



Neutral Citation Number: [2020] EWHC 3247 (QB)

Case No: QB-2019-000827

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30<sup>th</sup> November 2020

**Before:**

**HHJ LICKLEY QC SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

**DOMINIC NASH**

**Claimant**

**- and -**

**HERTFORDSHIRE COUNTY COUNCIL**

**Defendant**

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**Mr Daniel Tobin** (instructed by **MW Solicitors**) for the **Claimant**  
**Adam Weitzman QC** (instructed by **DWF Law**) for the **Defendant**

Hearing dates: 2<sup>nd</sup> – 6<sup>th</sup> November, 11<sup>th</sup> November, 12<sup>th</sup> November

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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30<sup>th</sup> November 2020 at 10am.

Approved Judgment**HHJ LICKLEY QC SITTING AS A JUDGE OF THE HIGH COURT:**

Note: I will be referring to page numbers on the paper copies of the trial documents supplied to me unless marked CF (computer file). The page numbers I have used throughout differ from the computer file page numbering for some reason.

Background and Issues

1. This is a claim for damages for personal injuries and loss suffered as a result of an accident that occurred on Sunday 13/3/16. At about 8.10am. The claimant, then aged 50 (d of b 9/5/65) suffered personal injury when he was riding his Condor road bike north along Mangrove Lane, Hertford Hertfordshire. As he rounded to his left a 90 degree bend bounded by hedges he collided with a Ford Transit van driven in the opposite direction by Onisim Gilca. There were three passengers in the van. No fault is suggested on the part of the driver of the van.
2. The claimant, in summary, contends that the collision was caused by the condition of the road surface. He says he did not hit or make contact with a pothole but had to take avoiding action and swerved to avoid potholes on the inside of the bend (to his left as he approached) thus forcing him into the path of the oncoming van. There is no dispute that the impact point was to the claimant's offside and beyond the centre of the road. The precise point is however not agreed by the expert witnesses. The claimant says the defendant Hertfordshire County Council (HCC) failed to ensure the highway was in a reasonable state of repair so that the potholes represented a real source of danger. The claimant contends that the accident was caused by their negligence and /or breach of statutory duty to maintain the highway pursuant to S.41 Highways Act 1980. He asserts as factual issues;
  - (i) At the time of the accident there were defects in the road surface that represented a danger to road users and in particular cyclists. As a consequence, there is a breach of the duty imposed by S.41.
  - (ii) Those defects were the cause of the accident.
  - (iii) The last inspection of Mangrove Lane carried out on the 20/8/15 was defective and not performed correctly. There were defects at the scene that should have been noted and recorded as category 2 defects and repaired.
  - (iv) The defendant's highways maintenance policies are deficient because category 2 defects are not considered and repaired appropriately and therefore the S. 58 Highways Act 1980 defence available to the defendant is not proved.
  - (v) In addition, he asserts that Mangrove Lane was incorrectly classified and due to the traffic use, location and nature of the road it should have been designated as a class 4a *Link Road* in accordance with the Code<sup>1</sup>. If so a quarterly inspection regime would have been adopted for Mangrove Lane and not

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<sup>1</sup> Well Maintained Highways – Code of practice for highways maintenance Management 2013. Table 1 Carriageway Hierarchy para 8.8.1.

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annually as had taken place. Thus, it is said defects in the carriageway would have been found and repaired before the accident. As a result, the statutory defence is not made out.

3. The defendant Highway Authority submits the sole cause of the accident was not the surface of the road but the riding of the bike by the claimant. They say he rode too fast and too wide around the corner. They say that is what he told PC Jacob on two occasions shortly after arriving at hospital. Despite being seriously injured he was lucid and gave a clear account of what happened. Unfortunately, the claimant's condition deteriorated after this time when he suffered a stroke. They say whatever defects were present, and they accept some were, they played no part in the accident. In addition, they say
  - (i) The potholes at the scene were not dangerous given their size and location accordingly there is no breach of S.41.
  - (ii) Even if there is a breach of S.41 the potholes were not the cause of the accident
  - (iii) Mangrove Lane was correctly designated as a 4a *rural access road* and that the annual inspection on the 20/8/15 was carried out correctly. They say the defects that were at the scene at the time of the accident had developed over the intervening seven month period from August 2015 to March 2016.
  - (iv) If they are wrong about (ii) above and there were potholes located on the nearside of the bend that may have been of such depth that they were in a state of actionable disrepair and therefore dangerous the defendant had taken such care in all the circumstances as was reasonably required of them to ensure that the lane was not dangerous to traffic and therefore can rely upon the statutory defence of S.58 Highways Act 1980.

The scene

4. For the claimant, the bend was to his left and for the van driver to his right. A plan of the road appears on p.1036 (CF). The claimant's approach is shown in the video footage exhibited to the statement of Mr John Franklin. In addition, post-accident police photographs [pp. 190-213] and body worn camera footage show the scene from both driver's perspectives. To the south of Mangrove Lane is the town of Hoddeston and to the north the town of Hertford. Along the 2.5 miles of Mangrove Lane there are entrances to farms and properties at points otherwise the road is bounded by fields. The claimant had lived in Hertford for about 10 years and had cycled along the road before the accident. I am asked to resolve liability only at this stage.
5. Mangrove Lane is, at the *locus*, a single-track road with no road markings. The width of the asphalt road surface varies between about 3.2 and 5.5 metres. On the apex to the bend, the carriageway widens to about 6 to 6.2 metres. There is a parking / passing space and a gate to a field to the north-east corner of the bend. The apex of the bend, where there is another gate, is located roughly level with that gate situated to the south west of the road.
6. The defendant Hertfordshire County Council (HCC) is the relevant highway authority

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pursuant to the Highways Act 1980 and owes a duty to maintain the highway under S.41 of that act. The road is classified as a *rural access road* (class 4b) for the purposes of inspections. That classification meant the road was subject to an annual inspection by a highways inspector tasked with noting and reporting defects to the carriageway and edges of the road. The last inspection was carried out on the 20/8/15 by Mr Cooke an inspector employed by Ringway the contractors engaged by HCC.

7. It is agreed that at the time of the accident the available evidence shows defects including potholes to the road surface at the point of the collision on the claimants nearside of the bend. They are shown in police body cam footage. Unfortunately, at no point were the potholes and other defects measured with any precision and therefore the expert witnesses have done their best using the available film and photographs to assess the potholes taking into account road structures and the depth of the wearing surface being the top layer of the carriageway as an indicator of the depth of any pothole or other defect. Evidence as to dimensions comes from the wife of the claimant and the claimant's solicitor who attended on the 4/4/16. They measured the potholes using their hands and other items but not a ruler. They did not take photographs. Additional evidence comes from the work documentation for the repairs carried out to the potholes and road surface after the accident (p.1050). It should be noted however that repair works will inevitably be larger than the defect repaired given the need to bond repairing materials with solid and sound surroundings.

