

Synopsis of the matter as follows;

- Instructing Solicitors acted on behalf of the 5 Claimants. YD, KN, and JF (members of British Cycling) and DC and SW.
- All 5 claims all relate to incidences of cyclists slipping at a ford which crosses Burroughs Road, Leicestershire (“the Ford”).
- The incident locus can be seen using the following hyperlink:
<https://www.google.co.uk/maps/place/Burroughs+Rd,+Leicester/@52.6511726,-1.2608039,17z/data=!4m5!3m4!1s0x48775ee0ef15380b:0xe45cc501fe6630fc!8m2!3d52.6510848!4d-1.2600422>
- 3 Claimants were travelling eastwards, in the direction of Ratby. 2 signs face those travelling this direction.
- The remaining 2 Claimants, were travelling westwards, away from Ratby. 1 sign faces those travelling in this direction.
- There is also a footbridge along the side of the Ford, although several witnesses note that it is small, with one saying it is too small for a cyclist to walk alongside their bike.
- The road on which the Ford is situation is a popular cycle route. It appears to be an ‘on road’ route which is connected to National Cycle Route 63. It is highlighted on the National Cycle Route, albeit it is seemingly not a part of the official route. Paragraph 2 of the judgment transcript of Marian Sanders v Leicestershire County Council, discussed below, refers to the route as being an approved cycle route.
- The Council has received several prior complaints regarding the dangers of the Ford.
- Date of accidents to injured parties represented YD 07.08.19, KN & JF 06.08.19, DC 12.06.19 & 12.07.19 – the nature and extent of injuries and expenses vary.
- We obtained the report of an expert engineer, Mr Mike Blake. In short he visited the site, notes that the surface of the concrete section was a floated finish when laid originally, but that it has deteriorated over the years, particularly at the more trafficked parts in the inner sections. He also notes that there were algae present on the surfaces of the concrete, which was more evident on the northern half of the carriageway width. Mr Blake notes that the presence of the algae is the cause of the slipperiness. He considers that surface treatment involving brushing across the concrete at 90 degrees would alleviate the slippery conditions. Mr Blake points out that the surveyor sent to inspect the ford by Lancashire County Council recommended on 1 May 2019 that the Defendant Council scarify grooves in the concrete to form a grip, diagonally across the ford. He considers that the concrete surface represents a significant risk to cyclists, and any two-wheeled road users. Mr Blake notes the signage, but he appends a photo

to demonstrate that the same was partially obscured by vegetation. He opines that without local knowledge, and without sight of the sign, cyclists would not be aware of the need to dismount their bicycles before traversing the Ford. Mr Blake recommends that the stream should be piped under the road surface and the existing concrete broken out and replaced with a high grip tarmac surface. He considers that this will cost in the region of £15,000 - £20,000 excluding VAT. His report was disclosed to the Defendant on 14 August 2020.

- We obtained evidence of 9 lay witnesses, their statements were disclosed to the Defendant on 6 January 2021 and is summarised as follows;

Witness 1 – MxxF

Mr F was cycling through the Ford in August 2014 and his front wheel slipped from underneath him, causing him to fall.

He sustained a broken collar bone, two broken ribs, a punctured lung and multiple head and body lacerations.

Mr F had gone to visit the Ford following the incident with a friend who was a solicitor, who told him that he would not be successful in a claim due to the warning sign. He therefore did not pursue litigation.

Witness 2 – Pxx S

Ms S cycled through the Ford in July 2018 when her front wheel came out from underneath her and she fell.

She notified the Council and requested the placement of additional warning signs and they responded to say they had sent her request to the Highway Authority. She did not hear anything further. Ms S exhibits this correspondence to her witness statement.

Witness 3 – Kevin Tomlinson

Mr Tomlinson lives on Burroughs Road, the same road as the index Ford.

He has witnessed various incidents at the Ford. He contacted the County Council who sent somebody to inspect the ford in 2011. It was noted that in times of heat the algae grows around the perimeter of the Ford making the

ground slippery, especially for those using racing tyres. Following this, a sign was put to say, 'cyclists dismount'.

Mr Tomlinson has fallen in the Ford himself, while walking through it after dismounting from his bicycle.

Last year, he contacted both the Parish Council and the County Council, but no action has been taken.

Witness 4 – Pxxx Sxx

Mr S fell in the Ford in June 2011 while cycling across it. He notes that his bike skidded and flipped from under him as if he had cycled over oil. This incident occurred before the placement of warning signs.

He sustained a dislocated shoulder and bruised hip.

Mr S did not report the incident to the Council or pursue a personal injury claim.

