



Highways Proof - Aberdeen

Thursday, 30 August 2018

Aberdeenshire Council
Woodhill House
Westburn Rd
Aberdeen
AB16 5GB

1 INTRODUCTION

Welcome to the Highways Mock Proof, 2021. This booklet contains 3 sections:

1. Introduction
2. Court Papers
3. Judgment exercise

This Mock Proof is a civil court case brought by a member of the public seeking damages against a Local Authority. It arises from an accident on a pavement maintained by the Authority and is set in 2021. Its purpose is to inform delegates about the issues which are likely to arise in claims and court cases following implementation of the 2016 WMHI Code of Practice, to show how such court cases are conducted, and to familiarise them with the court process.

The updated Code of Good Practice was published in October 2016. There is a two year lead in period. Accordingly, predications have been made about how it will work. The case contains a number of features which will be seen in both current and future highway cases:

- Testing the claimant's account
- The new Code
- The likely response of claimants lawyers to risk based systems.

2 COURT PAPERS Delegates will be provided with a Record (the document containing the parties finalised written pleadings), a minute of the pre-trial meeting, and the parties productions and lists of witnesses. In the ordinary course of events these are the only documents which the Sheriff or Judge will see.

The Sheriff will have read the court papers before the Proof starts. This will familiarise him with the issues, in the same way as the delegates will be, having pre-read this pack.

Each party will normally have their own statements containing a note of what their witnesses will say but these are not normally exchanged or seen by the court.

RECORD

(Personal Injuries Action)

**SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS
AT DONSTRATH**

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire
PURSUER

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath
DEFENDER

The pursuer craves the court to grant decree -

- (a) for payment by the defender to the pursuer of the sum of **THIRTY THOUSAND POUNDS (£30,000) STERLING** with interest thereon at the rate of eight per cent per year from 1 July 2019 until payment;
- (b) for the expenses of the action.

**STATEMENT OF CLAIM FOR PURSUER
AND
ANSWERS THERETO FOR DEFENDER**

Stat. 1 The pursuer is Mr Duncan Clumsy. He resides at 79 Tripping Crescent, Market Town, Donstrathshire. His date of birth is 1 July 1975. His National Insurance Number is ... The pursuer is self employed.

Ans. 1 Admitted that the pursuer is Mr Duncan Clumsy. *Quoad ultra* not known and not admitted.

Stat. 2 The defender is Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath. At all material times, the defender was the local authority for Market Town with responsibility for the management and maintenance of roads and footpaths under the Roads (Scotland) Act 1984. Those roads and footpaths included Elm Street, Market Town.

Ans. 2 Admitted.

Stat. 3 This court has jurisdiction to hear this claim against the defender because the pursuer seeks reparation for loss, injury and damage sustained by him through the fault and negligence of the defender. The harmful event in consequence of which the pursuer suffered said loss, injury and damage occurred on Elm Street, Market Town.

Ans. 3 Admitted that this court has jurisdiction.

Stat. 4 On or around 1 July 2019, at or around 6pm, the pursuer was walking on a pavement footpath on Elm Street, Market Town. He was walking home alone having visited his local pub with friends for a birthday drink. Around fifty metres from the pub, the pursuer tripped and fell. He had placed his right foot in a pothole on the pavement. He tripped when his right foot made contact with the edge of the pothole. The pothole was in a rough and poorly maintained area of the pavement. The pothole itself was around 75cm wide and 50cm long. It was of varying depth. The edge which the pursuer tripped on was 35mm in depth. The pursuer reported the defect to the defender on 2 July 2019. It was repaired by the defender on 8 July 2019. Between 22 and 29 June 2019 there was an annual outdoor food and drink festival on Elm Street, organised by the defender. Footfall on Elm Street was higher during that period than it normally was. The defender's averments in answer are not known and not admitted except insofar as coinciding herewith.