Law

8. The correct test to apply in such cases can be found in *Mills v. Barnsley MBC* (1992) PIQR P289. The familiar passage is;

*“In order for a plaintiff to succeed against a highway authority in a claim for personal injury for failure to maintain or repair the highway, the plaintiff must prove that:*

*(a) the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;*

*(b) the dangerous condition was created by the failure to maintain or repair the highway; and*

*(c) the injury or damage resulted from such a failure.”*

9. Hughes LJ as he then was, more recently set out the issues which a court would have to consider when determining whether a highway authority is liable for breach of its statutory duty under section 41 in *Devon CC v TR [2013] EWCA Civ 418*, His Lordship said;

*‘8. The issues which called for decision were therefore these.*

*i) Was there a breach of s 41, i.e. was the road in a condition which exposed to danger those using it in the ordinary way? If yes:*

*ii) Was the accident caused by that breach? If yes:*

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- iii) *Had Devon made out the statutory defence under section 58 of that Act, i.e. of taking all reasonable care? If no:*
- iv) *Was there any contributory negligence on the part of TR?'*

10. As to what constitutes a “*danger*” this is a matter of fact for the court to decide and involves a balance between the private and public interest. In *James v Preseli Pembrokeshire DC*, citing *Mills* Lloyd LJ held,

“Steyn LJ at the end of his judgment [in *Mills*], said this:  
*Finally, I add that in drawing the inference of dangerousness in this case, the judge impliedly set a standard, which, if generally used in thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon the 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 highway is 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 the first point.*

I regard that passage as being particularly apposite to the present case. In one sense, it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. But that is not the test of what is meant by “dangerous” in this context. It must be the sort of danger which an authority may reasonably be expected to guard against. There must, as Steyn LJ says, be a reasonable balance between private and public interest in these matters’

11. It is for the claimant to prove to the civil standard that is on the balance of probabilities often referred to as proving what is more likely a breach of S.41 and that the dangerous highway was the cause of his accident. The claimant must establish that the point in the highway which caused his injury was dangerous. It is irrelevant that there were other spots nearby which were dangerous or that the highway was generally not in a good condition. This case concerns the claimant alleging that he had to avoid dangerous defects in his path and not coming into contact with a defect or series of defects and then suffering injury.
12. I will deal with the issues in the same order as set out above however the evidence in relation to the nature and size of the defects and the cause of the accident are, to a large extent, bound together. I will summarise the evidence I have heard on the issues that arise. All witnesses called live identified their witness statements and confirmed that the contents were true.
- (i) The condition of the road at the time and the cause of the accident.

Witnesses

Approved Judgment(i) Dominic Nash - The claimant<sup>2</sup>

He said he had ridden along Mangrove Lane on many previous occasions. He knew the bend. He said he was a cautious but experienced bike rider having commuted in London for a year. He is also an experienced car driver. He said that he had travelled south on Mangrove lane that morning therefore passing the bend but in the opposite direction and for some reason he could not remember he turned back when he reached Hoddeston and did not complete his normal route.

He said the road was damp as he approached the bend and as he did so he was just to the nearside of the centre line of the road (there is no marking in fact) due to edge/ verge defects to his left. As soon as he entered the bend he saw some defects namely potholes on the nearside of the bend. He took a line between the defects and the centre line of the road. As he came around the bend potholes filled with water came into view suddenly. He swerved to his offside taking him over the centre line to his offside. He said the large pothole depicted in police photo 9 (p.198) was the one that made him swerve to his right. He said the van was approaching, he probably tried to brake however given his new direction and the position of and speed of the van the van he did not have time to slow enough, stop or turn again to his nearside to be able to pass the van safely. He recalled the collision and going under the van. He said his speed was about 10 mph reducing to 8-9mph with braking. In a series of short points 1,2 and 3 the claimant described his thoughts and actions leading up to the collision.

He said the photos taken by PC Jacob showed the pothole filled with water he saw. He made a similar comment in relation to the photos taken by A/Sgt Miller and the plan she produced (JCM/03a) who attended to assess the scene later and she placed markers at points of relevance.

He said he spoke to police officers and one had an urgency in their voice. He did not want to blame anyone and so he said it was not the van drivers fault. He said his stroke was starting and so he asked for more morphine. He said he was in no real condition to know who was asking him questions or what he was asked. His last memory was arriving at the hospital and he was told he was having a stroke and a wire would be put into his groin to get it out. He regained consciousness in April.

In cross- examination he said it was necessary to swerve and he veered off as soon as he saw the pothole. He accepted the hedges had obscured his view to some extent and was not sure if he would have spotted the van approaching over the hedges. He said if he had seen it he would have slowed. He said he did not see the van until he swerved to avoid the potholes. He said it was slightly damp and he did not want

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<sup>2</sup> witness statement p.35 dated 26/6/20

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to skid and going through the potholes was not an option. He added '*I was not going particularly fast. I could not brake or I would have done it*'. He said '*I am sure I took the prudent measures I needed to at the time*'. Having looked at some photos and when asked where the van was when he first saw it he said '*I can't say for sure how close it was*'.

In relation to the comments made to PC Jacob he said he did not remember making the first comment but did the second. He said he was trying not to blame the van driver and did not mention the potholes because he was in distress, panic stricken, not thinking straight, not in a clear place and thought he might lose his arm. He denied that the accident occurred as he had said to PC Jacob saying '*I came round on a line I would not taken and was confronted by the potholes and I swerved to avoid them*'.

- (ii) The van driver and passengers (all foreign nationals with limited English were spoken to by Police Officers with the use of a remote interpreter service)
- (a) Gerhard Fallman<sup>3</sup> is the only person from the van to comment about potholes in his witness statement. He was sitting in the right rear passenger seat of the van. He said he saw the claimant suddenly veer off his lane and onto their side of the road. He said he could see potholes on his left (claimant's left) and it was clear that he was trying to avoid the potholes so as not to damage his cycle or fall off. As a result of veering Mr Nash was then completely 'out' of his left side of the road. He said he saw Mr Nash jump off his bike and slide into the van. He then said '*It also seemed that Mr Nash was cycling too fast around the bend. Once he had veered into our side of the road he had insufficient time to react and avoid colliding with us*'. The claimant in his evidence denied jumping off his bike.

In the police collision booklet (p.56) he made no mention of the potholes saying '*the bicycle veered off its lane. The car was unable to avoid. The bicycle ended up under the front wheel of the car*'.

Mr Fallman was not available to give evidence. A hearsay notice was served dated 23/10/20 because he could not be located to attend to give evidence. He is said to reside in Austria. A message was sent to his Facebook page in the week before the CEA notice was served asking him to make contact and to give evidence remotely. No contact was made with him. No objection to his evidence being adduced was pursued.

I have to assess therefore the weight I attach to this evidence. In doing that I have taken account of S.4 Civil Evidence Act 1995 – Considerations relevant to the weighing of hearsay evidence. They are; it was not reasonable or practicable to produce him to give

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<sup>3</sup> witness statement p. 52 dated 14/9/16.

