Demonstrating consideration of the following will be influential:
- A. Competency of those involved in managing, developing and implementing the RBA, to the satisfaction of the Highway Authority. [A.5.3.2]
 - B. CPD focussed on the RBA – a failure to implement and/or follow a system of CPD will make it difficult to evidence the competency of any affected person. Practically, all staff should have a working knowledge of the requirements of the New Code. Consider also the actions of agents and contractors. [A.5.3.4]
 - C. Whether staff members’ Institute of Highway Engineers (IHE) qualifications are up-to-date. While not determinative, absence of an up-to-date IHE qualification is likely to carry weight. [B.5.5.2 and B.5.5.3]
34. It is clear that it is all members of staff who must be competent in the RBA. As such, those at management level must be considered within the context of litigation, especially given the foundational importance of establishing a hierarchy of highways, and the reality that responsibility for this will largely lie with those in management.
35. It should be considered whether the evidence of the authority deals with competency, including all relevant aspects of ‘a’ to ‘c’ above.

CONCLUSION

36. The New Code runs to 256 pages and this article necessarily only focuses on certain aspects which are likely to be of importance in the litigation of highway claims. I am of the view that those involved in such litigation are likely to see arguments raised which tend to relate to the themes discussed above. As such it is hoped that the above is of some assistance in guiding thoughts both pre-litigation and during the course of litigation. However, the practical impact of the New Code is a fluid uncertainty, and formal advice should always be taken, with no reliance placed on the contents herein.

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