Ans. 4 Admitted that between 22 and 29 June 2019 there was an annual outdoor food and drink festival on Elm Street, organised by the defender. Admitted that footfall on Elm Street was higher during that period than it normally was. Admitted that the pursuer reported the defect to the defender on 2 July 2019. Admitted that it was repaired by the defender on 8 July 2019. Not known and not admitted that on or around 1 July 2019, at or around 6pm, the pursuer was walking on a pavement footpath on Elm Street, Market Town. Not known and not admitted that he was walking home alone having visited his local pub for a birthday drink. Not known and not admitted that around fifty metres from the pub, the pursuer tripped and fell. Not known and not admitted that he had placed his right foot in a pothole on the pavement. Not known and not admitted that he tripped when his right foot made contact with the edge of the pothole. *Quoad ultra* denied. Explained and averred that the pavement footpath at Elm Street, Market Town was inspected by the defender, in accordance with its risk-based approach, at three monthly intervals. At the inspection on 1 March 2019, a defect was noted of 15mm in maximum depth. No immediate repair was considered necessary. At the inspection on 1 June 2019, it was noted

that the defect had deepened to a maximum depth of 20mm. This was below the actionable defect depth of 25mm. Immediately prior to the defender repairing the pothole, it was of a maximum depth of 25mm.

Stat. 5 As a result of the fall, the pursuer sustained loss, injury and damage. He sprained his right ankle and foot. His left elbow hit the ground heavily. He suffered a contusion and abrasion of his left elbow. His elbow injury resolved around one month post-accident. He continues to experience right ankle and foot discomfort. His right ankle gives way intermittently, especially when walking on uneven ground. The pursuer regularly played football before 1 July 2019 but has not yet been able to return to that. Physiotherapy has been recommended, which the pursuer is seeking. With physiotherapy, it is anticipated that the pursuer will make a full recovery by around 26/27 months post-accident. For around two months post-accident, the pursuer needed assistance with all routine personal and domestic activities, including washing, dressing, climbing stairs, household chores and shopping. These services were provided by his cohabiting partner. The pursuer claims (i) solatium; and (ii) services.

Ans. 5 The precise nature of any loss, injury and damage sustained by the pursuer as a result of the accident is not known and not admitted. *Quoad ultra* denied. The sum sued for is excessive.

Stat. 6 The pursuer's claim is based on the defender's breach of their common law duty to take reasonable care for the Pursuer. They ought to have inspected the pavement on Elm Street every month, rather than every 3 months. Had they done so that would have disclosed the existence of a defect on the pavement. In any event, having identified a defect of 20mm on 1/6/19 they failed in their duty of reasonable care by not taking any further action. It was reasonably foreseeable, particularly in light of the increased footfall during the food and drink festival, that the defect would deteriorate following the 1/6/19 inspection. With reference to the defender's averments in answer, admitted that certain duties of reasonable care were incumbent on the pursuer under explanation that he fulfilled those. *Quoad ultra* the defender's averments in answer are denied.

Ans. 6 Admitted that the defender owed certain common law duties of care towards the pursuer under explanation that they fulfilled said duties by exercising reasonable care in the performance of them. *Quoad ultra* denied. The defender contends:

(i) That they are not liable to make reparation to the pursuer;

- (ii) *Esto* they are liable to make reparation to the pursuer (which is denied), the pursuer, by his own negligence in failing to take reasonable care for his own safety, materially contributed to his fall such that any damages awarded should be reduced in terms of contributory negligence; and
- (ii) In any event, the sum sued for is excessive.

Form PI7 Form of minute of pre-trial meeting

Rules 36.K1 and 36A.10(3)

Court ref. no

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT DONSTRATH

JOINT MINUTE OF PRE-TRIAL MEETING

in the cause

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire **PURSUER**

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath **DEFENDER**

MacDOUGALL for the pursuer and

MacLEAN for the defender hereby state to the court

1. That the pre-trial meeting was held in this case by video conference on 4 July 2020
2. That the following persons were present-
Greg MacDougall, solicitor for pursuer
Catriona MacLean, solicitor for the defender
3. That the following persons were available to provide instructions by telephone-

Mr Duncan Clumsy, pursuer
Pauline Irvine, Claims Handler, Donstrathshire Council, the defender
4. That the persons participating in the meeting discussed settlement of the action.
5. That the following questions were addressed-

