Neutral Citation Number: ([2015] EWHC 3330 (QB)

Case No: A23YP544

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
IN THE BIRMINGHAM COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2015

Before :

Mr Justice HADDON-CAVE

- -

Between :

Mr CRAIG ROLLINSON	**Claimant**
- and -	
DUDLEY METROPOLITAN BOROUGH COUNCIL	**Defendant**

- -
- -

Mark Thomas (instructed by **FCB Mandy Bowler LLP**) for the **Claimant/Respondent**
Jack McCracken (instructed by **Weightmans LLP**) for the **Defendant/Appellant**

Hearing dates: 23rd October 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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HADDON-CAVE

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Mr Justice Haddon-Cave:

Introduction

1. On the morning of 26th November 2012, the Respondent, Mr Craig Rollinson, slipped on a patch of moss on the footpath outside his home in Dudley. He brought a claim for damages for personal injury against the Appellant, Dudley Metropolitan Borough Council ("the Council"). He claimed that the Council owed a statutory duty to keep the footpath free from moss and algae under Section 41 of the Highways Act 1980 and was in breach of duty.

2. By his judgment dated 21st May 2015, HHJ Simon Brown QC held that the Council was liable to Mr Rollinson for breach of its duty under s.41 of the Highways Act 1980 for failing to remove the moss. The Council appeals against that decision.

3. This appeal raises an important question as to whether local councils are under a duty to keep all roads, pavements and footpaths throughout England and Wales free from moss and algae. The existence of such a duty would have serious logistical and budgetary implications for all councils.

The Facts

4. Mr Rollinson is 55 years old. He lives at 42 Lormond Road in Dudley. Lormond Road is in a leafy residential suburb of Dudley. Dudley is a large town in the West Midlands. 42 Lomond Road is one of four bungalows in the road which have been adapted for the elderly or infirm. Mr Rollinson suffers from a back condition and other health problems and is registered as disabled. He has lived at No. 42 since 2011.

5. Lomond Road is adjoined by a number of footpaths on which the public are permitted to pass and repass, without let or hindrance. It was accepted that the public have been permitted to pass and repass over these footpaths for a period exceeding 20 years. In these circumstances, it was common ground that both Lomond Road and the adjoining footpaths were "highways" and maintainable at public expense pursuant to s.36(2) of the Highways Act 1980.

6. On the morning of 26th November 2012, Mr Rollinson decided to go out. He shut his front door and began walking down a short footpath. The footpath broadened out to form the pavement by the road where his car was parked. The footpath had a slight downward incline. The surface of the path was bitumen. Photographs produced at the trial showed that there were intermittent areas or patches of moss or algae on the path and pavement area. Unfortunately, Mr Rollinson slipped and fell on a patch of what he referred to as "moss", injuring himself. Fortunately, Mr Rollinson only suffered bruises from which he soon recovered. He brought a claim against the Council as described. The agreed damages were in the region of £2,500.

The Decision under appeal

7. HHJ Simon Brown QC held that the Council owed a duty under s.41(1) of the Highways Act 1980 to use its resources to remove moss from the highways which constituted a danger to users of the highway and that the Council was in breach of its duty in this case

and liable in damages. The reasoning of the Judge on the central issue of the scope of the statutory duty was only briefly stated. After citing some of the relevant authorities, the Judge said:

> "7. In my judgment, where there is moss, a green plant with roots, albeit not true roots as in other plants [*sic*]. It puts down roots into the surface beneath it and adheres to it; it thus becomes part of the surface. Therefore, it became part of this particular roadway. It is in that category which has bonded with the road that Wilkie J [in *Thomas (infra)*] was referring to. Therefore, in my judgment, s.41 is engaged and the highway is to be maintained to keep the surface in repair."

8. The Judge also went on to dismiss the Council's allegation of contributory negligence on the part of Mr Rollinson as follows:

> "11. In my judgment, it would have been a counsel of perfection to expect a disabled person on a path which is substantially covered with moss, to try to find a particular route to avoid the moss on this particular occasion. In my judgment, I accept Mr Rollinson's evidence that it really was not feasible for him to do so. He could, he thought, have gone closer to a hedge, but that would have been prickly and there was no real alternative but to walk through the area of moss. Of course, it is patchy but it's very difficult to see from the photographs where those patches were. There certainly was not a clear pathway through from what I can see from the photographs and therefore, in my judgment, there has been no contributory negligence on his part. "

The Grounds of Appeal

9. The Council raised three grounds of appeal. First, the Council challenged the Judge's finding that its statutory duty under Section 41(1) of the Highways Act 1980 to keep the fabric of the highway in repair extended to removing moss and algae from the highway. Second, the Council contended that there was no evidence on which the Judge could find that the moss was rooted in the surface of the highway and the Judge illegitimately used his own personal knowledge of gardening to reach this conclusion. Third, the Council contended that the Judge erred in failing to make a finding of contributory negligence against Mr Rollinson.

The Legislation

10. Section 41 of the Highways Act 1980 provides as follows:

> "41. Duty to maintain highways maintainable at public expense
>
> (1) The authority who are for the time being the highway authority for a highway maintainable at public expense are under a duty……to maintain the highway."