Witness 5 – Julie Messenger

Ms Messenger is Mr Tomlinson's partner (witness 3), and she also lives on Burroughs Road.

She notes that there have been several incidences of people slipping in the Ford. Ms Messenger does note that a sign was put up after her partner notified the Council, but she says she does not consider it to be prominent and she has not noticed a reduction in incidents since the sign has been put up.

Witness 6 – KR

Mr R was cycling with Mr S (witness 4) when Mr S slipped in the Ford in 2011.

Mr R cycled through the Ford in May 2019 at a slow pace, as he was aware of the dangers of slipping due to witnessing Mr Sr's incident. However, the front wheel of his bike slipped, and he fell onto the ground, sustaining lacerations to his fingers.

Mr R did not think to report the Ford the Council.

Witness 7 – GM

Mr M was also present when Mr S fell off his bicycle in 2011.

He notes that two cyclists were ahead of them and one of them shouted a warning as they approached the Ford, so Mr M and Mr S slowed down. However, Mr S still fell in the Ford.

Mr M notes that the course of the Ford may have been slightly changed since this incident to make it safer, to make the water run straight across the Ford rather than at an angle. Counsel should note that Instructing Solicitors have not come across any evidence that this adjustment has been made.

Witness 8 – JM

Mr M fell over in the Ford in August 2017, while travelling westwards.

When cycling through the Ford, his bike slipped from underneath him and he fell off. He was dazed and confused and suffered multiple lacerations and a fractured wrist.

Mr M notes that he did not see a warning sign but after the incident he saw that there was a sign (see sign C) but that it is set back and not directly on the road.

Witness 9 – RB

Mr B is a farmer and lived at the two farms along Burroughs Road for most of his life.

He has witnessed many incidents on the Ford; the air ambulance has needed to park in his field on a few occasions.

Mr Brooks has notified the Council several times of the dangers of the ford and has suggested that they put grooves in the road. Whenever he has notified the Council, he has been told that there is nothing more required as the signage is already there.

He has noted in his statement two incidences of horses falling over in the Ford, as well as countless cyclists falling. Mr Brooks also noted that there was a car crash at the Ford in 2006 where a young adult lost their life. There are two news articles pertaining to this incident (enclosures 13f-g), but they both

allude to the fact that the driver was driving at speed, so Instructing Solicitors did not exhibit these to the statement of this witness.

- A letter of Claim was sent to the Council on behalf of each of the 5 Claimants between 30 September 2019 and 24 December 2019.
- The Council responded to each Letter of Claim denying liability for all incidents on the same basis.
- They essentially denied liability further to s58 Highways Act in that a reasonable system of inspection and maintenance in all the circumstances was instituted.
- In particular, the Defendant noted that:
 - The road has been in existence since 1884
 - The road has a dip at the bottom where the stream and Ford are situated
 - The road is subject to annual driven inspections for defects
 - Their last inspection was 14 December 2018 (8 months before the index incidents)
 - At their last inspection, no “actionable” defects were found
 - They have sought to bring the danger to the attention of road users with three warning signs as follows;
 - o Sign A – towards Ratby – “Ford 200 yards” – 182 metres from the Ford*
 - o Sign B – towards Ratby– “Ford – cyclists dismount slippery surface” – 82 metres away
 - o Sign C – from Ratby (westwards) – “Ford – cyclists dismount slippery surface” – 132 metres away
 - They believe the signage to be adequate
 - There is no duty upon them to place warning signs (relying on *Gorringe v Calderdale Metropolitan Borough Council 2004*)
 - There is no legal duty upon them to remove moss, algae etc. from the road (relying on *Rollinson v Dudley Metropolitan Borough Council 2015*)
 - The incidents were the fault of the cyclists for missing the signs and continuing through the stream despite seeing water and the footbridge at the ford itself
 - They say that the signs were not obscured by vegetation

*Instructing Solicitors note that the sign, in fact, says “Ford 300 yards”. If the ford is only 182.8 metres, this is approximately 199 yards.

- Instructing Solicitors wrote to the Defendant on 23 January 2020, querying their response and requesting further disclosure

- The Defendant have since sent further disclosure documents;
 - Street History Report – 12 June 2018 to 12 June 2019, received 27 March 2018
 - Disclosure documents received 9 April 2020
 - Highway Assets Maintenance policy dated 1 November 2011
 - Highway Assets Management Policy reviewed 23 June 2017
 - Street History Report 8 August 2019 to 8 September 2019
 - Enquiry number Number 357542, dated 12 November 2018
 - Enquiry Number 760040 dated 8 August 2019
 - Enquiry Number 760603 dated 13 August 2019
 - Response to Customer Enquiry Number 757072 dated 17 July 2019
 - Correspondence from Defendant enclosing photographs and response to query regarding Jill Howe, dated 16 June 2020
 - Photographs enclosed with correspondence
 - Correspondence from Defendant dated 26 October 2020 and enclosures:
 - Internal correspondence relating to complaint made by local farmer
 - Transcript of judgment of Judge Hedley sitting at Leicester County Court in the case of *Marian Sanders v Leicestershire County Council*, 4 October 2018

