

Section 41 Highways Act 1980

Richard Collier & Christopher Pask

This webinar will begin soon

Section 41 Highways Act 1980

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.

.....

How the duty gives rise to liability

- Not a claim in common law
- Don't plead negligence unless applicable
e.g. creation of a danger by installing street furniture

BUT: this is a not a claim under section 41

- Must arise from the failure to maintain
- S41 does not cover the design of the road
- Be alive to this in pleadings

Has the Claimant proved “where and how” they fell?

- Preliminary factual hurdle before considering dangerousness= Claimant must prove the particular spot and how they sustained injury/damage
- *James v Preseli Pembrokeshire Council* PIQR 114 as per Lloyd Jones LJ
 - : cites with approval the following extract from *Whitworth v The Mayor, Alderman and Burgesses of The City of Manchester*, June 17, 1971, C.A. (unreported):
 - “What is quite clear is that when a plaintiff in a trip case claims that she fell by reason of the dangerous condition of the pavement, she must indicate where and how she fell and she must prove it; and it is then for the court to consider whether the place where she fell constituted a danger for which the local authority could properly be held liable.” (my emphasis)
- Claimant’s evidence must address this in sufficient detail

‘Danger’

- This is the test - has the failure to maintain resulted in the highway being in a dangerous state?
- Key decision= *Mills v Barnsley MBC* [1992] PIQR
- Other helpful decisions= *Galloway v Richmond Upon Thames LBC* (2003) unreported, *Cenet v Wirral MBC* [2008] EWHC 1407
- Key principles:
 - The mere existence of a defect doesn’t equate to danger
 - The claimant must show both that: 1) the defect posed a reasonably foreseeable risk of harm; and 2) a reasonable person would regard it as presenting a real source of danger (my emphasis)

‘Danger’ key principles....

- Should not be an unreasonable burden on highways 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. The liability is not to ensure a bowling green.
- Balance the private interests of the claimant against the public interest in the prudent management of limited resources.
- Court entitled to consider the number complaints, similar accidents, and whether this is the type of defect not unusually seen in the carriageway of the road.
- The fact of repair does not constitute evidence of danger.
- The burden is on the claimant to prove dangerousness.

Topics

- Further evidential pointers
- Scope of s.41 - specific claims
- S.41(A) duty & Causation
- Contributory negligence

Further Evidential Points

Basics:

Size of the defect itself

- *Walsh v The Council of the Borough of Kirklees* [2019] EWHC 492
- “*there is in my judgment simply not enough reliable evidence of the dimensions or conditions of the pothole for me to say it is more likely than not that it presented a real source of danger in the sense identified in Mills...*”
- Claim dismissed

- *Nash v Hertfordshire CC* [2020] EWHC 3247 (QB)
- Another example of C’s estimate of depth not being accepted

Further Evidential Points

Summary

- C bears the burden of establishing breach
- Includes identifying the specific defect (*James v Preseli*)
- Requires evidence to be provided as to the size, failing which, claim should be dismissed (*Walsh & Nash*)
 - Object or tape measure to allow finding re size
- Relevant to both sides - D may need to challenge C's measurements
- Inconsistencies
- Both *Walsh & Nash* are a reminder of the relevance of other aspects of the evidence when assessing danger:
 - Repair afterwards will not always be seen as evidence of a breach of duty (*Walsh [19]*)
 - Relevance of the intervention levels - (*Nash [13]*)

Scope of s.41 - Specific types of claims

Verges & Tree Roots

Duty is to maintain the 'highway'

- Verges are distinct - *King Lifting Ltd v Oxfordshire CC* [2016] EWHC 1767 (QB)
 - Soft verge caused a crane to topple off the side of carriageway.
 - Brought primarily under s.41
 - [67] Judge held that different standards will apply to the verge of a highway as opposed to the carriageway itself. Verge in question was held to be in proper condition for its purpose and no breach of s.41 was established.

- Sighted *Thompson v Hampshire CC* [2004] EWCA Civ 1016:
 - Reiterated that s.41 is not the appropriate basis for a claim arising out of an allegedly dangerous design or layout of a highway - concerned only with the duty to maintain the surface of the highway.

Scope of s.41 - Specific types of claims

Verges & Tree Roots

Duty is to maintain the 'highway'

- Tree roots - points to remember:
 - Q - do they pose a danger to the ordinary traffic of the highway?
 - Tree roots in pavements are very common part of life in the UK, it is reasonable to expect people to be aware of that and take more care.
 - Generally, visible and often there will be space to avoid them - more problematic when there is a narrow section of pavement.
 - Keep in mind that that court it is striking a balance between public and private interests - law should not impose an unreasonably high burden on HA in relation to minor defects which must be accepted as part of life in a less than perfect world (*Mills v Barnsley*).

Scope of s.41 - Specific types of claims

Drains

Duty to maintain not necessarily confined to the traffic surface - can include fabric of the highway

- *Burnside v Emerson* [1968] 1 W.L.R 1490:
 - “Repair and maintenance thus includes providing an adequate system of for the road and it was in this respect that the judge found ... that the HA had failed in their duty to maintain”.

