Neutral Citation Number: [2023] EWHC 2614 (KB)

Case No: QB-2021-003247

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2023

Before:

VIKRAM SACHDEVA KC
(Sitting as a Deputy High Court Judge)

- -

Between:

DEMETRIOS KARPASITIS	**Claimant**
- and -	
HERTFORDSHIRE COUNTY COUNCIL	**Defendant**

- -
- -

Martin Porter KC (instructed by **Fieldfisher**) for the **Claimant**
Adam Weitzman KC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 14 – 16 and 23 March 2023
Further written submissions: 27 and 28 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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VIKRAM SACHDEVA KC

Vikram Sachdeva KC:

Introduction

1. On 22 April 2020, a month into the first Covid-19 lockdown, Demetrios Karpasitis, a 42 year old man, decided to go on a ride on his mountain bike during the afternoon. He followed a familiar route which took him onto a path to the east of the A10 dual carriageway. It was separated from the A10 by a grass verge. He travelled north up to the Paul Cully bridge which crossed over the A10 near Cheshunt. Up to the bridge the path was signposted as a shared footpath and cycle path. North of the Paul Cully bridge the path narrowed from 2.5m to approximately one metre, and there was no sign denoting the changed use of the path.

2. Mr. Karpasitis continued north to a quiet road called Anchor Close where he turned around to go home. Heading south towards the Paul Cully bridge at around 6.30pm or 7pm Mr. Karpasitis encountered a jogger also travelling south. Travelling around 10mph, he took the decision to overtake the jogger. This required him to cycle on the grass verge to the right of the path, with the A10 on the right of the grass verge.

3. Unfortunately there was a hole in the verge, just south of a road sign, which was sufficient to throw Mr. Karpasitis from his bicycle. This caused a complex fracture of the second vertebra, with serious consequences said to flow from the accident, including the loss of his job as a social worker.

4. The Defendant is the Highway Authority in respect of the grass verge (as well as the adjoining footway and carriageway) where Mr. Karpasitis fell.

5. Directions were made by consent by Master Gidden for a split trial of breach of duty and factual and legal causation of some injury (ie liability) and quantum, and the preliminary issues of liability (together with contributory negligence) are now before me.

6. The allegations pleaded by Mr. Karpasitis against the Defendant are of two types:

   i) A breach of s41 Highways Act 1980, and

   ii) A breach of a duty of care owed at common law.

7. The allegations of breach of s41 are primarily based on an allegation that the Defendant failed, adequately or at all, to heed the "obvious" risk that the hole posed to users of the cycleway/footpath given (1) the designated use of the path as a cycleway/footpath, (2) the narrow width of the cycleway/footpath (1m of usable path, as compared with the recommended 2.5m), (3) the "obvious" interaction which was likely to occur between cyclists and pedestrians, (4) the "obvious" need for cyclists and/or pedestrians to move onto the grassed area adjacent to the cycleway/footpath in order to let others pass, (5) the proximity of the hole to the cycleway/footpath (0.7m), and the size and depth of the hole. Mr. Karpasitis also alleges that the Defendant failed to devise, institute and/or enforce any or any adequate system of inspection of the highway.

8. The Defence asserts that the path was a footpath rather than a shared use cycleway/footpath.

9. Mr. Karpasitis responded to this assertion by introducing a further allegation of breach of a common law duty to signpost the path as a footpath given that the path south of the Paul Cully Bridge was clearly signposted as shared use, in the event that the path was a footpath. This allegation was made in the Reply rather than by an amendment to the Particulars of Claim, contrary to the CPR. However the Defendant did not object to that unorthodox approach at the time. The Defendant filed an Amended Defence pleading that it owed no common law duty of care to the Claimant. Mr. Karpasitis filed an Amended Reply specifically asserting that the Defendant did owe Mr. Karpasitis a common law duty of care.

10. At trial the Defendant indicated that it did not intend to press its further argument that illegality barred any claim, nor did it seek to pursue a re-amendment to its Defence to visit any negligence in relation to signage upon a local authority.

11. I acknowledge the hard work, care and skill which has plainly been deployed by both leading counsel over the course of the hearing and in written submissions in the preparation and presentation of their respective cases. I do not intend any disrespect to either of the parties if I do not address every single point which has been made to me, but I have taken them all into account and what follows is my assessment of the issues important to the disposal of this claim.

The Law

12. Section 41 Highways Act 1980 states as follows:

> **"41.— Duty to maintain highways maintainable at public expense.**
>
> (1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, 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."

13. Section 328 states as follows:

> **"328.— Meaning of "highway".**
>
> In this Act, except where the context otherwise requires, *"highway"* means the whole or a part of a highway other than a ferry or waterway."

14. Section 329(1) states as follows:

> **"329.— Further provision as to interpretation.**
>
> (1) In this Act, except where the context otherwise requires—

> *…cycle track"* means a way constituting or comprised in a highway, being a way over which the public have the following, but no other, rights of way, that is to say, a right of way on pedal cycles (other than pedal cycles which are motor vehicles within the meaning of the Road Traffic Act 1988) with or without a right of way on foot…
>
> *"footway"* means a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only…
>
> "maintenance" includes repair, and "maintain" and "maintainable" are to be construed accordingly;"

15. In *Southwark LBC v Transport for London* [2018] UKSC 63 [2020] AC 914 Lord Briggs stated as follows:

> "6. The word highway has no single meaning in the law but, in non-technical language, it is a way over which the public have rights of passage, whether on foot, on horseback or in (or on) vehicles."

16. Section 58 Highways Act 1980 states as follows:

> "**58.— Special defence in action against a highway authority for damages for non-repair of highway.**
>
> (1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) 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.
>
> (2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters:-
>
> (a) the character of the highway, and the traffic which was reasonably to be expected to use it;
>
> (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
>
> (c) the state of repair in which a reasonable person would have expected to find the highway;
>
> (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of

> the highway to which the action relates was likely to cause danger to users of the highway;
>
> (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed;
>
> but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions…"

Section 41

17. Section 41 creates a duty to put a highway 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: *Burnside v Emerson* [1968] 1 WLR 1490, 1496 – 7 per Diplock LJ.

18. The duty is reasonably to maintain and repair the highway so that it is free of danger to all users who use that highway in the way normally to be expected of them – taking account of the traffic reasonably to be expected on the particular highway. Motorists who thus use the highway are not to be expected to be model drivers. Drivers in general are liable to make mistakes, including some rated as negligent by the courts, without being merely for that reason stigmatised as unreasonable or abnormal drivers. In every case it is a question of fact and degree whether any particular state of disrepair entails danger to traffic being driven in the way normally expected on that highway: *Rider v Rider* [1973] 1 QB 505, 514F – G.

19. Section 41 creates an absolute duty to maintain the highway, which includes the work of repair and the taking of measures which will obviate the need to repair, to forestall the development of a defect in the road which will, if allowed to develop, require remedial action. The standard of maintenance is measured by considerations of safety. The obligation is to maintain the road so that it is safe for the passage of those entitled to use it: *Goodes v East Sussex County Council* [2000] 1 WLR 1356 per Lord Clyde at p1368H – 1369A.

20. The question was whether the particular spot in the pavement where the Claimant fell was dangerous, not whether the pavement as a whole was in a poor condition: *James v Preseli Pembrokeshire DC* [1993] PIQR P114.

21. The obligation of maintenance does not extend to prevent the formation of ice or remove the accumulation of snow on the road: *Goodes (supra)*. It will be noted that Section 41(1A) now creates an express statutory duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice.

22. The duty under s41 is a duty to repair and keep in repair, not a duty to take reasonable care to secure that the highway was not dangerous for traffic: *Goodes* at p1362; *Gorringe v Calderdale MBC* [2004] UKHL 15 [2004] 1 WLR 1057 at [68].

23. Section 41 does not extend to the provision of information by way of street furniture or painted signs: *Gorringe (supra)*.

24. Section 41 does not create liability for the layout of the highway. The "structure" of the road is to nothing more than the physical surface: *Thompson v Hampshire County Council* [2004] EWCA Civ 1016 [2005] LGR 467.

25. In *Mills v Barnsley MBC* [1992] PIQR P291 Steyn LJ stated as follows:

> "..[I]n drawing the inference of dangerousness in this case, the judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous. In my judgment the plaintiff's claim fails on this first point." (emphasis added)

26. Foreseeability of harm will not of itself entail the conclusion that the highway is unsafe; in one sense it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. It must be the sort of danger which an authority may reasonably be expected to guard against: *James v Preseli Pembrokeshire DC* [1993] PIQR P114, 119, approved in *Jones v Rhondda Cynon Taff CBC* [2008] EWCA 1497 [2009] RTR 13.