- Judgment of *Marian Sanders v Leicestershire County Council*, 4 October 2018; The Defendant forwarded this judgment and requested confirmation that the Claimants would not be proceeding on the basis of its contents. The facts of the case are similar to the facts of the Claimants' matters. Ms Sanders (the Claimant) was cycling in the direction of Ratby on 18 July 2014. She slipped in the Ford and sustained injury to her head and her hip. Quantum in this matter was significant, as the Claimant alleged that her injuries caused her to lose her employment and caused the breakdown of her marriage. Judge Hedley first considered whether the signage was visible. Counsel will note that signs A and B would have faced the Claimant. It was accepted that the Claimant's focus was on the carriageway but the Judge noted that, based on the factual circumstances of this matter (photographs produced by the Defendant), the signage was there to be seen on the day that the Claimant was cycling. However, the Judge noted that the claim would have failed even if he had accepted that the signage was not visible. In the Particulars of Claim, the Claimant had initially pleaded, amongst other allegations, a breach of statutory duty under s41 of the Highways Act 1980. Counsel for the Claimant had conceded this allegation on the basis of *Rollinson v*

Dudley Metropolitan Borough Council [2015] EWHC 3330 (QB), with which Judge Hedley agreed, noting there is no duty to ensure that highways are clear of moss, algae, lichen or similar vegetation. Judge Hedley went on to consider the basis of the Claimant's case: that although there is no duty to put signs in place to advise against hazards, this case fell within a narrow exception in which the local authority is guilty of misfeasance. It was contended by the Claimant that the Defendant, having installed a sign, had assumed the duty to ensure that the sign was visible and checked periodically. The Defendant contested this allegation, relying on *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15. Judge Hedley considered that the Claimant's case was 'on all fours with the situation in *Gorringe*' in that if the signs were obscured in any way, the position would be restored to where it was before the signs were there and there would be no obligation on the local authority to provide a warning

- Complaints and responses within Defendant disclosure; As noted above, the Defendant's surveyor, Jill Howe, attended the Ford on 1 May 2019 (pre-dating all index incidents) and noted it was slippery and she raised defect number 312805. The request was for the Council to "please scarify grooves into concrete to form a grip. Cut diagonally across Ford". Lay Witness 9, Richard Brooks, notes that he also recommended the same technique in a discussion with the Borough Councillor. To date, this action has not been taken. It seems that Jill's raised works were closed in September 2019 without resolution. Interestingly, Jill Howe is also mentioned in the above-mentioned *Marian Sanders* case.
- Another complaint was made on 17 July 2019, enquiry 757072, which said "I would like you to consider erecting danger warning signs for cyclists on either approach to the ford. I recently came off my bike due to slimy algae beneath the water which is not visible to the naked eye. It has become apparent to me through talking to a friend that everybody knows somebody who has had an accident there! As this is a recognised cycle track I am concerned that more serious accidents will happen here. My bike was wrecked, and I suffered deep gravel filled cuts. As well as more signage a more roughened surface in the stream bed would reduce skidding in the algae. Please add this to your next meeting's agenda for serious consideration".
- The Council responded to the above complaint on 17 July 2019, to say "warning signs already exist advising of ford. Signs on highway apply to road users not groups. It is down to the road user to decide the most appropriate course of action – either turn their vehicle around or go through or dismount or seek alternative route."
- Another complaint included in the Council's records, was enquiry 758156 made on 26 July 2019. This enquiry reads "customer called to request we consider a sign along by the Ford or a small bridge to prevent cyclists from riding over it as it has caused XXXX to fall off his cycle. He says he is in a cycle club and other members have also said

that they have fallen when riding over the same Ford. Customer says that he was not hurt badly but worries that someone might be.”