Section 1

		Yes	No
1.	Is the diet of proof or trial still required?	x	
2.	If the answer to question 1 is "yes", does the defender admit liability? (If "no", complete section 2) If yes, does the defender plead contributory negligence? If yes, is the degree of contributory negligence agreed? If yes, state % degree of fault attributed to the pursuer.	x	x x
3.	If the answer to question 1 is "yes", is the quantum of damages agreed? (If "no", complete section 3)	x	

Section 2

(To be inserted only if the proof or trial is still required)

It is estimated that the hearing will last ½ day

N.B. If the estimate differs from the number of days previously allocated for the proof or trial then this should be brought to the attention of the sheriff clerk. This may affect prioritisation of the case.

During the course of the pre-trial meeting, the pursuer called on the defender to agree certain facts, questions of law and matters of evidence.

Those calls, and the defender's responses, are as follows-

<i>Call</i>	<i>Response</i>	
	<i>Admitted</i>	<i>Denied</i>
1. That the photograph lodged as 5/1 of process is a true and accurate photograph of the pothole referred to on Record being repaired.	x	

During the course of the pre-trial meeting, the defender called on the pursuer to agree certain facts, questions of law and matters of evidence.

Those calls, and the pursuer's responses, are as follows—

<i>Call</i>	<i>Response</i>	
	<i>Admitted</i>	<i>Denied</i>
1.		

Section 3

Quantum of damages

Please indicate where agreement has been reached on an element of damages.

<i>Head of claim</i>	<i>Components</i>	<i>Not agreed</i>	<i>Agreed at</i>
Solatium	Past		£4,000
	Future		£2,000
Interest on past solatium	Percentage applied to past solatium (4%)		£ 160
Past necessary services			£ 500

Quantum is agreed, on a full liability basis and subject to liability, at £6,660.

Greg MacDougall
Agent for Pursuer

Catrina MacLean
Agent for Defender

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT DONSTRATH

LIST OF WITNESSES FOR THE PURSUER

in the cause

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire **PURSUER**

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath **DEFENDER**

1. The Pursuer, Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire
2. Mr Randolph Rhodes, 1 Ivory Tower, Snowball Lane, Perfect Town

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT DONSTRATH

LIST OF WITNESSES FOR THE DEFENDER

in the cause

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire **PURSUER**

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath **DEFENDER**

1. Mr Robert Parker, Highway Inspector, Donstrathshire Council, Austerity House, 1984 Bleak Street, Donstrath
2. Mr Fergus Kruger, Highways Manager, Donstrathshire Council, Austerity House, 1984 Bleak Street, Donstrath

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT DONSTRATH

FIRST INVENTORY OF PRODUCTIONS FOR THE PURSUER

in the cause

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire **PURSUER**

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath **DEFENDER**

5/1 Photograph of the pothole referred to on Record being repaired.

5/2 Expert Report by Mr Randolph Rhodes dated 20 January 2020.

5/1



**EXPERT REPORT IN RESPECT OF INCIDENT ON ELM STREET,
MARKET TOWN ON 1 JULY 2019; prepared by Mr Randolph
Rhodes, 1 Ivory Tower, Snowball Lane, Perfect Town on 20
January 2020.**

Introduction

I have been asked by Greg MacDougall, solicitor, to consider matters relating to an incident on Elm Street, Market Town, on 1 July 2019.

In particular, I am asked to consider the reasonableness of the policy for inspection and repair of Donstrathshire Council in respect of Elm Street at the time of the incident.

Author

I am a retired Highways Manager. Over a long and distinguished career lasting around 30 years, I worked for three different UK local authorities in devising and implementing systems for the inspection and repair of highways.

Elm Street

I have seen the photograph 5/1 of the court process. That shows a defect on one of the footways of Elm Street having been partially repaired. The reason why I say "partially" is that the poor state of the pavement around the area where part of the defect has been repaired is clear to see.