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evidence however the attempts to find and locate him were made somewhat late in the day and contact appears to have been lost over the years, there is no multiple hearsay, I do not believe he had any improper motive nor do I believe the adducing of the evidence in this way suggests any attempt to prevent a proper evaluation of his evidence. That said the defendant has not been able to cross-examine him and test his evidence. His witness statement was some three months after the event and was therefore not contemporaneous. The witness statement differs in a key regard to what he said to the police at the time albeit in difficult circumstances. He is also wrong according to the claimant in suggesting he jumped off his bike. His evidence is relevant and I take account of it however for those reasons the weight I attach to it is limited.

- (b) Wolfgang Gramer who was in the other rear seat in the van told the police that the bike was *'far into the road'* p.70
- (iii) Graham Hirons<sup>4</sup> attended the scene. He is a local resident and businessman. He said that for some weeks prior to the 13/3/16 he had been aware of potholes on the nearside of the 90 degree bend. He added he drove along the lane once or twice a month and the whole of the lane had potholes on the corners. He qualified his comment *'that for some weeks prior to the 13/3/16 he was aware of potholes on the nearside of the 90 degree bend'* by saying perhaps for a period of time would be a better phrase. If it had been a number of months he would have said so. He said it had always been like that and had never been particularly good.
- He said the potholes looked to be of a significant depth and covered a significant area of the road. He came across the accident and helped. The claimant was in the middle of the road on his back. He was conscious but in a lot of pain. He said he had been run over by the van and did not say anything else about how the accident happened. Mr Hirons noted the potholes filled with water.
- (iv) Paramedic Nicholas Mills<sup>5</sup> attended and treated the claimant. According to the witness other than reporting he was very cold and in a great deal of pain nothing was said by the claimant about how the accident occurred. No comments were made about potholes by the claimant. Similar evidence was provided by Paramedic Ian Howe.
- (v) An East of England ambulance service note (p.111) records at 09.11.27 (approximately 1 hour after the accident) the claimant was maintaining his airway and that he was alert and had a Glasgow Coma Scale of 15/15. Other reports refer to the claimant as talking, having suffered no loss of consciousness, was rousable and conversing throughout even

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<sup>4</sup> Witness statement p.94 dated 28/5/20

<sup>5</sup> Witness statement p.104 dated 1/7/20



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after sedation (p.113). His injuries were noted and treated. It is clear the claimant suffered a stroke in hospital and his condition deteriorated markedly.

- (vi) PC Jacob<sup>6</sup> attended the scene with PC Bevan. He took photographs (p.149-165) and noted the potholes to the nearside of the road that had filled with water adding they would have looked like puddles rather than potholes. He described the potholes as '*significantly sized*'.

When stabilised he escorted the claimant to hospital in London in the ambulance. He was aware that the claimant was seriously injured, had fractures and been given pain relief. He said however that he appeared lucid. He said he would not have taken the account he did from the claimant if he had been in any doubt that he was lucid. He said the hospital staff would not have let him speak to the claimant and to interview him if he was not lucid. He added that no mention was made of potholes by the claimant and that they had caused or played any part in the accident.

He noted in the police collision report at p.177 and p.178 that the claimant said to him at 10.20hrs '*I came round too wide, too fast, hedge was high, not his fault, nobody's fault*' and at 10.35hrs when he asked the claimant for a detailed account and was following the booklet '*Record of interview at scene*' the claimant said when asked what had happened "*I hadn't been riding long. About 5 miles from my home address. Weather was cold, not too foggy, no sun. I rode the route sometimes once or twice a week. The road was wet might have been a skid involved. I came round the corner (left hand bend) a bit too wide and a bit too fast, the hedges were high, it wasn't his fault. Nobody's fault*". The claimant was unable to sign the note. Between those comments the claimant was breathalysed at 10.30hrs with a negative result.

An ISR report logged a note at 11.00 hrs informed the control room that the claimant was due at his parents for lunch (as he confirmed) and could a message be forwarded to them. The note adds to pass on PC Jacobs telephone number. It is suggested and I accept the claimant must have reported this concern and asked that the message be conveyed suggesting he was alert to that extent at or near the time (p.400).

In his oral evidence, he added he was a road policing unit officer for 10 years and is now a police driving instructor. He had seen many accidents. He had some recollection of the incident but '*not the best*'. He explained how the collision report was compiled by his colleague PC Jackie Lister. Other officers would contribute sections. He said p.177 was all in his writing as was p. 178. He believed the claimant gave him the next of kin details (p.177). He said the comments made

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<sup>6</sup> Witness statement p.144 dated 8/10/18 and 384 dated 12/3/20

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by the claimant were recorded as they were said. He maintained that the claimant was lucid enough to talk in the ambulance and at hospital. They arrived at 10.09hrs and so the comments were made after arrival. He did not recall the entry in the log about lunch and said *'I doubt If anyone else knew it'* and *'It sounds plausible he told me'*. He said the first comment may have been to someone else and he recorded it however the second was part of a Q&A as set out on the page. Of that second comment, he said *'That is as verbatim as I would have written it down. I would not write it otherwise'* and *'He was having a conversation with me and he said that. Anything else relevant would have been included'*. He said he had no concerns about the claimant's ability to answer his questions. He added *'It was quite a shock that he had taken a turn for the worse later that day'*.

- (vii) PC Bevan<sup>7</sup> attended with PC Jacob. He completed the report and produced a plan (p.181) showing a suspected route taken by the claimant and the van. It is not evidential or based on any forensic evidence he said adding he could not comment on what the claimant had done. He noted that the road at the scene was in a poor state of repair with pooled water in potholes on and around the apex of the bend and a large crack from the apex leading to the centre of the road.
- (viii) PC Gumbrill attended and produced body cam footage. He noted the potholes on the footage. The footage is the best evidence of the scene taken as it was within an hour of the incident. My assessment is that the furthest point from the edge of the road to the claimants near side a defect of any size can be seen is at a point approximately one third across the width of the lane. The defects do not reach the centre of the lane.
- (ix) PC Henderson<sup>8</sup> attended the scene at the time and later given the deterioration in the claimant's condition because the police considered they might be dealing with a fatality. The Forensic Collision Investigation unit attended. The officer noted lots of potholes on the road and the road was in a bad state of repair. Despite what her witness statement said at p.381 the comment attributed to the claimant was not made to her but to PC Bevan.
- (x) A/SGT Miller<sup>9</sup> a Forensic Collision investigator attended as part of the specialist team later in the afternoon at around 2pm. When she arrived the van and bike had been removed. She marked areas and marks on the road surface of interest (p.185-186). Some yellow chalk marks had been left by others who attended earlier. These include the final positions and angles of the wheels of the van. She took photographs of the approaches of both vehicles and the markers she positioned. She noted that the condition of the road was overall good with some

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<sup>7</sup> Witness statement pp.169 and 392

<sup>8</sup> Witness statements pp. 133 and 380 dated 26/10/18 and 12/3/20

<sup>9</sup> Witness statement pp 183 and 405 dated 1/6/20 and 5/6/20

cracking of the road surface with pooled water to the offside prior to the bend (photo 5). She noted pooled water and cracking at the apex of the bend that continued round to the west. These areas came into view as you went around the bend she said. The holes in the road surface were sufficiently deep to hold pooled water. She did not measure the potholes. She concluded that as the van was hard to the left close to the hedgerow the driver could not have taken further evasive action. She concluded he was not speeding. She had prepared two scaled plans however where water was depicted no depth was indicated. These plans were used by Mr Hopwood as part of his analysis as a road traffic collision expert.

