

The Ombudsman's final decision

Summary: The Ombudsman will not investigate Ms B's complaint about damage to her car caused when she hit a pothole. It is reasonable to expect Ms B to use her right of remedy in the courts for the compensation she seeks.

The complaint

1. The complainant, whom I shall call Ms B, complains she hit a pothole on the highway and had to spend time and money repairing her car and making a claim for compensation from the Council's insurers. Ms B complains the Council was aware of the pothole but had not repaired it.

The Ombudsman's role and powers

2. The Local Government Act 1974 sets out our powers but also imposes restrictions on what we can investigate.
3. The law says we cannot normally investigate a complaint when someone could take the matter to court. However, we may decide to investigate if we consider it would be unreasonable to expect the person to go to court. (*Local Government Act 1974, section 26(6)(c), as amended*)

How I considered this complaint

4. I have considered Ms B's complaint and the Ombudsman's role and powers.

What I found

5. Ms B has explained she hit the pothole on 8 March 2019. Her car was damaged, and she had to pay for repairs. Ms B reported the pothole to the Council on the same day and the Council carried out repairs on 11 March 2019.
6. Ms B has made a claim against the Council, but the Council's insurers have rejected this. The insurers say the Council has a defence against the claim because it had last inspected the road on 1 March and identified the defect. The Council's insurers say it dealt with the defect within a reasonable period.
7. Section 41 of the Highways Act 1980 places a duty on highway authorities to maintain public highways. Highway authorities are expected to routinely monitor the state of highways for which they are responsible and to carry out repairs where necessary.

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8. Section 58 of the Highways Act 1980 gives a highway authority the right to put forward in court a special defence against claims for loss or damage resulting from the condition of the highway.
 9. As the Council has rejected Ms B's claim, she now has the right to make a claim in court. The Ombudsman cannot normally investigate a complaint when someone can take the matter to court. I do not consider there are any reasons why the Ombudsman should exercise his discretion and investigate Ms B's complaint. This is because whether the Council is liable for the damage to Ms B's car is a legal issue. It requires interpretation of the law to determine whether the Council fulfilled its duty under the Highways Act and whether it can rely on the defence provided by Section 58. This is not a matter the Ombudsman can decide. Ms B wants to see the inspection reports from 1 March, but this forms part of the legal issue and is not a matter the Ombudsman will investigate.
 10. It is reasonable to expect Ms B to use her right of remedy in the courts now the Council has refused her claim. Only the courts can decide if the Council has failed to properly maintain the highway and is liable for Ms B's losses. There is a simple, low cost procedure open to anyone to make a money claim through the courts. Or Ms B could consider using a 'no win no fee' solicitor or checking if she has legal expenses insurance that would cover such a claim.

Final decision

11. The Ombudsman will not investigate this complaint. It is reasonable to expect Ms B to use her right of remedy in the courts.

Investigator's final decision on behalf of the Ombudsman