27. In deciding whether there is in truth a danger, the court is entitled to take into account the reasonable expectations of the public as to the standard of maintenance of the highway surface: *Griffiths v Gwynedd CC* [2015] EWCA Civ 1440 [2016] RTR 15 at [34].

28. It has been held at first instance that verges do not have to be suitable for all traffic to pass along. In an appeal by way of case stated from the Crown Court, it was held that section 41 did not require the widening of a single track unclassified rural road primarily for farm access used by cyclists, walkers, taxis and HGVs: *Kind v Newcastle* CC (31 July 2001, Scott Baker J). Although the highway included the whole of the width from the metalled part of the road to the verges, that does not mean the council had an obligation to level everything and make all part of it like a

motorway, flattening banks so that vehicles could pass over them. The question was whether the highway as a whole was reasonably passable for ordinary traffic. The mere presence of verges, because they form part of the highway, does not require the highway authority to extend the metalled carriageway over them.

29. Although road verges may constitute part of the highway, a different standard will normally apply to verges as opposed to the carriageway itself. In a case in which there was no footway adjoining the verge it was held that the purpose of verges is to support the carriageway, not to provide a safety buffer for overrunning vehicles: *King Lifting Ltd v Oxfordshire CC* [2016] EWHC 1767 (QB).

Section 58

30. The non-statutory Code of Practice is not a mandatory standard although it is evidence of good practice. Highway Authorities had to exercise their own judgment: *AC v TR* [2013] EWCA Civ 418 [2014] RTR 1.

31. If there is a failure to maintain, the highway authority is *prima facie* liable for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable: *Burnside (supra)*.

Negligence

32. The Highway Authority can be liable for damages in negligence if it commits a positive act of entrapment or ensnarement: *Thompson (supra)* at [29].

33. The Highway Authority will be liable in negligence where it has enticed the motorist to his fate by some positive act, or where the motorist has been trapped into danger: *Gorringe (supra)* at [102].

34. A person who does a positive act which affects the safety of the highway will generally owe a duty of care to road users and if there is a breach of that duty liability will follow: *Yetkin v Mahmood* [2010] EWCA Civ 776 [2011] QB 827, [25]. There was no legal requirement that such act had to amount to an enticement, or that the Claimant needed to show that he had been "trapped" into danger: [32].

The Issues

35. I have listened to everything that has been put forward on behalf of both parties, in writing and orally, and will set out the issues which I consider to be important. Simply because I do not mention it in this judgment does not mean I have not taken all of the evidence or submissions into account.

36. First, statute. There are three issues relevant to liability (see by analogy *AC v TR* [2013] EWCA Civ 418 [2014] RTR 1 at [8]):

    i) Was there a breach of s41, ie was the highway in a condition which exposed to danger those using it in the ordinary way?

    ii) Was the accident caused by that breach?

iii) Had the Highway Authority made out the statutory defence under s58, ie of taking all reasonable care?

37. Second, common law.

i) Can misfeasance or an omission by the Defendant give rise to a common law duty of care.

ii) Did the Defendant engage in any positive act or any omission which gave rise to a common law duty of care?

iii) If so, what was the scope of that duty of care?

iv) Was the Defendant in breach of any common law duty of care?

v) Did any breach by the Defendant of a common law duty of care cause the Claimant's accident?

38. Third, Contributory Negligence. If there is a liability, did the Claimant's negligence contribute to the accident and if so, what is the appropriate apportionment.

39. I will address each issue in turn. Before that, I will discuss the evidence, and then address an issue which affects both causes of action.

The Factual Evidence

40. The Claimant, Mr. Demetrios Karpasitis, gave oral evidence as to the circumstances of the accident. He had cycled most of his life and on 22 April 2020 left the house in the late afternoon and set off on his mountain bike in a southerly direction, turning left at the end of the street and continued on a path which was shared between cyclists and pedestrians alongside the A406 North Circular Road in an easterly direction. He then turned left and connected with a cycle path alongside of the A10 Great Cambridge Road in a northbound direction, crossing junctions on foot where necessary, then along the underpass below the Waltham Cross Interchange (where the M25 crosses the A10), then on to the underpass at the B198 (Winston Churchill Way). He went on to pass Theobalds Lane and under the Paul Cully Bridge, on to College Road, before turning back around Anchor Close.

41. He rang his wife to let her know that he was on his way home and retraced his route. When he had completed approximately three quarters of the distance between the junction of the A10 with the B198 (College Road) and Theobalds Lane, he came across a jogger also going southbound who was wearing headphones. The path would more than double in width after the Paul Cully Bridge but Mr. Karpasitis decided to overtake the jogger. After passing a traffic sign held up by two poles he steered onto the right hand grass verge which bordered the southbound A10 and tried to overtake.

42. Unfortunately, Mr. Karpasitis' front wheel hit a hole in the verge and he went straight over the handlebars. He knew immediately that he had injured himself. His face was bleeding, and his neck was causing him significant pain. The jogger came to assist him, as did a woman driving on the A10, Georgia Jessopp. The ambulance took Mr. Karpasitis to North Middlesex Hospital, where a fracture of the second cervical vertebra (C2) was diagnosed. He was then transferred to the regional major trauma

centre, The Royal London Hospital, where on 28 April he underwent a posterior stabilisation of C2/3/4. He was discharged on 30 April, but he has not felt able to go back to his previous job as a social worker, and the prognosis is currently unclear.

43. Mr. Karpasitis struck me as a sincere witness who was trying to do his best to recall material facts.

44. I next heard from the Claimant's father, Mr. Soderis Karpasitis, who had gone to examine the accident site with his son on 6 May 2020 and again on 13 June 2020. On both occasions he took photographs and a video. On 6 May 2020 he described the hole as being "very wide and deep", with the grass quite overgrown. He took a walk along the verge and noticed around 10 holes of varying depth. On 13 June 2020 he found the verge and hole to have been covered in topsoil and the foliage had been trimmed. The edge of the verge where it met the pavement had been squared off.

45. Mr. Soderis Karpasitis also struck me as a genuine witness.

46. Mr. David Crook gave evidence next. He knew Mr. Soderis Karpasitis through an amateur radio society, and on 3 May 2022 came across him with his son on the path parallel to the A10, near the accident location. They told him what had happened. He gave evidence that the path was very well known to him, having lived nearby since 1977, and having cycled down the path 3 – 4 times per week for 40 years as part of his regular exercise route. He had always assumed that the path was a cycleway, and stated that the path was frequently used by cyclists. In my view Mr. Crook was doing his best to give accurate evidence.

47. Georgia Jessopp then gave evidence. She had been driving southbound on the A10 between 6.30pm and 7pm on 22 April 2020. She noticed a man lying down on the grassy verge to the left of the carriageway, with another man providing assistance to him, so she pulled over. She walked up to Mr. Karpasitis and could see that his helmet had split in half but remained on his head. He had a deep cut on his forehead.

48. She immediately noticed what she described as a "very large" hole on the grass verge, a few metres past a road sign. The hole was, according to her, "very deep", and she said that "if I were to stand in it, it would be up to my knees". She could not be precise but she estimated the width of the hole as "at least a few feet wide". She commented that the grass surrounding the hole was quite overgrown, and despite being so large, the hole itself was quite inconspicuous. She stated that "[y]ou certainly would not be able to see this from the path or even when immediately in front of it on the grassy verge". Ms. Jessopp performed an initial first aid check on Mr. Karpasitis, having received first aid training, and reassured him until the ambulance arrived. She had not spoken with Mr. Karpasitis since the date of the accident.

49. I have no reason to doubt Ms. Jessopp's evidence. Its significance is that it is the best evidence of the size of the hole on the date of the accident.

50. Mr. Chris Martin is employed by Ringway Infrastructure Service Limited ("Ringway") as the contract manager for grass-cutting services. Since 2012 the Defendant has contracted with Ringway to carry out its responsibilities for highway maintenance. Ringway are responsible not only for maintaining the fabric of the

highway but also for grass-cutting of the areas that are either part of the public highway or are adjacent to it.