- *Mott MacDonald v Department of Transport* [2006] EWCA Civ 1089
 - “An effective drainage system is an intrinsic part of the design of the modern road, and like any other part of the road it needs to be properly maintained. It is difficult to see why a statutory duty to maintain the road should exclude it”.

Scope of s.41 - Specific types of claims

Manhole covers

Can be problematic for HAs given the time consuming nature of checking individual covers

- *Atkins v LB of Ealing [2006] EWHC 2515:*
 - *Tipping manhole cover on a very busy shopping street*
 - *Balance of public and private interests came down against the HA when considering the risk of serious injury which could be caused by someone stepping on a tilting cover vs the burden on the defendant in terms of costs and the practicalities of inspecting individual covers.*
 - *Importantly - the case was mainly concerned with the defence under s.58 so can be argued that it is confined to its own facts.*

Scope of s.41 - Limits

Transient Material

Goodes v East Sussex CC [2000] 1 WLR 1356

- House of Lords held that the primary duty under s.41 did not extend to the removal of surface lying material, including snow and ice.

Response to that decision was s.41(1A)

- Snow and ice are now distinct from other transient material
- Similarly, surface water, to a certain extent

Scope of s.41 - Limits

Transient Material

Gravel

- *Valentine v Transport for London & Hounslow LBC* [2010] EWCA 1358
 - [13] Bound by *Goodes* to hold that the removal of surface lying material is not required by s.41.

Moss & other vegetation

- *Rollingson v Dudley MBC* [2015] EWHC 3330 (QB)
 - Initial success overturned on appeal
 - [24] *“Fourth, the question of whether or not a particular problem, defect, contaminant or accretion will render a road, pavement or pathway ‘out of repair’ such as to engage s.41 will depend upon the precise nature thereof but relevant considerations will include (a) whether it is permanent or transient, (b) whether it amounts to, or comprises, material disturbance or damage to the road, pavement or pathway or the surface thereof, and (c) whether it can be said to have become part of the fabric of the road, pavement or pathway”*

Scope of s.41 - Limits

Transient Material

Bonded to the surface

- *Thomas v Warwickshire CC [2011] EWHC 722 (QB)*
 - What makes up the fabric of the highway is key
 - Concrete spillage resulted in a lump of concrete 25mm high, 1 metre long and 10cm wide becoming bonded to the surface.
 - It would be permanent until such time as it was remedied by a work crew.
 - Within the s.41 duty and the defendant was held to be in breach of duty
 - The fact that it was an accidental spillage was irrelevant.

Ice and Snow - s.41(1A)

Duty is to ensure 'so far as reasonably practicable, that safe passage along a highway is not endangered by snow or ice'.

Smithson v North Yorkshire CC [2020] EWHC 2517 (HHJ Gosnell)

- C was passenger in a car driven by D1*
- Skidded on ice and hit a tree, leaving C seriously injured*
- D1 settled case and sought a contribution from D2, the highway authority responsible for maintaining the road*

Result: D2 were in breach, it had the burden of establishing that it had taken reasonably practicable steps to ensure safe passage and that causation was not a defence available to a HA which was found in breach on s.41(1A). Apportionment.

Ice and Snow - s.41(1A)

Two stage approach to the question of breach:

- 1) Had safe passage been endangered by snow or ice; and
- 2) Had D2 shown it had taken reasonably practicable steps to ensure safe passage

Worth remembering that the facts were relatively atypical. Five incidents of cars skidding on ice on the vicinity and several police requests to grit the road which were ignored are unlikely to be a commonly occurring scenario.

- Causation

- D2 argued that despite being in breach, the claim should fail on causation, primarily because even if it had responded to the requests to grit, it would have made no difference as the gritters would have been sent to a different location than the one where the accident occurred
- Judge rejected that, but also went further and concluded causation was not an argument available as a matter of law.

Ice and Snow - s.41(1A)

Causation

- By analogy with s.58 and in reliance on *Wilkinson v City of York Council* [2011] EWCA Civ 207 if D could not make out the defence it could also not argue that even if it had taken all reasonable care it may not have prevented the accident.
- Problematic:
 - Whatever the position under s.58, the duty of reasonable practicability in s.41(1A) is a separate and distinct one. In *West Sussex v Fuller* [2015] EWCA Civ 189, EL case, CoA has said that causation is still an argument open to defendants.
- Likely to require further judicial consideration, but would suggest it is going too far for the court to say that D cannot argue causation at all in a s.41(1A) case.

Contributory Negligence

In most s.41 cases it should be born in mind:

- In cases where the only basis for alleging it is that a person should have paid more attention to where they were walking, doesn't generally get defendants very far unless can be shown that defect must have been obvious.
- Can be helpful:
 - *Nash* - Dismissed in any event as C could not establish danger, but judge commented that the speed at which C was cycling was the main reason he had not been able to stop, rather than the presence of potholes.
 - *Smithson* - speed at which D1 was driving lead the court to apportion 1/3 of the blame to him.

Thank you for listening

Richard Collier

rcollier@1chancerylane.com

Christopher Pask

cpask@1chancerylane.com

Next Week

Sarah Prager &
Andrew Spencer

How to Handle Brexit:
What to do, and When to do it

10th December at 11am