- The Council responded to this enquiry on 8 August 2019 to say “warning signs have previously been installed on both approaches to the hazard as shown. It would not be appropriate to introduce additional street furniture and clutter into the rural environment.”
- The Council have received other complaints. Of note, enquiry 760039 on 8 August 2019 noted that the hedges were obscuring the sign and several cycling accidents were happening in the same spot, with two in two days causing fractures. It also noted that the surface was dangerous. The Council then called XXX (the landowner) to check the hedges and cut any obscuring signs and it was noted that they ‘do not cut until September’.
- One of the Claimants, JF, made an enquiry on 13 August 2019, to say that she did not see the first warning sign as she was beginning to travel down the hill, and the second warning sign was obstructed by hedges and trees.
- On 15 August 2019, there is note of an email received regarding a complaint made to the Borough Councillor by a local farmer. The complaint concerned the ‘state of the brook’ with the farmer having reported that a cyclist had broken his collar bone. The note further says that there appeared to be a continuing problem with the Ford and the writer requested that it be reassessed, noting that they were aware of the signage already. Witness 9, Richard Brooks, is a local farmer and notes that he has brought the issue up with the Borough Councillor in 2019.
- The Council sent their response to this complaint to Instructing Solicitors on 26 October 2020. They noted that it was not the case of the council refusing to do anything but that necessary warning signs were present on site and road users are therefore aware of what to expect. They did note, however, that they would send a colleague from their maintenance team to inspect the location with regards to reports of excess algae.
- **Instructing Solicitors’ current position on the Defendant’s evidence**

Photographs

- The Defendant’s submission that the signs were not obscured by vegetation can be refuted by the photographs taken which clearly show the sign facing those travelling towards Ratby (sign B) being obscured by vegetation.
- Further, the Defendant’s photographs are each dated in November 2019, after all the index incidents took place. Clearly the hedges were cut back before the photographs were taken and so the signage is visible.

- The photograph shows sign B with the hedges cut back on 9 August 2019. One of the Claimants, KN, took the photograph of Sign B on 7 August 2019, which shows clear obstruction by vegetation. This means, therefore, that the Defendant seemingly cut the hedges within the two days between the date of the Claimant's photograph and the date of the Defendant's photograph.

- Section 58 defence

It is noted that while the Defendant raised a section 58 defence based on driven inspections only, they also indicate that they would do nothing about the moss or algae if discovered. Instructing Solicitors consider that this is not a defect case, but rather a case of danger by design or nuisance because the water, and therefore the moss and algae, exist perennially.

- Jill Howe, Defendant's surveyor's recommendations

Instructing Solicitors queried why the surveyor's recommendations were not carried out. The Defendant in their email of 16 June 2020 noted that the request was assessed by a manager within the highways team. They note that it was not practicable or appropriate for scarifying on the concrete as that would lead to debris and mud being washed out on to the ford from fields, causing an even greater hazard. They enclosed better quality photographs of the index locus.

- The recommendation of scarifying grooves into the concrete has been made by our expert engineer, Mr Blake and several lay witnesses. The rationale provided by the Defendant for not pursuing the work does not appear to be a reasonable one. Further, the cost of £15,000-£25,000 approximated by the expert engineer is seemingly not prohibitive.

- Sanders v Leicestershire County Council

The judgment transcript is seemingly unhelpful to the Claimants' positions. However, it is noted that, if anything, it is evidence that the Council has been on notice as to the dangers of the Ford for some time, and have chosen not to pursue any remedial action to try to alleviate the dangers of the Ford and reduce the incidences of people slipping and injuring themselves. Logically it would seem that

the Council should be under some level of duty considering the significant risk of injury that the Ford entails, and the number of people that have reported the Ford and / or suffered injury and loss as a result of slipping in the Ford.

- Further, the judgment took place in 2018, and therefore predates the inspection carried out by the Defendant's surveyor which recommended remedial action entailing scarifying of the concrete to make it less slippery.
- Instructing Solicitors sought the opinion of Barrister, Daniel Tobin at 12 King's Bench Walk. He is of the view that the merits of success on the case do not exceed 50%. In other words, success is not more likely than not. He concludes that the House of Lords' decision in Gorringe is just too great a legal barrier to these claims. Gorringe was the case that said Council have no duty to guard against transient defect such as overgrown vegetation, moss and algae. He considered another case Poole BC v. GN as a means of undermining the application of Gorringe to the fairly unusual facts of our cases. But having considered Poole BC he believes it only strengthens the defence of the council as there is nothing in there that would justify a departure from the application of that case despite the fact that the council clearly know of the danger presented to cyclists here and that it continues. The drainage arguments failed in the previous unsuccessful case of Ms Sanders and the provisions of the Highways Act are of not help – they only set out duties for the Council to guard against specific physical defects like potholes or ice. Dan is troubled by the inevitability of further cyclist injuries here. The Council seems intent not to scarify (as advised by their Inspector, Gill Howe in May 2019 or install drainage / alternative system as our Civil Engineer, Mr Blake, had suggested.
- It is against the above backdrop that the claims will need to be discontinued.

Kind regards

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