51. Mr. Martin gave evidence that records showed that the grass was cut in the area where the accident occurred on 6 and 7 April 2020. The specific work location is known as "A10 turn for Marina Gardens", and it was cut on 7 April 2020. The work was done by six grass cutting operatives, using variously a tractor with side arm, a ride-on mower, and a strimmer. Although there is no written procedure instructing operatives what to do if they discovered a dangerous issue such as a hole, Mr. Martin stated that they are all aware that they needed to report it to him. In the event, none of the operatives reported the presence of a hole at the accident location. If a hazard had been reported, he would escalate it to a Category 1 defect call out.

52. If any of the operatives had seen a hole of the type shown in the Claimant's photograph (which would have been more readily visible once the grass had been cut) at the very least he would expect them to place a cone in that location. Since it would require traffic management (at £1,200 a day) to allow for safe access to the hole, he would have expected the hole to have been filled in on the same day. Mr. Martin considered that had the hole been present at the time the grass was being cut, he would have expected one of the wheels of the ride-on mower to go into the hole.

53. My assessment of Mr. Martin is that he sought to tell the truth. I do not consider that his view that the defect was not a dangerous or class 1 defect under the DMA undermined his credibility, as suggested by the Claimant, for it was a reasonable view. I also consider that it was not implausible to speculate that a utility company may have filled in the hole.

54. Chris Allen-Smith is employed by the Defendant as Group Manager, Eastern Hertfordshire, Head of Profession, Asset Management and Maintenance, Highways Operations and Strategy. He was part of the Asset Management Board working group which helped implement the National Well-Managed Highways Infrastructure Code of Practice in 2016, which local highway authorities were encouraged to adopt in 2018. Mr. Allen-Smith confirmed that the Defendant had adopted this Code of Practice at the date of the last walked inspection of the accident location on 13 February 2020. He stated that the Defendant's Defect Management Approach ("DMA") forms part of the contract with Ringway. The DMA takes the hierarchy of carriageways and footways/cycleways is derived from the Defendant's existing practice, and it is consistent with the latest version of the Code.

55. There are five bands in the Defendant's footway/cycleway hierarchy:

    i) Primary Walking Routes: very busy areas of towns and cities with high public space and streetscene contribution.

    ii) Secondary Walking Routes: medium usage routes through local areas feeding into primary routes, local shopping centres etc.

    iii) Link Footways: linking local access footways through urban areas and busy rural footways.

iv) Local Access Footways: footways associated with low usage, short estate roads to the main routes and cul-de-sacs.

v) Minor Footways: little-used rural footways serving very limited numbers of properties.

56. Mr. Allen-Smith stated that the route in question is assigned to no. 4 Local Access Footway, having (very) low pedestrian volume, but it is proximate to a school and adjacent to a busy dual carriageway, hence it falls within "low pedestrian traffic – urban".

57. The DMA provides for six-monthly inspection of the footway for low traffic – urban footways. Mr. Allen-Smith states that that interval also applies to the adjacent grass verge. The carriageway, being a "primary" carriageway, is to be inspected at monthly intervals. Cycleways remote from the carriageways are to be inspected at three month intervals. Mr. Allen-Smith produced in evidence a survey conducted on 24 November 2021 between 7am and 7pm which indicated that 19 pedestrians and 18 cyclists used the footway.

58. After visiting the site Mr. Allen-Smith maintains that the footpath adjacent to the accident location was intended for pedestrian use and not for cyclists. He conceded in oral evidence that the path was known to be used by cyclists.

59. The DMA distinguishes between Emergency, Category 1, and Category 2 defects. Emergency and Category 1 defects are dealt with under the timescales in the DMA. Unlike the other categories Ringway manages the Category budget and decides whether and when the identified defect is fixed under the "Assess and Decide Strategy", which takes into account the nature of the defect, the hierarchy or road, whether it is high or low risk route, and whether there were other Category 2 defects nearby justifying repair. As verges are specifically referred to in the DMA, Mr. Allen-Smith states that holes on grass verges are a potential issue that he would expect Ringway inspectors to identify and deal with.

60. I considered that Mr. Allen-Smith sought to tell the truth. I do not accept that, in expressing confidence in Mr. Cooke's judgment and yet omitting to state in his statement that he differed from him in his view of what category of defect existed under the DMA was evasive or untruthful. I also do not accept that he was inappropriately argumentative. He maintained the view that Mr. Cooke would have flagged the defect as a Category 2 medium which would have been misleading had he known what Mr. Cooke's statement said, but that was not demonstrated to the court at that point. When Mr. Cooke's statement was disclosed Mr. Allen-Smith was entitled to continue to argue that the DMA did not permit verge defects to fall within Category 1. That is a respectable argument which is maintained by the Defendant.

61. James Vine, Contract Manager at Ringway, gave evidence that Ringway follows and implements the Defendant's policy which requires inspectors to examine verges in addition to footways and carriageways. He also confirmed that there were no records that Ringways carried out any works to the grass verge during the 12 month pre- and post-accident period. My assessment is that he was a credible witness. His clarification of his statement that the search for documents concerning works was not restricted to works that might have created a hole in the verge was helpful rather than

suspicious, and his theorising that a utility company may have filled the hole was legitimate, if a little speculative. His adherence to the view that Mr. Cooke would be expected to assess the defect as a Category 2 medium defect follows the Defendant's general line, but in the absence of proof that he had seen Mr. Cooke's statement stating he would have assessed it as a Category 1 defect I do not think this counts against his credibility.

62. Grant Kemp, who was a grass-cutting operative at the time of the accident, was usually the operative using the strimmer, and says that he would certainly would have strimmed around the signpost. If he had seen a hole next to the post, he would either have put a sign round it, or placed a cone to let his colleagues know, and he would also have told Chris Martin, the Contracts Manager. He also said that he did not see any such hole at the time and opined that it would have been very difficult to miss if it had been there at the time. I had no reason to disbelieve Mr. Kemp's evidence.

63. Robin Noades is a local network technician who was asked to visit the accident site after Mr. Karpasitis had notified the Defendant of his accident. He did so on 25 June 2020 but was unable to locate the hole. He also confirmed that Ringway have no records of being instructed by the Defendant to fill in any hole at the relevant location. He was also entitled to have a view on the nature of the footway despite not having investigated the signs south of Paul Cully Bridge, although it was a less informed view than some others.

64. Mr. Noades sought to tell the truth. I do not consider that his omission of Section A of the Claim Form from his witness statement harmed his credibility. Nor was he evasive in not proffering a view on who had filled the whole, for it was outside his knowledge. He was entitled to speculate that a utility company may have done the work.

65. Jeff Cooke, a highways inspector for Ringway, signed a statement on 10 June 2022, having retired from Ringway in June 2021. However, he declined to attend court, apparently on the basis that he was retired, and the Defendant filed a Civil Evidence Act Notice seeking to rely on his evidence as hearsay evidence. The Defendant did not seek to compel him to attend, and indeed at trial sought to disclaim reliance on his evidence. His statement was only admitted because the Claimant chose to put his evidence in as hearsay evidence under CPR 32.5(5).

66. It was Mr. Cooke who performed the last inspection prior to the accident, on 13 February 2020. He described his usual method of inspection, which involved parking his car at a particular location and walking the route with a hand-held tablet to record any defects. He was aware that his inspection duties required him to look for defects in the fabric of the footpath together with defects or holes on the grass verge itself, for the DMA includes a section on verges.

67. His contemporaneous note dated 13 February 2020 at 10:16:11 states relevantly as follows:

> "Location: Low (Rural) Priority Footway

> Description: Failed wearing uneven footway, raised foot areas, uneven frames, side out needed and damages uneven kerbs Also verge damage
>
> Work Location: Various points along section
>
> Defect Type: FSU6 Rough/uneven/crackd fwy-2M
>
> Priority: CAT2 Medium"

68. Mr. Cooke was a highly experienced highways inspector, having worked in that role for 19 years by that time. He said that if there had been a hole of any description present on the grass verge in the accident location during his last walked inspection on 13 February 2020, he would have recorded it on his handheld tablet. He anticipated that the defect, had it been present, would have been visible as the grass would not have grown a great deal over the winter period. Based on the Claimant's photograph, he opined that he would not have missed or overlooked such an "obvious" and "glaring" defect.