(xi) Mrs Rong Wu (the wife of the claimant)<sup>10</sup>

Mrs Wu was in France abroad at the time of her husband's accident training to be a ski instructor. She and her husband would cycle together occasionally at weekends. She described her husband as a cautious cyclist. Her evidence was that there had been an increase in heavy traffic along Mangrove lane due to works at the Simon Balle school in Mangrove Road (the northern main junction with Mangrove Lane) from 2014 to 2015 and the building of apartments in Balls park in a similar area from 2011 to 2015 had a similar effect on traffic.

Having been informed of her husband's accident on the 13/3/16 she travelled to London to see him. The claimant did not regain consciousness for many days and was then unable to speak due to having undergone a tracheotomy to his throat. She did not recall the day he began to talk again. She said that when he began to speak, they used pen and paper and made hand gestures to communicate. He had a memory of the accident and by the 29/3/16 he had communicated clearly to her that because of potholes in the road he had to take a wider route when cycling around the bend on Mangrove lane where the accident occurred.

On the 4/4/16 she attended the scene with the claimant's solicitor Mr Scarles. It later became clear that he had acted for Rong Wu some years before in relation to another claim and they had remained in contact in the intervening years. They took photographs. Rong Wu said that the potholes were measured using various objects and their hands. The deepest were 4-5 inches and covered a large are of the road.

In her oral evidence Mrs Rong Wu confirmed that she and her husband would cycle along Mangrove Lane and may have done so three times in January / February 2016. She said her memory was pretty bad as the events were nearly five years ago. I note her witness statement is dated January 2020. She was pressed about the conversations and the scene visit. First, she said she did not remember the condition of Mangrove Lane saying '*it changes*'. She said the road condition can

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<sup>10</sup> Witness statement p.268 dated 30/1/20

change a lot from month to month but did not have a thought for that particular winter meaning having any memory or concern about the road at that time I conclude. Second, in relation to her husband telling her how the accident happened she was particularly vague. She said he could not speak and that she was desperate. She said they communicated by letters, hand gestures and she drew on a board as he could not write. She said *'he could not see so we talked and guessed not really speak speak'*. He did suggest the potholes were responsible she said. She said she thought her husband had told her about the potholes before the scene visit but added *'I honestly can't remember we did a lot of drawings, pictures trying to lip read I can't remember how we did it. I have not kept anything unfortunately'*.

Finally, in relation to the scene visit and measurements she said that she took a lot of photos (p.273-277) and maintained that she used her fingers and a pen to measure depths of potholes because she is a trained engineer and did not need to use a ruler adding *'I put my finger in to measure. I don't need rulers I know precisely what the measurements were. I could not believe it they were so deep. I think I put a pen down and my finger to measure'*. She said she measured a few and they were all 5-6 inches deep. The worst one was 6 inches deep. The one nearest the person on photo (wearing cycling clothing is Mr Scarles) p.277 was 5 inches deep. She could not remember how many she had measured saying *'all bad right across'*.

(xii) Philip Scarles<sup>11</sup>

The claimant's solicitor is also a witness of fact. He said that he attended the scene on the 14/4/16 with Wong Ru. He took photos that day (282-288). He said he and Mrs Wu measured the potholes by putting various objects and their hands into them. At their deepest they were 5-6 inches deep. He also attended on the 14/4/16 with Mr Franklin (see below). Workmen were present repairing the road surface at the corner in question.

In his oral evidence he said he had first been contacted by Mrs Wu on the 15/3/16 two days after the accident. Very few details were provided then so he contacted the police and spoke to PC Lister. On the 29/3/16 he had received an email from Mrs Wu advising him that the claimant had taken a wider line around the bend because of potholes. That email has been produced. Mrs Wu said *'My brain is not functioning properly. Did you say there is no case on Dom's accident? He said because the potholes in the road he is having to take a wider route'*.

He accepted the depth of a defect was an important fact and that he had measured similar defects before with a ruler and taken a photograph. On this occasion it did not happen. He said the potholes were measured as he had described. He said the one that was 4/5 inches deep is the one

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<sup>11</sup> Witness statement p.279 dated 9/6/20

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further from him (T shaped) in photo p. 277. He said the depth was measured by hands, a pen and possibly a phone cover and was 'assessed by him'. He said only one pothole was 4/5 inches deep the others were a variety of depths less than 4/5 inches. He made no notes at the time of which ones he meant. He said he could be sure of the depths based on his estimation.

(xiii) John Franklin<sup>12</sup>

Is a consultant in Cycling safety and skills. His evidence was limited to factual evidence by order of Master Thornett. He visited the scene on the 14/4/16. The road had been repaired by that time. He measured the repairs and noted additional defects in the carriageway south of the repairs on the approach of the claimant. There were potholes of up to 6cms in depth (his statement stated 60cms) namely 2 inches. He also produced a video he made from a bike approaching the bend as the claimant did at different speeds on the 25/9/19. His camera was on the handlebar of his bike providing a fixed field of view and therefore did not accurately reflect the view of a rider however it was helpful. The speeds were at 2mph increments from 10 mph to 18 mph. He produced photos (p.298-302) and the video (JF2). He said that it would be more comfortable if one adopted a wider approach and if travelling at speed one would take the corner wider.

Local residents and traffic issues

(xiv) David Whitlow<sup>13</sup>

Mr Whitlow lives in Blackfields Farm the property to the west of the bend. He has lived there since 1996. He said that traffic has increased significantly up to March 2016. His estimate of traffic flow is four times what it was. He attributed this to the lane being used as a 'rat run' between the A414 at Hertford and the A10 at Hoddeston, local building works and a children's residential outdoor adventure centre known as Bushcraft towards the south at Monks Green Farm with associated coach traffic bringing children to the centre for short stays. He said the condition of the lane was poor up to March 2016 with many potholes. He contacted his MP and local councillors about the issue. He produced the emails from 20/7/18 to 20/1/19 (p.311-318). His emails reflect his concerns on a number of issues including the planning process, the use of the site by Bushcraft and the use of the lane by large vehicles given the narrow nature of the lane.

In his oral evidence, he said the fields adjacent to the scene of the accident were used for hay and not cattle. His recollection was that cattle had not grazed in the fields for at least 15 years. This is relevant to the evidence of Mr Cooke the inspector.