I went out myself to examine Elm Street on 13 January 2020. The footways were in a poor state. I understand that those footways have not been fully re-surfaced since 2008. Whilst I did not find any single defect of more than 25mm in depth at the point of my inspection, the footways were full of evidence of ad hoc repair work. It appeared to me that all of these places where repair work had been done were the sites of defects which had, before repair, deepened to more than 25mm.

At the time of my inspection, I saw that, open for business along the 0.5 mile stretch of Elm Street were: one local newsagent, one small convenience store, one hairdresser, one bookmaker and one pub. The majority of shop fronts on the street were lying empty or were boarded up.

I am aware that Elm Street has an annual one week long food and drink festival, organised by the council.

The Risk Assessment

I have seen the Risk Assessment prepared by Mrs Fiona Kruger, Donstrathshire Council, in respect of Elm Street, dated 20 January 2019.

The key points which I take from that risk assessment are that:

- The road and footways on Elm Street were, until the adoption by the council of the October 2016 document "Well-Managed Highway Infrastructure: A Code of Practice" inspected on a one month frequency.
- Inspection frequency has, since the adoption of the 2016 Code, been once every three months.
- 25mm is the "actionable" defect depth.

Opinion

1. I consider it unreasonable for Elm Street not to have had a full re-surfacing since 2008.
2. At a minimum, I consider that full re-surfacing of streets such as Elm Street should happen at least once every ten years.
3. I consider it unreasonable for the inspection frequency of Elm Street to have been reduced from once every month to once every three months. I think that it should still be inspected monthly.
4. I consider it unreasonable for the frequency of inspection to take no specific account of the annual food and drink festival. I think that an inspection should take place every year at the end of that festival to assess the extent of any deterioration caused by it.
5. 25mm is, in my view, the high point of what could be considered reasonable as an "actionable defect".
6. When I was a Highways Manager, which I was until I retired 5 years ago, we used 20mm as the "actionable defect" depth. If, as the Council claim, the defect was a maximum depth of 20mm on 1 June 2019 then the system which I operated as a Highways Manager would have required a repair of that within one week.
7. I often found during my time as a Highways Manager that the period of time between a defect worsening from a depth of 20mm to 25mm was shorter than the period of time between a defect worsening from 15mm to 20mm.

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT DONSTRATH

FIRST INVENTORY OF PRODUCTIONS FOR THE DEFENDER

in the cause

Mr Duncan Clumsy, 79 Tripping Crescent, Market Town, Donstrathshire **PURSUER**

against

Donstrathshire Council, a local authority having its principal offices at Austerity House, 1984 Bleak Street, Donstrath **DEFENDER**

6/1 Risk Assessment in respect of Elm Street, Market Town, dated 20 January 2019.

6/2 Road Inspection Record of Elm Street from 2016-2019

**RISK ASSESSMENT IN RESPECT OF ELM STREET, MARKET TOWN;
20 JANUARY 2019, prepared by Mrs Fiona Kruger, Highways
Manager, Donstrathshire Council, Austerity House, 1984 Bleak
Street, Donstrath**

Market Town

- Market Town has a population of 6,125 (as at start January 2019)
- Most of the working age population of Market Town do not work in the town.
- Most of the town's adult population do not do their main shopping and leisure activities in the town.
- Since January 2017, the town has had no bank.
- The town's two main streets are Oak Street and Elm Street.
- Oak Street is the more significant street of the two main streets, with a greater number of shops and other amenities.

Elm Street

- A 0.5 mile stretch of road running between Market Town Park and Oak Street.
- Open for business at present on Elm Street are: one local newsagent; one small convenience store; one hairdresser; one bookmaker; and one pub.
- The majority of the units on Elm Street are presently not open for business. Donstrathshire Council is actively promoting a "buy local" agenda to try to re-energise Elm Street. The Council is also offering highly competitive rental rates to try to encourage new businesses to open up on Elm Street.
- Since 2017, the Council has run a food and drink festival on Elm Street for one week in June to try to attract business to the town.