69. If he had seen a hole in the grass verge at that location, he would have arranged for a metal footway plate to be placed over the hole, to make the area safe. He would then have reported it to the Ringway local network technician. Although he would not have expected any pedestrians (and certainly not cyclists) to be on the grass verge, he was concerned about the possibility of a vehicle parking on the verge, for the hole was big enough to swallow up a tyre (although there was insufficient room to park a vehicle on the verge so close to the signpost, and he could not recall ever seeing vehicles parked on the verge during his inspections). He would therefore have recorded "Category 1, 24- hour – sunken grass verge please make safe with appropriate footplate". If the hole had been at a location with heavy footfall, he would have requested a 2 hour repair, and also called the depot to send someone out to complete the repair as soon as possible.

70. Mr. Cooke stated that once the inspector has made a record of a defect, that is uploaded to Ringway's system and a repair order is assessed and ordered.

71. I took account of Mr. Cooke's statement, and gave various parts of it differing weight, as will be apparent from my conclusions. I reject the suggestion from the Claimant that the location/timing data concerning the car indicates that Mr. Cooke did not carry out the inspection at all. The Defendant states that the said data is not accepted as accurate, and there is no evidence as to their accuracy. I find the extracts submitted by the Claimant from the US government website and from Google Maps concerning accuracy of Google Maps cannot fill that gap, not having been introduced and analysed by a suitable expert. I accept that the location/timing data cannot be relied on as accurate, and I therefore place minimal weight on location/timing evidence. It would be very surprising if Mr. Cooke had seen fit to be deceptive in such an important way, and there would need to be cogent evidence to prove it, which is lacking. Further, the contemporaneous record made by Mr. Cooke indicates that an inspection was carried out, and that no defect of the nature encountered on 22 April 2020 was found. The fact that the record was identical to that made on the previous

inspection cannot found an inference that there was no inspection: it could just be that no repairs can be carried out since the last inspection.

72. However Mr. Cooke did give an unconvincing reason as to why he was not minded to give oral evidence: that he was retired. That was the case when he signed his statement. Accordingly I place less weight on his statement than I might have done if he had given oral evidence in a persuasive way, although I do not infer that his evidence that he carried out an inspection of the relevant grass verge on 13 February 2020 was therefore untrue, for that would be inferring too much: there are various potential reasons why Mr. Cooke may not have wished to give evidence other than that. The fact that he has been praised for his evidence in another case is not relevant to my assessment of the cogency of his evidence in this case.

73. Even without Mr. Cooke's witness statement, there is the contemporaneous evidence of his inspection, which found no defect in the grass verge similar to that encountered by the Claimant on 22 April 2020.

74. Kyle Darcy was an experienced grass-cutting operative who was authorised to use ride-on lawnmowers and would have done so at the location of the accident in April 2020. He stated that he was confident that he would have got close to the signpost, and if a hole of the type shown in the Claimant's photograph had been present on 6 or 7 April 2020, the wheels of the mower would have gone into it. He stated that he could not have realistically missed it.

75. If he had seen a hole of that size and description, he would have coned it off, using cones from the nearby lane closure trucks. Mr. Darcy struggled to think that he would have missed a hole of that size, for he would have had no difficulty in getting the ride-on mower very close to the signpost. The usual sequence was for the mower to go in first, then the strimmer, then the blower. If he saw any type of defect, he would immediately tell his supervisor, who would ask the grass-cutting operative to cone the hole off, and it would then be reported on an emergency callout and repaired. I had no reason to disbelieve Mr. Darcy.

76. Tony Harris was another grass-cutting operative whose statement was admitted by a Civil Evidence Act Notice, on account of his ill-health. He did not see any hole on the grass verge when working at the location in April 2020. I accept that.

The Expert Evidence

77. Mr. Paul Ketteridge is a Highways Engineer who was called on behalf of the Claimant. He is a Chartered Engineer and is a Member of the Chartered Institution of Highways & Transportation. He has experience in the design and supervision of the construction of highway and drainage schemes and has advised local authorities on the planning and development of cycleway systems. He has not had any direct maintenance experience since 1992.

78. He said as follows in his report and in his answers to questions put by the Defendant and in two Joint Statements with the Defendant's Highways expert:

    i) The Claimant must have made a sharp right hand turn, but there was nothing dangerous about this.

ii) The height difference between the footway and verge was only 2.5cm, which is not hazardous for a mountain bike.

iii) The Defendant's policy required biannual walked inspections of the footway and verge, and it was programmed to take place in February and August.

iv) It is very unlikely that a hole of this size could have developed over a period of a few weeks. The defect in the grass verge had been present for some time and was there at the time of the last inspection.

v) If the grass verge had been inspected along with inspection of the path then the hole in the verge would almost certainly have been seen by an Inspector. The fact that the hole was not observed begs the question of staff competency in carrying out the inspection.

vi) From the length of grass at the time of the accident, the quality of the cut prior to that date is questionable. The Claimant's father's video taken on 6 May 2020 shows long grass disguising and hiding the hole in the grass verge. His inspection on 19 May 2020 gave him the impression that the grass had not been cut that year.

vii) A side arm would ride across the hole and not recognise it. A ride on mower, if driven in a straight line over the hole, would probably ride over it, although if it changed direction it may find the hole. A strimmer may certainly find the hole.

viii) Dangerousness: it is clear that the area where the Claimant fell was defective. Irrespective of the undulations of the grass verge between the carriageway and the path, one would not anticipate, in an irregular surface, a hole of over half a metre in depth. Any such hole would be a danger to a pedestrian crossing the verge or moving onto that verge. In this case the Claimant was a cyclist, making the defect more aggressive.

ix) The hole was properly classified as a Category 1 defect within the DMA and it needed to be marked with a traffic cone within 24 hours and ideally a metal plate placed over the hole within 24 – 48 hours, prior to arrangements being made to fill and compact the hole.

x) The path, although 1.2 metres wide (or 1m due to grass growth) rather than the minimum for shared use paths of 2.5 – 3m, was in fact used by cyclists (being listed by Strava) and pedestrians, and there was no sign denoting the end of shared use. One must presume it is a shared path.

xi) It is evident that the Defendant attempted to rectify the defect with topsoil but with minimal success, as it was still present on 6 October 2020.

xii) The Defendant's site investigation on 14 June 2022 on initial excavation revealed loose spoil, then some evidence of tree roots, which indicated that might have been a tree to the south of the Advance Direction Sign, although not directly where the hole was located, and that it had been removed. Further excavation found evidence of old vegetation, including a bowl of dead grass,

together with a small piece of polystyrene. There was also a tunnelled hole present at the side of the excavation. This indicated that rodent activity had taken place.

xiii) Whilst he is no expert on rodents, some research had indicated that a living or nesting area is made out of readily available material such as soft debris like grass, leaves, insulation. As the material found was buried beneath the soil, he considers that the nest was created within the existing hole and was present at the time of the accident. The hole was not created by the rodent; the rodent made use of the existing hole.

79. I found Mr. Ketteridge to be a generally credible witness, who gave reasoned answers to the best of his ability. I disagree with the Defendant's submission that Mr. Ketteridge lacks the necessary expertise and knowledge to offer admissible expert evidence on the practice of a highway authority, or that he answered questions in a partial manner: at no point were his answers unreasonable or giving rise to a suspicion of bias.

80. However Mr. Ketteridge did not have recent direct experience in highway maintenance, his last such experience being in 1992, nor did he claim to have particular expertise in the formation of holes in grass verges by rodents, and had to do what he described as "basic research" to reach a view, implying that he did not have even basic knowledge on the topic. He expressly states that a report from another expert may be valuable, indicating his lack of confidence in his conclusions. In his report he states that:

> "**While I am no expert on rodents** some **basic research** has indic[a]ted a living or nesting area is made out of soft debris such as grass, leaves, insulation or other material that is readily available. As the material found was buried under the soil, I am of the view that the 'nest' was created within the existing pot hole and was present at the time of the Claimant's accident. The pot hole was not created by the rodent, the rodent made use of the existing pot hole. **On this point a further opinion may be valuable from a different expert**." (emphasis added) (Report para 88)

81. Orally Mr. Ketteridge said first "I don't know anything about rodents…" and later candidly admitted "I am not – as I said at the outset – an expert on rodents… Yes, I don't maintain to be an expert on rodents at all". However, he somehow felt able to reject the theory that the hole had been caused by rodents in the short term despite having no expertise to comment on it, and instead adhered to the alternative theory that the hole was caused by something other than rodents and over a longer period of time.