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<sup>12</sup> Witness statement p.290 dated 9/10/20

<sup>13</sup> Witness statement p.306 dated 3/6/19

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He said Mangrove Lane is a narrow single carriageway with few places to pass. The southern access to Mangrove Lane is via Lords Street and is restricted by residents' parked cars. Larger vehicles would struggle to get through. The lane does not feed directly into the A10 as there is a bridge. He said the Bushcraft problem started in 2015. Coaches would arrive 2/3 at a time. It was not every day and took place from spring to October each year. The site closed in 2018. He said the lane had deteriorated on and off while he had lived and not just for the three months between January and March 2016.

(xv) Steve Williams<sup>14</sup>

Gave evidence specific to the number of Bushcraft coaches that would have used Mangrove Lane in the summer of 2015. He had information of the numbers of children attending and when. From that assuming a coach had a 52 seat capacity he was able to determine the number of vehicle movements per day to drop off and collect. If more than 52 children attended he assumed a mini bus was used for those over 52. His analysis was at best an assessment given that there is no accurate way of determining how many children were on each coach and the capacity of each vehicle.

He said camps ran from 20/5/15 to 8/8/15 and then from 4/9/15 until 23/10/15. There was no traffic movement from that date until after the accident in question. He produced a schedule of visits with numbers of children (p.1147-48). As an example, using his analysis for the 21/9/15 there were seven vehicles using Mangrove lane dropping off students and they were collected on the 23/9/15.

(xvi) William Ashley<sup>15</sup>

He lives at Monks Green Farm Mangrove Lane. He is a farmer and has lived at the farm since 1986. He gave evidence about the use of Mangrove Lane by the Bushcraft centre and the increased traffic volumes. He had submitted an application to convert an outbuilding to a light industrial / storage unit however that was refused by HCC who cited increased traffic use as a factor to decline the application. He detailed how, due to local interest and pressure, the licence issued to Bushcraft by East Herts District Council was discovered to be not appropriate for the activities undertaken. He gave other reasons for increased traffic volumes, the school building works and use as a 'rat run' from the A414 to the north to Hoddeston in the south. He confirmed the fields adjoining the scene were used for grass. Finally, he added that Mangrove Lane had numerous potholes along its length in 2015 and 2016. He produced relevant emails.

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<sup>14</sup> Witness statement p.595 dated 12/6/20

<sup>15</sup> Witness statement p. 320 dated 8/6/20

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In his oral evidence, he said Mangrove Lane had got busier as the years went on. He said the lane got busier as other roads got busier and drivers avoided the busy roads. He said after the school extension traffic increased he thought in 2014 or 2015.

(xvii) Mr Jeff Cooke<sup>16</sup>

Is employed by Ringway Infrastructure Services (RIS) as a Highways Inspector. He has been working in that capacity since 2001. He set out his training and experience. He knows the location of this incident through his work and as a cyclist. He lives about one mile from the scene. He performed the last scheduled inspection of Mangrove Lane before the incident on the 20/8/15. He did that by driving a van and stopping at times to inspect. He drove the lane in both directions and took about 50 minutes to do so. He was alone and not accompanied by a driver. He is confident he did not miss any category 1 or 2 defects during his inspection. When he inspected the bend in question he parked in the gateway opposite the apex of the bend as he always did. He gave reasons for doing that first to have a cup of coffee and to observe the cattle in the field. He said he could not remember if there were cattle in the field that day but there would be cattle there usually. He accepted in oral evidence that cattle had not been in the field for many years.

He explained how using his tablet device he is able to record defects. His exhibit 'JC3' (p.496) is the site history report for that inspection. He identified three defects one in each of the three sections of Mangrove lane (numbered 3U190/10, 20 and 110 from south to north. A plan is at p.502). He identified a category 1 pothole being deeper than 40mm in section 3U190/10 and was able to mark that with his device accurately. That was the only such defect along Mangrove Lane. If there had been others he would have identified them and taken action. He identified edge deterioration as category 2 defects in each of the other two areas as can be seen on the report. He described what he saw, meant and what he expected to happen. The section 3U190/20 edge deterioration he noted under defect number 697868 he said did pass the spot where the accident occurred. He said it was damage to the soft verge adjacent to the carriageway that sometimes affected the edge of the bound surface in a way he called 'fretting'. He said it was minor encroachment at the edge of the bound surface. He said it was away from the wheel tracks of a cyclist, would not present a danger and did not merit a category 1 repair. He said there were no defects to the bound surface. He did not think the defect would migrate to a category 1 defect before the next inspection.

I asked that Mr Cooke be recalled to explain his reference in his witness statement to edge deterioration 'passing the spot of the accident' given that there seemed to be some confusion as to what he meant namely at the bend itself or along the section generally. He told

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<sup>16</sup> Witness statement p.459 dated 1/7/20

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me the edge deterioration was generally along that section of road. He did not need to record an exact location because no one would be going out to attend to it. The edge deterioration was at various points. Specifically, he could not recall edge deterioration at the bend in question.

He confirmed he pothole he had identified was repaired a few days after his visit. He believed he had taken a photograph of the defect at the time he saw it. There is no such photograph it appears. He said if he saw a defect in the carriageway that was 35mm deep he would make an assessment and if need be action a repair. Finally, he said '*I know what to patch*'.

He was shown the photo at p.150 and said he would have ordered a repair of the pothole filled with water. The defect on p.152 he would give his close attention. He said the smaller pothole was the same as the photo p. 150. He denied that there was a defect in the carriageway at the bend when he inspected in August 2015.

(xviii) Mr Vincent Brodie<sup>17</sup>

Is employed by RIS as a Team Leader and Senior Highways Inspector. He is Mr Cooke's line manager. He accepted the contract between HCC and RIS provides that once a decision is made to carry out a driven inspection of the highway there should be two inspectors in the vehicle. He had overlooked that and apologised for the fact that Mr Cooke was alone when he carried out the inspection on the 20/8/15.

He confirmed the training given to Inspectors and their understanding and application of the policies in force for highway inspections and maintenance known as the Defect Management Approach (DMA).

## Experts - Highways

(xix) Mr Andrew Hill<sup>18</sup> was called by the Claimant and Mr Michael Hopwood<sup>19</sup> for the Defendant. Mr Hopwood produced helpful enhanced photographs with the defects labelled from A to F (p.910). In particular I refer to photographs 5 – 9. Photographs 1-4 show a section of road before the accident scene. They produced a joint report at p.923 dated 20/10/20.

## (xx) Areas of agreement and disagreement in the joint report;

(a) At paragraph 2.18 the experts agreed that areas of edge deterioration noted by Mr Cooke in August 2015 (assuming this was at or near the scene of the collision however this is not at all clear on the evidence) are irrelevant to the defects alleged to have caused Mr Nash to swerve.