Risk Factors

- High risk factors:
 - Town centre
 - Presence of some shops
 - Annual food and drink festival since June 2017 which attracts increased footfall
 - Not fully re-surfaced since 2008

- Low risk factors:
 - Relatively low footfall
 - No complaints in respect of the state of the road and footways in the last five years
 - No reported incidents on account of the road and footways in the last five years

Risk Assessment

- In terms of the July 2005 document "Well-maintained Highways: Code of Practice for Highway Maintenance Management", the Elm Street road was classed as a "Main Distributor", subject to inspection on a one month frequency.
- In terms of the 2005 Code, the footways on Elm Street were classed as "Primary Walking Route", subject to inspection on a one month frequency.
- The introduction of the October 2016 document "Well-Managed Highway Infrastructure: A Code of Practice" gave the Council an opportunity to review, on a risk-approach basis, the inspection frequency for Elm Street. The Council decided unanimously to reduce the inspection frequency of both the road and footways of Elm Street to three months. This decision, informed by a fully considered risk-based approach, took account of the risk factors identified above and also these points:
 - One monthly inspection was perhaps appropriate for Elm Street in the late 1990s and throughout the 2000s when Market Town was a busy and thriving town but with the population increasingly working and spending both leisure and shopping time away from the town, three monthly inspection would suffice.
 - Faced with ever-increasing austerity, the Council simply could not afford to continue with a monthly inspection regime.
 - The annual food and drink festival only takes place for one week each June. Any additional deterioration to the road and footways which this might cause can be assessed at the next inspection of the three month cycle.
- Three monthly inspection is reasonable, on a risk-based approach.

Actionability

- The Council unanimously agreed, in keeping with the majority of other local councils in Scotland, that 25mm, or 2.5cm, would be the depth of a defect for that defect to qualify as "actionable".
- Actionable here means that it is in need of repair.
- If an actionable defect is identified during an inspection on a three month cycle then it should be repaired within 10 working days of identification.
- These actionability rules are reasonable, on a risk-based approach.

6/1/3

Review

- This Risk Assessment should next be reviewed, and an updated Risk Assessment produced, in January 2022.
- Ideally, the Council should aim to fully re-surface Elm Street before the next review in January 2022. Austerity has prevented full re-surfacing on the ten year target (by 2018). Since there have been no complaints and no reported incidents in the last five years, it seems that the surface remains fit for purposes at present, subject to inspection and repair as needed in terms of this Risk Assessment.

ROAD INSPECTION RECORD: ELM STREET
FROM 2016 TO 2019

DATE	INSPECTOR'S INITIALS	WHAT WAS FOUND
02/09/2016	RP	No dangerous defects seen (NDDS)
01/12/2016	RP	Tree roots by park edge
05/03/2017	FK	NDDS
03/06/2017	RP	Buchan tap cover missing, notified Water Company
01/09/2017	RP	NDDS
05/12/2017	RP	NDDS
02/03/2018	MH	NDDS
03/06/2018	RP	NDDS
01/09/2018	RP	NDDS
04/12/2018	RP	Surface cracking approaching pub
01/03/2019	RP	Defect approaching pub 15mm maximum depth
01/06/2019	RP	Defect approaching pub 20mm maximum depth
08/07/2019	RP	Repair carried out – defect 25mm maximum depth at time of repair

3. JUDGEMENT EXERCISE

1. Are you satisfied that the pursuer suffered an accident as a result of a defect on the pavement on Elm Street, Market Town on 1 July 2019

2. Do you consider that on 1 July 2019 there was a defect on the pavement in Elm Street which posed a risk of danger?

3. Was it reasonable for the defender to have changed their system of highway inspection from monthly to three monthly?

Please provide explanation for your answer

4. Do you consider the defender's risk assessment and record of inspections complied with the terms of the 2016 Code of Good Practice. If not, please explain why

5. Was it reasonable for the defender at their inspection of Elm Street on 1 June 2019 to take no action with regard to the defect identified? Please give explanation for your answer.

6. Has the defender breached its duties of reasonable care towards the pursuer?

7. In the event the court finds the defender liable to the pursuer should damages be reduced because of contributory negligence on the part of the pursuer? If so, to what extent .