82. Further, there were certain rules and guidance which were plainly relevant to the questions asked of him, such as (in relation to dangerousness) the national guidance "Well-Managed Highways Infrastructure: A Code of Practice" and (in relation to the negligence claim) the Highway Code, yet he did not make reference to these points in his report, and indeed was not as familiar with them in oral evidence as I would have expected. Nor did Mr. Kettridge grapple with the important influence of the location

of the defect on the assessment of dangerousness, contained in the case law, the national Code of Practice, and the DMA.

83. Mr. Michael Hopwood is the Defendant's Highway Engineer. He is a Civil Engineer, and a Fellow of the Institute of Highway Engineers, and a Member of the Chartered Institute of Highways & Transportation. He stated as follows in his report and in two Joint Statements with the Claimant's Highways expert:

i) The closeness of the sign to the hole and the position of the hole relative to the footway suggest that Mr. Karpasitis must have made quite a sharp right turn and overcome a relatively high and steep difference in level, if he did not cycle between the two posts (as he claims).

ii) There was quite a considerable height difference between the footway and the verge – around 300mm.

iii) The photographs on 19 May 2020 show a sizeable hole/depression. The 6 May 2020 photographs perhaps do not show a sizeable hole/depression, although they do show something.

iv) The likely cause of the hole, arising out of the investigation of 14 June 2022, was established and agreed on site to be caused by burrowing animals and/or the rotting underground remains of a tree stump.

v) Most or all UK highway authorities keep digitised records of roads, footways, cycleways and public rights of way. Images extracted from the Defendant's "internal webmap" system confirm that that the path at the accident location is recorded as a footway (although it fails to show the 2010 change to the footway south of the Paul Cully Bridge making it a shared pedestrian/cyclist facility).

vi) It is not clear who filled in the hole between 19 May 2020 and 13 June 2020. Neither Ringway nor the Defendant has any records of any work having been undertaken. A plausible explanation might be fly tipping of soil by a heavy lorry.

vii) On inspection there was nothing to suggest that the footway was anything other than a pedestrian footway, being narrow and uneven. Travelling northbound, the path narrowed considerably (relevant design standards requiring 2.5-3m width for shared paths, the path narrowing to 1.2m) and its condition changed from being level to becoming slightly undulating, due to tree roots.

viii) There was no signage or markings intended for cyclists going northbound. "No cycling" prohibitive signs are generally only used on footways where a particular and repetitive risk has been identified or the outcome of a collision could be severe, such as on footbridges. With the footway in question subject to such minimal usage, he would not expect prohibitive signs to have been used.

ix) When travelling southbound, there was nothing that could have misled cyclists into considering that the section of footway in question was a shared facility.

x) Despite the legalities of the situation, it is a matter of common experience that cyclists use footways. This is nothing more than a typical situation whereby some cyclists have chosen to use a footway.

xi) Whilst it was clear that the shared facility had ended when going north from the Paul Cully Bridge, more could have been done to make it abundantly obvious, with the addition of markings and/or signage.

xii) Aerial photography in 2000 demonstrates a tree in about the same location as the hole and the traffic sign was not present. Later aerial photography shows that the tree was felled in about 2005 and the traffic sign was installed. Google Street View shows that the stump was removed between 2009 and 2012.

xiii) The analysis of pedestrians and cyclists performed on 24 November 2021, which yielded an average of around 3 users per hour, suggests extremely low usage. There were about the same number of pedestrians as cyclists.

xiv) There is no suggestion or evidence that usage by cyclists was an issue known to the Defendant prior to the accident in question, although there is witness evidence that the footway had been used by cyclists for many years.

xv) For a defect to be dangerous, there has to be a real and identifiable risk of users encountering it.

xvi) The defect photographed on 19 May 2020 was not dangerous, but was a Category 2 rut (ie not immediately dangerous, as with Category 1 defects, but which might become dangerous) to be added to a future programme of work, because:

a) It was entirely reasonable not to expect footway users to be on the grass verge immediately adjacent to a busy high-speed road.

b) The footway was subject to such minimal use that cyclists using it were unlikely to encounter anyone else.

c) The width of 1.2 metres permitted careful cyclists and pedestrians to squeeze past each other without using the verge.

d) The verge was considerably higher than the footway and acted as a natural boundary, such that cyclists would not be expected to mount the verge to pass someone.

e) With the large sign and two posts very close, he would not expect anyone inspecting the footway and verge to have considered that cyclists would mount the verge to pass someone at that particular location.

xvii) Within the DMA it would correctly be identified as a rut greater than 100mm, and therefore “high” rather than “low” risk. All verge defects are categorised

as either Category 2(M) or 2(L). Category 1 defects are those considered to be immediately dangerous and need to be repaired soon. Category 2 defects are those not considered to be immediately dangerous, but which might develop further and become dangerous, or which might benefit from being addressed in the long term to prevent future deterioration. They are typically added to a programme of work to be attended to at a later date, perhaps even months in the future.

xviii) If the hole was of a comparable size to that seen on 19 May 2020, it should have been categorised as Category 2(H) at the highest.

xix) The defect required consideration for rectification under the "Assess & Decide Strategy", programmed for attention as and when local resources allow or other work is being undertaken in the area. There was no immediate urgency to the matter, for it was only potentially hazardous in the event of someone venturing onto the verge, and he would not expect users of the little-used footway to go onto the grass verge adjacent to a large sign and a busy high speed road.

xx) His experience was that defects in grass verges were generally not considered by UK highway authorities to be Category 1 dangerous defects, because the verge is rarely intended to be used to travel along. In locations where there is no adjacent footway, verge defects may be dangerous if there is good reason to believe that the verge is ordinarily being travelled along, eg where it is used by horse riders or there is a nearby public right of way and walkers and/or horse riders are encouraged to use the verge to access that right of way.

xxi) The footway was correctly classified as a Hierarchy 4 "low pedestrian traffic-urban" footway under the Well-maintained Highways guidance (18 September 2013) or the Well-Managed Highways Infrastructure guidance (October 2018). Biannual walked footway inspections were in accordance with national recommendations and good practice.

xxii) In his experience it was not at all unusual for the adjacent verge not to be mentioned in records of either carriageway or footway inspections, even though the verge is inspected. It is something of a "given" that the verge will be inspected during the inspection of the footway, or, if there is no footway, during the inspection of the carriageway.

xxiii) If the alleged defect was present at the inspection on 13 February 2020 and in the same condition seen in the photographs take on 19 May 2020 he would have expected the inspector to have identified it as a defect. Mr. Cooke himself says he would not have missed or overlooked such an obvious and glaring defect.

xxiv) He recorded the joint excavation findings on 14 June 2022 as follows:

a) At a depth of about 300mm – 400mm a piece of rotting wood (possibly a remnant of a tree stump) was found.

b) At a depth of about 500mm – 600mm what seemed to probably be a rodents' nest was uncovered.

c) Up to a depth of about 600mm – 700mm, the soil was relatively loose.

d) Below that the material changed to a firm clay. Numerous circular holes were found in the clay, varying from about 30mm to 100mm in diameter. Both he and Mr. Ketteridge considered that the holes were animal burrows.

xxv) He considers it very likely that the hole/depression was not present on 13 February 2020, and developed shortly before the accident on 22 April 2020, for the following reasons:

a) Mr. Cooke was a very experienced safety inspector, and he would have had a clear and unobstructed view of the verge. The grass on the verge would be likely not to have been particularly long as it would have been very early in the growing season, and he would have been no more than 1.5m from the hole (assuming he walked in the middle of the footway). There was no reason why Mr. Cooke would have missed such a relatively large hole in the verge.

b) The grass verge was cut on 6 and 7 April 2020 and none of the grass cutting operatives encountered it.

c) The cause of the hole has been established as being burrowing animals and/or an underground rotting tree stump.

d) Whichever cause it seems very likely that the ground underneath the verge could have simply collapsed very suddenly.

e) Alternatively the presence of animal burrows underground plus nesting material indicate that rodent activity caused a void into which the ground collapsed, rather than rodents using an existing hole to nest.

84. In oral evidence Mr. Hopwood conceded that a hole of the size seen by Mr. Ketteridge would pose a substantial risk to cyclists who may come off the path and to grass cutters going twice a year to cut the grass, and litter pickers.

85. Mr. Hopwood claimed to have a good understanding of drainage and soil mechanics, but he was less familiar with drainage and ground conditions, and he recommended a colleague who might be better suited to advising on such issues. A report was completed by his colleague which he had seen, but no permission to rely on further expert evidence was granted by the court.

86. I found Mr. Hopwood to be a generally credible witness. I do not accept the Claimant's characterisation of him as partial, and do not agree that any of his expert evidence reflected anything other than his genuine and legitimate view of the evidence.