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<sup>17</sup> Witness statement p.453 dated 19/6/20

<sup>18</sup> Report p796 dated 22/9/20

<sup>19</sup> Report p. 839 dated 27/8/20



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- (b) Paragraph 2.20 they agreed having studied the photographs that at the time of the accident there were probably several (Mr Hopwood says two) defects in existence at the locus which exceeded HCC's 40mm depth criterion for category 1 defects. They were therefore potentially dangerous. They disagreed as to whether or not the defects were there in August 2015 and if so exactly how deep they may have been accepting that it would have been less than 40mm. Mr Hopwood was of the opinion and said in evidence that the defects may have appeared in the intervening seven months given the weather and how rapidly such defects can appear. He explained how. Mr Hill offered other differing opinions and explanations.
- (c) They disagreed about a number of key issues including the size and position of defects in order to assess if they were dangerous and the extent to which the defects would have affected all road users including cyclists. They disagreed about the categorisation of Mangrove Lane.

(xxi) Evidence before me

(a) Creation and timing of defects

Mr Hill said he had assessed the weather in the South east generally and not specifically at the location and determined that the winter of 2015-16 was not an exceptionally cold winter it being slightly milder than what you would expect. He said there were frosty periods that may lead to damage to the highway. Water when it freezes exacerbates damage he said. Traffic passing accelerates existing damage. He said the traffic was light meaning less damage would occur in that way. He accepted potholes can form very quickly in some situations involving sub-zero temperatures, rain, heavy traffic and a weakness in the structure.

Mr Hill was of the view there was or were defects at the scene in August 2015 that had not been noted. That was a defect or defects probably not in excess of 40mm and so not requiring action but it did need an assessment. His recommendation would be for it to be assessed and placed it in category 2 high, medium or low and repaired according to the defendant's policy.

Mr Hopwood maintained and explained how such defects can occur during the winter and in a period of seven months. He had accessed the weather for the area as set out in his report with periods of freezing weather. He said he did not think the potholes were there in August 2015 and added '*there is every reason to consider the potholes did and could occur over the winter*'.

(b) The defects and their dimensions

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Mr. Hill had seen the photographs. He had not been to the site unlike Mr Hopwood. He said the defects were not located at the start of the curve rather at the end although still on the curved section. Of visible defects in the photos he said you can only determine the depth by putting something into the defect. He was referred to Mr Hopwood's photo 7 (p.913) with the marked defects. He said it looked to be a series of patches in the road with holes between them. Defect E was a defect with water in it. He said the only way to assess dangerousness is to measure the depth. Of Mrs Wu's measurements, he said he was reluctant to criticise a witness but added typically defects to the wearing surface are 30-40mm and if to the wearing and base course can vary markedly and can be up to 100mm. He said her 5-inch measurement sounded unlikely. He accepted the wearing surface can be less than 40mm in a rural road and the photos showed a loss of that surface.

Of the repair (p.1067) and the photos taken before the works (p.1104) he said the top photo showed a defect about 300mm square however he could not determine the depth and of the middle photo he could not get any idea of depth. In relation to the lower photo he saw a defect along the verge to the left that was the biggest measuring about 300 by 400mm in size and some of the wearing course had become removed so he estimated the depth to be 30-40mm however it could be less. He said the physical size of the repair which he said referred to a depth of 75mm does not help in relation to depth of the defect because you have to remove loose material. He concluded that the evidence strongly suggested the area of the defects was dangerous at the time of the accident. He added if a defect is deeper than 40mm it is potentially dangerous for a cyclist.

#### Mr Hopwood

He was asked about his photos and the labelled defects. In his report (p. 873/874) he had estimated dimensions based on the top course of the road being 50mm deep. Evidence adduced in the trial altered that assumption. The top course would be 40mm or less in rural roads in Hertfordshire I was told by Mr Vine. Of defect A he said it was about 0.5 m into the road and was less than 50mm deep based on it being a loss of the wearing (surface) course. Given the evidence that the wearing course would be less than 40mm he revised his estimation and said the depth was probably less than 40mm. If so it would not meet the criteria for a category 1 defect. Defects B and C were much smaller and shallower than A. He said defect D was also small and shallow and close to the edge. Defect E was, in his opinion larger and probably deeper than A – D and deeper than 50mm on his original assessment as set out in his report. However, he used new images and revised his assessment saying it was not very deep. If the image shows just the surfacing course (others used the wearing course term) then it was no more than 40 mm deep and probably less. He had originally stated in

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his report that pothole F was probably deeper than 50mm however he could not estimate the actual depth. The images he had to work from showed this defect full of water. He said it could be the depth of the surfacing course but he could not say. He said there was no defect anywhere near to 5 inches deep in the photographs. He referred to an image of a pothole that was 5 inches deep as a reference (p.921). He said if it was that deep you would be able to see the sub-base level.

## Experts road traffic collisions

(xxii) Mr Mark Littler<sup>20</sup> was called by the Claimant and Mr Damien Mutch<sup>21</sup> was called by the Defendant. They produced a joint report dated 9/10/20 (p.783)

(a) Mr Littler in his summary stated that the scene evidence is consistent with the claimant colliding with the front offside corner of the van. When that happened the claimant was beyond the centre of the road. By applying available reaction time research the claimant would have had sufficient time to avoid the defective road surface by steering to his right. He preferred marker point 2 (as located by A/Sgt Miller) as the impact point given the deposition of mud / dirt on the road consistent with the impact dislodging material from the underside of the van. If that is correct that point was 5.5m from the rear of the final position of the van and 12m beyond the apex of the bend.

(b) Mr Mutch said the evidence shows that Mr Nash came to rest in the middle of the carriageway and not under the van. There was no evidence that he passed fully under the van. He stated that the evidence suggests that the bike had capsized or very nearly so when it collided with the van. Therefore, the bike was moving across the path of the van at impact. The bikes speed cannot be determined from the physical evidence. He assessed the van's speed to be broadly about 17mph being braked in preparation for the bend. The van driver had seen the bike hence he drove to his nearside. He concluded that had the claimant been travelling at 10mph he could have stopped his bicycle short of the point of collision under heavy but not full emergency breaking. Therefore, the scene evidence is not consistent with the claimant riding at 10mph.

(c) Both agreed that the physical evidence does not permit a reconstruction of the incident.

(d) Areas of agreement and disagreement in the joint report

They agreed that damage is not consistent with the bike being upright at the point of collision and,

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<sup>20</sup> Report dated 9/9/20 p. 614

<sup>21</sup> Report dated 23/9/20 p. 669

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- (i) Generally, in relation to what the marks at the scene were consistent with. They disagreed which near side tyre had caused the tyre mark at marker point 4. That meant they had differing views as to the distance the van braked heavily for. MR Littler assessed the distance as 13.5m and Mr Mutch 16.8m.
- (ii) The impact point occurred at some point between marker 2 (deposits of mud) and marker 4 (scrape mark). The distance between the two is about 6m. They both gave their reasons.
- (iii) At impact the claimant would have been beyond the centre of the road.
- (iv) Whether or not the claimant could have seen the van above the hedge line is dependent upon his eye level and where he was looking as he approached.
- (v) The physical evidence does not assist in determining the precise locations of the van / bike at the moment they came into view of the other or in establishing the precise path of the claimant.