87. His view that the filling of the hole was not done by Ringway was reasonable; that the hole might have been created acutely by burrowing animals was plausible, and his

doubts over the Defendant's cycling map were understandable, given that the map was inconsistent with the Defendant's designation of the footway. It was not especially helpful for him to quote from the record of the accident in the ambulance records, but it was permissible. His citations from the witness evidence reflected his views as to what was relevant. His views as to the designation of the footway were understandable. His resistance to accept the Defendant's map permitting cycling on the footway was comprehensible, given its inconsistency with the Defendant's designation of the footway.

88. Mr. Hopwood does have recent experience of highway maintenance, and he also cited and was familiar with the National Guidance, DMA, and Highway Code. He had some experience of the effect of rodents on ground conditions, commenting that it was basic civil engineering, in which he was qualified, but he did not claim particular expertise in that area. I found him more persuasive than Mr. Ketteridge, and on issues where they differed, I generally preferred the evidence of Mr. Hopwood.

89. Dr. Robert Davis is the Claimant's Cycling expert. He was a transport planner for 35 years, has a PhD in road safety, and has written a book on the subject. He wrote a report and answered questions in a Joint Statement with the Defendant's Cycling expert.

90. It is argued by the Defendant that cycling is not a matter which gives rise to a specialised body of knowledge, and expert evidence on it is inadmissible, since it does not satisfy that requirement in *Kennedy v Cordia (Services) Ltd* [2016] 1 WLR 597, [43] – [44]. I disagree. The contents of the report from the Claimant's Cycling expert persuades me otherwise; a number of the observations made constitute a specialised body of knowledge.

91. In his view Mr. Karpasitis was behaving as a proficient and law-abiding cyclist in not using the A10 carriageway; on cycling on what he had every reason to suppose was a shared use pedestrian and cycle path, there being no signs advising that the shared path had ended; and by overtaking the jogger in the manner he did.

92. The Defendant did not rely on the report it had filed from its Cycling expert, and did not call him.

Size of the hole on 22 April 2020, and on 13 February 2020

93. Two key questions are what size the hole was on the following dates:

    i) the index accident 22 April 2020, and

    ii) when it was last inspected, 13 February 2020.

94. Since no measurements were (understandably) taken on the day of the index accident, and it was not detected during the inspection on 13 February 2020, there is an issue as to how large the hole was on both dates, if indeed it was present at all.

95. The Claimant pleads that it was 0.8m x 0.7m in width, and 0.55m in depth on the date of the accident. He submits that the hole was not materially different in size to that found by his Highways expert Mr. Ketteridge on 19 May 2020.

96. The area was inspected by Mr. Jeff Cooke, an inspector with Ringway, on 16 August 2019 and 13 February 2020. On neither occasion was any hole in the verge in the vicinity of the sign noted. On 1 April 2020 there was a driven inspection of the carriageway. A still from the video indicates the area near the sign, but no hole in the verge is apparent. On 6 – 7 April 2020 the grass was cut by five men, three employed by Ringway and two by another company, using variously a tractor with side-arm, a ride-on mower, and a strimmer. None of them recorded that a hole was present.

97. Direct factual evidence of the size of the hole on 22 April 2020 was given by Ms. Jessopp, an independent witness who saw the hole on the day of the index accident from the footway and said that it was "very deep and I would say that if I were to stand in it, it would be up to my knees. I cannot be precise but I would say it was at least a few feet wide". She did not indicate how high her knees were from the ground, but she appeared to be of normal height for a woman, which approximates to around 45 or 50cm.

98. The Claimant's father, Mr. Karpasitis senior, said following a visit with the Claimant on 6 May 2020, "The pothole itself was very wide and deep". He took photographs and made a video recording. It is possible to see something in the photographs but it is not possible to clearly make out a substantial hole. However the video did show a substantial hole in the verge when the camera neared the hole. On 19 May 2020 Mr. John Ketteridge visited the site. He took photographs, which show a substantial hole, and measured the hole at being 0.8 x 0.7 x 0.55m.

99. On 13 June 2020 Mr. Karpasitis again visited the site with his father. However the hole had been filled in. The Defendant denies having filled it in; it is not clear from the evidence who did. The Defendant denies instructing that the hole be filled in, and has no record of ordering that the work be done.

100. On 25 June 2020 Robin Noades visited the site. He was unable to see the hole. On 6 October 2020 Mr. Ketteridge visited again and found the hole present, in a filled-in state, although he did not measure it. From the photographs he took it looks far smaller than it had appeared on 19 May 2020.

101. On 24 November 2021 Mr. Hopwood visited for the first time. He was unable to find the hole. On 29 March 2022 Mr. Allen-Smith, a senior manager for the Defendant, visited and viewed the hole. He measured it at 0.9m – 1m in diameter and 0.3m deep.

102. On 14 June 2022 there was a joint visit by both sides during which the hole was excavated and the contents examined. It is common ground that the hole was composed of decaying roots from a tree which had been removed, together with holes made by rodents and a rodents' nest. There is no suggestion that the hole resulted from inadequate drainage.

103. The Defendant points out that no measurement was made on the day of the index accident. It submitted that (1) it was for the Claimant to identify the dimensions of any alleged defect at the time of the accident, (2) there is no reliable evidence of the depth of the hole prior to 19 May 2020 (when Mr. Ketteridge visited), and (3) the dimensions of the hole changed over time, and (4) there is no reliable evidence of the depth of the hole and cannot prove that it was dangerous, either on the date of the index accident, or on the date of the inspection.

104. The Defendant's expert, Mr. Hopwood, considers that it is (very) likely that the hole developed just before the accident on 22 April 2020, from the collapse of earth as a result of rodents burrowing. There were many tunnels found in the excavated hole, and nesting materials, and the hole varied in size over time. Mr. Hopwood also considers it relevant that a very experienced highways inspector, Mr. Jeff Cooke, did not detect a hole on 13 February 2020, and the grass cutting operatives did not report any such hole on 6 – 7 April 2020, even after the grass had been cut.

105. The opinion of the Claimant's expert, Mr. Ketteridge, was that the substantial size of the hole meant that it had probably developed over a long period of time, and that it was probably there at the time of the index accident, and at the time of Mr. Cooke's inspection on 13 February 2020, and was of a similar size. The fact that the hole formed due to a combination of rotting tree roots and rodents creating holes does not change that.

106. The best evidence of the size of the hole on 22 April 2020 is the evidence of Georgian Jessopp, who came to help Mr. Karpasitis after the accident, and who gave persuasive and independent evidence of the size of the hole. She said that the hole was "very large" and "very deep", and she said that "if I were to stand in it, it would be up to my knees". She could not be precise but she estimated the width of the hole as "at least a few feet wide".

107. That description is not materially different from the size of the hole as measured on 22 April 2020 as on 19 May 2020, ie 0.8m x 0.7m x 0.55m. On the balance of probabilities I find that the hole was a similar size on 22 April 2020.

108. As to the size of the hole on 13 February 2020, I find that there was no significant hole in the grass verge on that date, for the following reasons.

    i) First, for reasons that I have stated already, where there is a conflict between them, I prefer the expert evidence of Mr. Hopwood to that of Mr. Ketteridge, although I note that neither expert claimed particular expertise in ground conditions and the formation of holes in grass verges. On this point Mr. Hopwood considered that it was very likely that the hole was created by the collapse into a void created by burrowing creatures between 13 February and 22 April.

    ii) Second, Mr. Ketteridge's sole reason for considering that the hole could not have developed in the time after the inspection on 13 February was its size. That is not a reason based on the potential mechanisms by which holes develop, but merely an assertion based on a measurement. Mr. Ketteridge provides no reason linked to the mechanisms by which holes form why relatively large holes in grass verges may not develop suddenly.

    iii) Third, the hole varied in size over short periods of time, having not been detected on 6 October 2020 but again being present on 30 October 2020. It was also present and measured at 0.9 – 1m in diameter and 0.3m deep on 29 March 2022. This variation is more consistent with the hypothesis that the hole could vary in size over short periods of time.

109. Given that a central question is whether Mr. Cooke missed a significant hole on 13 February 2020, it would not be logical to use as a reason why such a hole did not exist on that date the fact that Mr. Cooke would not have missed such a hole.