They disagreed in relation to a number of things including that Mr Littler considered the claimant would be unlikely to negotiate the bend at a speed in excess of 15mph. Mr Mutch assessed the likely cornering speed to be above 17mph.

In their joint summary, they stated that the Claimant would have needed to take a path towards the centre of the road as he approached the apex of the bend to avoid an area of repair and a small pothole. To do that he might have followed a path beyond the centre line. By adopting such an approach line would have increased the Claimant's sight line and thus provided a longer distance to avoid the collision. In their assessment, the Claimant's speed was likely to have been in excess of 10mph. It follows they said the further west the collision the higher was the Claimants average speed. The lower his speed the greater his opportunity to avoid the collision. If he was travelling at 10mph that was consistent with the physical evidence only if the collision was at the eastern limit of the range and he maintained a constant speed i.e. he did not slow before impact.

(xxiii) Evidence before me

(a) Impact

Mr Littler

He said the major damage to the van caused the front bumper to fracture requiring a considerable impact. He said he and Mr Mutch agreed the claimant was falling off or had fallen off at that point given the lack of damage above the height of the bumper. If seated the

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claimant would have hit higher up than the bumper. He said marker 3 was a gouge in the dirt by the side of the road made by the bike as it was dragged under the van. It appeared to him that was created by a pedal or the bottom of the pedal crank bracket not the handlebars as he first thought. Marker 4 was the final position of the rear offside tyre and a scrape mark directly under the tyre. He said it was caused by the rear off side tyre. He gave reasons why the claimant did not go fully under the van. The physical evidence he said tells us the claimant came round the bend but we don't know where or how fast and he collided with the van to a point 12m beyond the apex or at a point 6m beyond the apex as Mr Mutch suggested.

**Mr Mutch**

He said his diagram 3b (p.708) was created by him positioning the van where he considered the collision to be. He also marked the repair patches to the road he measured. He gave his explanations for marker 4 being the point of impact. He was asked about the movement suggested by marker 3 and said there was some validity in Mr Littler's argument. He said of his diagram (p.710) if the impact was at point 4 he could demonstrate lines to encompass a reasonable range of lateral positions for the Claimant's approach. He said it demonstrated when the Claimant had a view of the van. His figure 6 (p.711) he said showed the Claimant would have avoided the potholes and the van as well.

**(b) Speeds****Mr Littler**

He said there was insufficient evidence to determine the speed of the van. He agreed the vans speed when it braked was about 25-28mph but could be more or less. He said we agree the likely speed was in the region of 20mph. If applying brakes the driver must have seen the claimant at some point prior to that. Of the bike he said he could not estimate the speed from the physical findings. He added the physics fits with the bike traveling too wide and too fast. The collision took place over the centre line and therefore was consistent with the claimant going too wide and too fast and also consistent with veering to the right. He thought Mr Mutch's estimation of 17 mph was high for a bike rider of the Claimant's experience but that was not impossible. He said he could have gone around the bend at 18mph.

He said if a rider was going round a bend fast and wide he would tend to lean to the nearside. He added that if a bike rider then lost control he would fall to his nearside. He described the concept of counter steering to suggest how you might fall to the offside in such circumstances. Mr Mutch disagreed with that suggestion. He said however a fall to the offside was not consistent with the final resting point of the bike. It is more usual, he said, if you steer to the right and lean that way the more likely you will fall to the right. Therefore, as the claimant entered the bend his speed would be higher depending upon how much he slowed. His speed increases the further west the collision point. The claimant's

speed was, on average, above 10 mph. If the impact was at marker 2 he would have had the van in view for longer.

Mr Mutch

He agreed with much of what Mr Littler said about speed and leaning to the left when going round a bend. He explained perception times saying at 10 mph the Claimant could have stopped before he got to marker 4. At 16 mph he could have stopped before marker 2. He said the explanation could be he was travelling too fast and he could have been too wide. It could be he had made some other manoeuvre, so it could be all three. The physical evidence does not assist with confirming or contradicting what he told the police. However, the bike was leaning to its left at the point of collision. That was more consistent with travelling too wide and fast than swerving to his right.

Local authority / Ringway witnesses

(xxiv) Robert Payne<sup>22</sup>

Is a RIS Service and Development and Communications director. He was in post when the contract with HCC began in 2012 contracting out the performance of the highways inspection and maintenance duties to RIS. He described the training given to staff. He explained the Direct Management Approach (DMA) comprising three sections Assess and decide, the inspection manual and the enquiry guidance notes. The DMA forms the policy in place regarding the inspection and repair of highway defects at the time of the accident. It provides the criteria to be applied for intervention levels for defects to be applied by inspectors. He described the hierarchy of staff and the training given. No issue is taken that Mr Cooke the inspector on the 20/8/15 was not suitably trained and supervised. No concerns had been raised about Mr Cooke's competence or application of the guidelines.

(xxv) James Vine<sup>23</sup>

Is a District Service Agent (DSA) employed by RIS. He addressed the site history report for the inspection carried out on Mangrove Lane by Mr Cooke on the 20/8/20 (p.528). It was a driven inspection and three defects were noted. The first was a pothole in excess of 40mm that was programmed for repair, the second and third were edge deterioration and classified as category 2 medium risk. The pothole was repaired on the 25/8/15. He spoke highly of Mr Cooke and his work.

He produced as his exhibit 'JV5' the repair documentation and photographs showing the repairs to the carriageway at the scene of the accident. The work was undertaken between the 12/4/15 and the 14/4/15. Some better copies of the photographs have been supplied showing before and after images of the defects / repairs. They have assisted the experts in assessing the dimensions of the potholes. The

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<sup>22</sup> Witness statement p. 567 dated 29/6/20

<sup>23</sup> Witness statement p.517 dated 1/7/20

works were undertaken following a member of the public reporting the defects on the 17/3/16.

He had searched the customer services history and was unable to find any complaints of defects to the highway from the last inspection on the 20/8/15 to the date of the accident at the location of the accident. There were complaints recorded before the 20/8/15 for Mangrove Lane before the 20/8/15 but they do not relate to the 90 degree bend area. A plan (JV/7 p.566) shows the location of all customer complaints before and after the last inspection but before the accident in March 2016. They were on the 9/4/15, 12/4/15, 24/4/15 and 29/6/15 (see p.1050). None are near the location of the accident. All of the three reported defects he said were Cat 1 defects although he was unable to say when they were repaired. The defect reported on the 29/6/15 by Mr Fagin referred to '*potholes on both sides of the road*'.

He was asked to look at the scene photos (police photo 21) and said he could see standing water but did not accept there were category 1 defects from the photo.

He said the wearing course (the top layer) of the road and in a rural lane it can be a thin surface and less than 40mm. On other roads, there would be a 40mm wearing course. He did not believe the system allowed for a category 1 defect description to be used for edge deterioration. He said an inspector is expected to make an assessment based on judgement and experience and all of the circumstances of the local conditions.

In some detail, he described from paragraphs 6 to 10 of his witness statement the way in which the category 2 medium and low defects are prioritised and managed given the fact that there are between 50,000 and 60,000 defects in the 'defect pool' at any one time. He said such defects were not regarded as hazardous but they were relevant to the overall condition of the highway. Any carriageway defects as opposed to those to the side of the road meeting or exceeding the intervention criteria for a pothole would be identified and dealt with as category 1 defects.

(xxvi) Chris Allen-Smith<sup>24</sup>

Is employed by HCC as a Group Manager. He has worked in strategic roles around asset and highways management since 2002. He manages maintenance strategies and has been a member of working groups that helped implement the code of practice in 2016. His evidence centered on the highway hierarchy classification for Mangrove Lane, defect repairs under the DMA and their types. His evidence is more directly relevant to the S.58 defence issue in this case.

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<sup>24</sup> Witness statement p.410 dated 22/6/20

Decision

## 13. Was the highway dangerous?

I have considered the detailed submission both written and oral from both parties. Where there are disputes between experts I prefer the evidence of Mr Hopwood. He was straightforward, had worked as a highways inspector in the past, carried out detailed analysis of the available evidence, had been to the scene and obtained the weather reports for the relevant period for the location.

The defects that were present have never been measured accurately and with any certainty. The witnesses have no doubt done their best to estimate depths. I reject, for reasons advanced by Mr Hill and Mr Hopwood, the evidence of defects of up to 5 inches deep given by Mrs Wu and Mr Scarles. They took photographs when they were at the scene and given the issues it is difficult to understand why they did not take photographs of the potholes with an object or measure to demonstrate depth.

I find myself in a similar position to the judge at first instance in *Walsh v Kirklees [2019] EWCH 492* who stated that *‘there is in my judgement 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 ..’*

The best evidence now is that some of the defects may be up to 40mm deep. Two are located more central to the road and one by the verge. Although there is no magic in the depth of 40mm I accept that was the defendant’s intervention level for resolving category 1 defects and to that extent it is of some evidential value. That said a defect of less than 40mm if dangerous as defined in *Mills* and *Preseli* would mean a breach of S.41.

I make the following findings

- (i) I have no reason to doubt Mr Cooke when he says on the day of his inspection on the 20/8/15 there were no recordable defects at the bend in question. I find that he is and was a highly experienced, conscientious and well-trained Inspector. He was a reliable witness despite the criticisms made of him. If there had been a defect he would have recorded it appropriately I have no doubt. The fact that he was alone is balanced by the time he took, the fact that he drove the lane twice to complete his inspection and that he did make notes and reports of defects as he found them. Therefore, I find that there were no recordable defects at the scene on the 20/8/15.
- (ii) I find that on balance the defects that were present on the day of the accident emerged over the seven months between the inspection and the incident as described and for the reasons advanced by Mr Hopwood. There was no defect present in the carriageway on the 20/8/15 that would have been categorised as a category 1 or 2 defect.
- (iii) Given the above I cannot be satisfied to the requisite standard that any of the potholes labelled A-F by Mr Hopwood were deeper than 40mm. In particular



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defects A and E were probably less than 40mm. Defect F may have been deeper however there is no reliable evidence to assess that pothole given that the images show it filled with water. Defect F was in any event the last defect a person taking the claimant's route would have encountered and it was to the very edge of the lane. Accordingly, the evidence leads me to conclude the depth of the three larger potholes was less than 40mm but on balance more than 30mm.

- (iv) In assessing danger I take the following into account. Mangrove Lane is a country lane where vehicles would struggle to pass each other. I accept that some defects in the carriageway were to be expected. The defects were to the side of the road and allowed approximately two thirds of the road width to pass without the need to make contact with the defects. Although the section of road had defects as described I assess the level of risk as low. Balancing the private and public interests and bearing in mind all of the circumstances I do not conclude on the balance of probabilities that these defects represented the sort of dangers which an authority may reasonably be expected to guard against. The road was not in a condition which exposed to danger those using it in the ordinary way. The potholes and other defects individually or collectively did not present a real source of danger in the sense identified in *Mills*.
- (v) Accordingly, I find there was no breach of S.41 Highways Act 1980.

#### 14. What was the cause of the accident?

In any event, even if there had been a danger to persons using the road as described in *Mills* and a breach of S.41 what was the cause of the accident? I make the following finding

- (i) I am not satisfied on the balance of probabilities that the claimant's account is correct. The accounts he gave to PC Jacob reflect what happened. The claimant was unfortunately riding his bike too fast and too wide as he came around the bend thus preventing him from stopping in time and he collided with the van. Despite his injuries, undoubted pain and that he had been given medication he did not mention the potholes in the time when was with the officer as playing any part in his accident. I conclude that if the potholes had played any part in his unfortunate accident he would have mentioned that fact in the time he spent with PC Jacob which covered time at the scene, the journey from the scene to hospital in London and then for a time within the hospital. For some reason that morning he chose to cut his journey short and to go home having cycled past the scene of this accident a few minutes before albeit in the opposite direction. The potholes played no or no material part in the cause of the accident I conclude. I therefore reject the Claimant's account. He was not travelling at around 10mph as he stated but considerably faster.
- (ii) I come to that conclusion for the following reasons
- (a) The collision point was somewhere between marker point 2 and point 4. The precise point cannot be determined with any degree of accuracy. On balance, that point was nearer point 2 than 4.

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- (b) The expert witnesses agree that the Claimant was over the centre of the road at the point of collision
- (c) The experts agree the Claimant was travelling faster than his stated speed of around 10 mph and I find on balance probably in the region of 16 to 18 mph. If he had been travelling at his stated speed he could have stopped and there would not have been a collision.
- (d) As he rounded the bend he was leaning inwards hence his bike fell under the van and ended up turned and facing in the opposite direction trapped under the front near side wheel. The Claimant fell to his left nearside and did not pass under the van. The greater his speed the more he was leaning inwards. That in turns means any or any significant swerve to the right is unlikely.
- (e) The physical evidence is more consistent with the account given to the police i.e. travelling too wide and going too fast rather than swerving to his right.
- (f) I come to these conclusions bearing in mind the evidence of Mr Fallman that I dismiss as being outweighed by the other cogent evidence.

15. Accordingly, it is not necessary for me to consider the S.58 defence.

16. I add for completeness that in my judgement Mangrove Lane was correctly classified as a 4a rural access road within the roads hierarchy at the time. I found the evidence of Mr Hopwood and Mr Allen Smith in particular persuasive on this point. There was no doubt an increase in some traffic during the time that the Bushcraft centre operated and undoubtedly the perceptions of local residents were that traffic levels and usage had increased. That said the evidence adduced showed that the classification was correct given the definition applicable and the normal and regular use of the road and its setting.

17. For the above reasons the claim fails.