110. The grass cutting operatives did not find it, but their primary job was to cut the grass, not find holes in the verge, and not all of the means of cutting the grass would necessarily have detected the hole – the tractor with side arm, and the ride-on mower in particular. In determining what was present on 13 February I therefore place little weight on their failure to detect a hole.

Statutory Liability

Breach of s41

111. The first issue is the status of the footway/cycleway north of the Paul Cully bridge. I find that it has been formally designated by the Defendant as a footway, and that status has not been varied by the Defendant at any time. There is other evidence that it is a footway, in particular its narrow width (1.2m), its slightly undulating nature, and the lack of signposts and/or markings indicating that it is a shared cycleway and footway. The mere fact that cyclists in fact use it, and the lack of an "End of Route" marking or sign looking north after the Paul Cully bridge is insufficient to change its status.

Was the relevant part of the highway in a state of disrepair?

112. The question is whether the hole in the grass verge put the highway into a state of disrepair for the purposes of section 41 of the Highways Act 1980.

113. Whether a hole is dangerous is primarily a question for a highway inspector's judgment. They are assisted by the DMA, but it merely provides guidance, and does not release the highway inspector from his duty of making an individual assessment.

114. The DMA defines Category 1 defects as follows:

> "'Category 1 Defects' (2 hours, 24 hours, 5 working days & 20 working days) – are Defects that require prompt attention because they represent an immediate or imminent risk of one of the following:
>
> - injury to any party using or repairing the highway network…"
>
> 'Category 2 Defects' are all Defects that are not categorised as Category 1 Defects. Category 2 Defects will be sub-divided into:
>
> Category 2(H) – High Priority
>
> Category 2(M) – Medium Priority
>
> Category 2(L) – Low Priority"

115. There is a suggestion from the Defendant that Category 1 defects are dangerous and Category 2 defects are not. I do not accept that the question of dangerousness can be ascertained using this categorisation, for some Category 2 defects are in fact remedied, and must therefore be dangerous. If they were not dangerous, there would be no need to remedy them.

116. The question in law is not whether the Defendant has taken reasonable care to secure that the highway was not dangerous for traffic, but whether the duty to repair and keep in repair of the particular part of the highway under s41 has been satisfied. It requires consideration whether the Defendant has put the highway 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; whether it has maintained and repaired the highway so that it is free of danger to all users who us that highway in the way normally to be expected of them. Foreseeability of harm alone is insufficient to establish dangerousness; the danger created must be the sort of danger which an authority may reasonably be expected to guard against, which can include consideration of the reasonable expectations of the public as to the standard of maintenance of the highway surface. A different standard will normally apply to verges as opposed to the carriageway.

117. The Claimant argues that the defect was dangerous because it would be a danger to a pedestrian crossing the verge or moving onto that verge; and the danger to a cyclist was even greater.

118. The Defendant concedes that if the hole had existed in the carriageway or footway it would have constituted an actionable defect for the purposes of section 41; it argues that the situation is different here because it was in the verge.

119. The Defendant argues that the obligation under s41 only extends to those who are entitled to use the highway for passage and to maintain the highway to avoid danger to traffic being driven in the way normally expected on that highway. The Claimant, being a cyclist, should not even have been cycling on the footway, let alone on the grass verge adjacent to the footway.

120. It is a criminal offence under s72 Highways Act 1835 to "wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers", so an argument could be made that there was no s41 duty where a cyclist rides on a footway. The Defendant withdrew the argument that the statutory duty was not owed to those on the verge due to illegality but maintains a "non-normal user" argument in respect of the verge.

121. I find that riding on the grass verge is capable of constituting a normal use of the grass verge. Although not common, and not the primary purpose of the grass verge, it is foreseeable that pedestrians and cyclists may use grass verges for passage. Both Highway experts considered it uncontroversial that the highway authority was obliged to look for defects in verges, and repair them, according to their assessment of dangerousness. The Defendant's DMA refers to defects in the highway, which would not have been relevant had it been thought that verges were not suitable for pedestrians (or cyclists), or that they could never be dangerous.

122. The Defendant also argues that the minimal use of the footway coupled with the unreasonableness of using the verge to overtake a pedestrian means that even a large hole in the verge could not result in a dangerous defect, or at least one that required rapid repair. That is reflected in the fact that the only defects in the DMA which relate to verges, those identifying ruts, can only ever be Category 2 defects, and (it is said) therefore not dangerous.

123. I find that the defect in this grass verge case was dangerous and called for repair, albeit it was not urgent, for the following reasons:

    i) There is persuasive evidence that footways are often used by cyclists, and specific evidence that this occurred at this location. The Defendant accepts that cyclists used this footway, and Mr. Allen-Smith admitted that it knew as such. Had he not admitted this, I would have inferred that the Defendant must have known that cyclists used the footway.

    ii) It is clearly foreseeable that pedestrians and/or cyclists may choose to go onto the grass verge, even though the spot involves riding up a small bank of 300mm, and that the particular spot was proximate to a traffic sign.

    iii) The verge was by the side of a footway, not just on the side of a carriageway, and I find that there was a real risk that a pedestrian might step into the hole or a cyclist may cycle into it from the footway, notwithstanding its proximity to the road sign.

    iv) Both Mr. Cooke (the highway inspector) and Mr. Martin (contract manager for grass-cutting) were both clear that if there was a substantial hole present on 22 April 2020, it would be Category 1, and had to be repaired quickly.

    v) It is the kind of damage that members of the public would reasonably expect would be remedied, albeit that due to the infrequent likely usage, such repair would not necessarily have to be urgent.

124. The DMA does not appear to have a category which is directly relevant to the defect in this case, as both Highway experts agreed. In my view a rut exceeding 100mm is not sufficiently similar to the defect in this case to be of great use in assessing dangerousness.

125. I find that, on the specific facts of this case, that stepping onto or cycling onto the grass verge in this case is a normal user of the highway, and that the public have a reasonable expectation that substantial holes in such a verge would be repaired within a reasonable period of their discovery. Such substantial holes constitute the sort of danger which an authority may reasonably be expected to guard against. I do not accept that this finding would place an unrealistic or disproportionate burden on highway authorities' limited budgets.

126. In all the circumstances I conclude that the defect was dangerous as of 22 April 2020.

Causation

127. But for the breach of section 41, would the accident have occurred? And if there had been signposts requiring cyclists to dismount, would the Claimant have done so?

128. The question is whether, but for the defect in the highway, the accident would not have happened. It is clear that the defect in the highway caused the accident, by causing Mr. Karpasitis to fall from his bicycle.

129. As to the common law claim, if a "No cycling" sign had been erected just north of the Paul Cully bridge, I find that the Claimant would not have attempted to cycle on the footway north of the Paul Cully bridge, and the accident would not have occurred.

130. Accordingly, causation in respect of both the statutory and common law claims is made out.

Has the s58 defence been established?

131. The burden to establish the s58 defence lies squarely on the Defendant. Its general policy of biannual walked inspections of the footway and verge is accepted as being in accordance with national guidance and lawful. The question is whether the Defendant can prove that it carried those inspections out competently.

132. Section 58(1) mandates consideration of:

i) The character of the highway, and the traffic which was reasonably to be expected to use it. That part of the highway is a grass verge between an infrequently-used footway and a busy dual carriageway, and the verge could foreseeably have pedestrians and cyclists crossing it.

ii) The standard of maintenance appropriate for a highway of that character and used by such traffic. This particular grass verge had to be maintained, but not to a standard comparable to a footway or shared footway and cycle path. Walked inspections every six months were agreed as sufficient.

iii) The state of repair in which a reasonable person would have expected to find the highway. Reasonable people would not expect such grass verges to be maintained so as to be free of all but minor defects, but they would not expect large holes potentially obscured by grass with the potential to cause serious injury even to those proceeding at minimal velocities.

iv) Whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway. Given that the hole appeared shortly before the accident, the answer is in the negative.

v) Where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed. Again, given the appearance of the hole shortly before the accident, there was no time to erect warning notices.

It is also specified that for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions. On the evidence, both of these requirements are met.

133. It is clearly of assistance to the Defendant that it employed an experienced inspector, Mr. Jeff Cooke. Mr. Cooke says in his witness statement that he would have spotted a hole of that size had it been there. I have found that the hole was probably not present on 13 February 2020.

134. Mr. Cooke declined to attend court to give oral evidence, on the basis that he was now retired. This is an unsatisfactory reason, for Mr. Cooke had been retired on the date he signed his statement yet did not say at that time that he was unwilling to attend court. However, that would not be a good reason to ignore his witness evidence in its entirety, for there are a number of possible reasons why a person may not wish to give evidence in a trial, not all of which mean that his witness statement is inaccurate. On the other hand the weight to be properly placed on his witness statement must be reduced by his non-attendance.

135. Although he has been described in other proceedings as "a highly experienced, conscientious and well-trained Inspector [and] a reliable witness…" (*Nash v Hertfordshire County Council* [2020] EWHC 3247 (QB)), that is not directly relevant to my assessment of his performance in this case, which turns on the evidence before me.

136. Criticism was also made of Mr. Cooke by the Claimant on the basis that GPS recordings of his car on the day (contained in a disclosed document but not referred to in his witness statement) proved that he could not have performed the walking inspection. The Defendant's position is that the GPS evidence is not agreed to be accurate (as made clear in the Defendant's email disclosing it on 18 May 2022) nor is there any evidence of its accuracy or its proper interpretation. It would also constitute impermissible non-acceptance of part of a party's own witness evidence, contrary to the principles described in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 3529 at [170] – [173]. I accept the Defendant's submissions on the GPS evidence and I am unable to place any weight on that evidence. I therefore reject the contention that Mr. Cooke did not perform a walking assessment of the footway on 13 February 2020.

137. A significant point relied upon by the Claimant in seeking to impugn Mr. Cooke's inspection was the assertion that the hole was present and of a similar size to that encountered on 22 April 2020. I have held that the hole was probably not present on 13 February 2020, so that argument is not open to the Claimant.

138. Leaving aside Mr. Cooke's witness statement, there is contemporaneous documentary evidence that an inspection was performed on 13 February 2020, which did not detect a hole, although it noted other defects. That alone is persuasive evidence that an inspection was performed on 13 February 2020, and no hole was found.

139. There is no other reason to consider that Mr. Cooke's inspection on 13 February 2020 was anything other than competent. My assessment of the evidence in the round is therefore that the Defendant has satisfied the burden of proving the s58 defence. For that reason, the Defendant is not liable under s41 Highways Act 1980.

Common Law Claim

140. For liability in common law to arise, the Defendant must have committed a positive act which adversely affects the risk to users of the highway: *Thompson (supra)*; *Gorringe (supra)*; *Yetkin (supra); Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 [2018] AC 736. There is no authority suggesting that misfeasance or an omission by the Defendant gives rise to a common law duty of care.

141. It is right to record that the parties have agreed, through their Highway experts, the dimensions of the footway and the locations of relevant signs:

    i) The shared facility to the south and just to the north of the Paul Cully bridge is 2.5m wide.

    ii) To the south of the bridge there are shared use signs that accord with diagram 956 in Chapter 11 of the Traffic Signs Manual marking the route as a shared path.

    iii) The footway to the north of the bridge is 1.2m wide although only 1m of its width was available to pedestrians because it was overgrown.

    iv) There were no signs after the path narrowed to indicate that it was shared use. Dr Davis' evidence is that the next cycling sign was some 3 miles north of the accident site.

    v) There is no 'End' sign to the north of the Paul Cully bridge to mark the point at which, on D's case, the path narrows and changes from a shared facility to a footway.

142. Here the footway was converted into a shared use footway and cycle path south of the Paul Cully bridge, but north of the bridge it remained a footway. Observers could see that the width of the path narrowed significantly from 2.5m to 1.2m, and became slightly undulating due to tree roots. Further the signage was said to be confusing, in that there was a shared cycle path/footway sign south of the bridge, but there was no sign requiring cyclists to dismount north of the bridge. The Claimant says that could, and did, mislead cyclists into thinking that the shared use of the path continued. Further, against it being clearly not for cyclists, as many cyclists as pedestrians appeared to use the footway north of the bridge, although they have used the footway for many years, predating the change of use of the footway south of the bridge.

143. The Claimant's cycling expert considered that the signage going north from the Paul Cully Bridge should have been clearer, perhaps with an End of Cycle Route sign. In my judgment merely because signage could have been clearer does not indicate that it is negligent not to do so.

144. However the presumption in the Highway Code, which is relevant evidence, if not determinative, is that a footway is just that unless a marking or a sign expressly authorises cycling. Rule 13 of the Highway Code makes it clear that it is mandatory to sign routes if pedestrians are to share them with other road users. Therefore unless there is a sign permitting shared use, the footway remains for pedestrians only. There is no general positive duty to sign (whether by a marking or a sign) the end of a cycle route, for excessive signage is thought to clutter up routes: see the Department for Transport's Local Transport Note 02/08 paragraph 3.1.3. It is likely that for the termination of cycle lanes in general, the END or END OF ROUTE signs are rarely

required: paragraphs 3.4.2 – 3. In general, the CYCLISTS DISMOUNT sign should only be used in relatively rare situations where it would be unsafe or impracticable for a cyclist to continue riding: paragraph 3.6.2.

145. There is no evidence that the Defendant has committed any positive act. Omitting to erect a sign indicating that cycling is not permitted is an omission. If that is incorrect, the positive act of constructing a shared facility south of the Paul Cully bridge without erecting a sign prohibiting cycling north of the bridge was not negligent, for given that the general presumption is that paths cannot be used for cycling absent expression permission; that the use of end signs is discretionary and indeed used as an exception rather than the rule; that the change in width of the path, together with its undulations and the lack of shared use signs were sufficient to indicate to a reasonable cyclist that the path was no longer one which could be used for cycling. It is not similar to failing to put up a "No Entry" sign at one end of a one way street (per Lord Brown's example in *Gorringe*): there are presumptive rules about not cycling on footpaths absent express authorisation which cyclists are taken to know.

146. Nor can this case be considered to be comparable to *Yetkin* on the facts. In *Yetkin* the Defendant created the danger which caused the accident; whereas here the criticism is a failure to warn.

147. I accept the Defendant's submissions that the use of end signs is not mandatory, indeed it is discouraged in the guidance; nothing in the guidance requires an end sign at a point like this; the reduction in width of the path implies a change in character and of use; and the absence of signs indicating shared use north of the Paul Cully bridge implies that the path is not shared use. There is therefore no liability in negligence in this case.

Contributory Negligence

148. The Defendant alleges that the Claimant's actions in cycling on the verge and failing to avoid the hole were both blameworthy and causative. It submits that it should have been obvious that the footway was not suitable for cyclists, and that he turned onto the verge at a right angle and gave himself no time to consider or look for defects, travelling at 10mph into the defect, which was 0.7m from the edge of the footway. A prudent cyclist will ensure that he rides in such a way that he can see and react to the road ahead: *Thomas v Warwickshire CC* [2011] EWHC 722 (QB) at [90] – [92]. Further, there is no obligation to maintain a verge to a similar standard to a footway or shared cycle path and footway, so a cyclist could not expect to be able to proceed at comparable speeds on a verge.

149. I have already found that it was foreseeable that cyclists might try to cycle on the grass verge in this case, and I further hold that it might not be unreasonable to do so, and indeed it was reasonable to do so in this case.

150. I find that Mr. Karpasitis was travelling at 10mph when he turned off the footway to overtake the jogger and made a sharp right hand turn after the sign onto the grass verge.

151. However that does not mean that a cyclist can expect that a grass verge will be maintained so as to be free of undulations and bumps. In my judgment the speed of

10mph was excessive for the conditions, and the sharp right hand turn was a manoeuvre which Mr. Karpasitis should avoided because it made it difficult for him to see the route ahead. Given that he was entering a verge where it might be more difficult to see and avoid unevenness, he ought to have taken more care to give himself time to look out for defects and to be able to avoid them. This was a large hole and he did not see or avoid it. His actions were negligent and contributed to the accident.

152. There is greater causative potency in creating a danger as opposed to failing to avoid it when in motion. The Claimant had to react immediately to circumstances as he travelled along and his negligence was of the moment, whereas the Defendant had the resources and time to ensure that it complied with its statutory duty. Both parties' acts have causative potency with respect to the accident, but in my view the Defendant is more blameworthy than the Claimant for the accident.

153. The preponderance of responsibility should lie with the Defendant but the Claimant's contribution was more than marginal. In all the circumstances I consider that a reduction of damages of 33% would properly reflect the relative degrees of culpability and causative potency.

154. Accordingly I find that if Mr. Karpasitis had succeeded in his claim, he would have been liable for contributory negligence to the extent of 33%.

Conclusion

155. For the reasons I have given, I will order that there be judgment for the Defendant.