11. The interpretation section of the Highways Act 1980, Section 329 provides ""maintenance" includes repair, and "maintain" and "maintainable" are to be construed accordingly". Section 58 of the Highways Act 1980 provides a limited defence to the absolute duty under s.41(1):

highways authority will not be liable if it proves that it took "… such care as is all the circumstances was reasonably required to secure that part of the highway to which the action relates was not dangerous for traffic."

12. The absolute duty under s.41(1) to keep the highway under repair is to be contrasted with the relative duty under s.41(1A) to ensure that snow or ice does not pose a danger to users of the highway. Following the decision in *Goodes* (*infra*), the following amendment to the Highways Act 1980 was made by s.111 of the Railways and Transport Safety Act 2003 specifically to cater for snow and ice:

> "41(1A) In particular, a highway authority are under a duty to ensure, so far as reasonably practicable, that safe passage along a highway is not endangered by snow or ice."

The Authorities

13. Section 41(1) has been the subject of extensive consideration by the authorities in a variety of contexts.

(a) Snow and ice

14. In *Goodes v. East Sussex County Council* [2000] 1 WLR 1356, the Respondent was injured in a car accident when the car he was driving skidded on black ice early in the morning. He claimed against the local council for breach of s.41(1) of the Highways Act 1980. The Supreme Court held that a highway authority's duty under s.41(1) to "maintain the highway" was an absolute duty to keep the fabric of the highway in such good repair was to render its physical condition safe for ordinary traffic to pass at all seasons of the year, but that duty did not extend to prevent the formation of ice or removing accumulations of snow on the road.

15. In his comprehensive analysis of the history of the highways legislation, Lord Hoffmann in *Goodes* explained that the precursor to s.41(1) of the Highways Act 1980, namely s.44(1) of the Highways Act 1959, was not a code which "sprang forth fully formed from the legislative head" but was built upon centuries of highways law. He explained that the historical duty to maintain the highway, whether imposed upon the inhabitants at large at common law or transferred to highway authorities by particular 19th Century statutes, was not considered to include a duty to remove ice or snow (*ibid*,p. 1363A). Special statutory provisions were directed to keeping the highways free of dirt, ice and snow, which demonstrated that the general duty to maintain the highways was confined to keeping the fabric of the highways in repair (*ibid*,p.1363E-F).

16. Lord Hoffman said that it was not easy to fathom why the draftsman had defined "maintain" to include "repair" but postulated that this may have been because the draftsman wanted to make it clear that the duty to maintain did not merely include maintaining a road in its existing condition but included putting it is an appropriate state of repair (p.1365G). He rejected the argument that the law of 1959 should 'move with the times' and be treated as including a duty to remove snow and ice. He said that it would be impossible to impose such an absolute duty:

> "No highway authority could avoid being from time to time in breach of its duty, which would apply not merely to fast carriage roads but to all highways,

> including pavements and footpaths. … There would be no question ordering the highway authority to comply with its duty. In the present case, the highway would have been properly maintained except for the period when the ice formed at dawn and when it melted an hour or two later." (p. 1366C-D)

17. Thus, somewhat counter-intuitively, although the statutory duty is expressed to be the duty to "maintain" which is defined by s.329(1) as including "repair", the true scope of the s.41(1) is properly understood as being limited to "repair" and "keeping in repair".

18. The House of Lords in *Goodes* approved of the minority decision of Lord Denning MR in *Haydon v. Kent County Council* [1978] QB 343 where Lord Denning MR conducted a similar historical analysis of the legislation and held that the duty under s.44(1) of the Highways Act 1959 did not include the duty to remove snow or ice.

(b) Hedges and undergrowth

19. In *Hereford and Worcester County Council v Newham* [1975] 1 W.L.R. 901, it was contended that three footpaths which had dense vegetation growing in and over their surfaces were out of repair. One path, known as footpath no. 19, had a seven foot high hawthorn hedge growing in its middle. The second known as, footpath no. 20, had thick undergrowth growing on it. A third was obstructed by a barbed wire fence. The Court of Appeal held that, in the particular circumstances of that case, 19 and 20 footpaths were out of repair. Cairns LJ explained the reasoning of the court as follows (at p. 911):

> "I consider that a highway can only be said to be out of repair if the surface of it is defective or disturbed in some way. Not every defect in the surface would constitute being out of repair —e.g. an icy road would not in my view be out of repair.
>
> In the present case the path which I feel least doubt about is the one that was obstructed only by a barbed wire fence. I cannot imagine anybody describing the presence of such a fence as a want of repair of the path....
>
> The other two paths have a substantial growth of vegetation in them. That vegetation no doubt constitutes an obstruction, but it must also interfere with the surface of the paths. If there had been merely branches and thorns overhanging from the sides of the footpaths I should not consider that they were out of repair, but I understand that a hawthorn hedge in one case and thick undergrowth in the other is actually rooted in the surface of the paths. With some hesitation I am of opinion that this did cause the paths to be out of repair." (emphasis added)

(c) Drains

20. In *Burnside v Emerson* [1968] 1 W.L.R. 1490 and *Mott MacDonald Ltd v Department of Transport* [2006] EWCA Civ 1089, claims were made in relation to incidents arising from pooled water on highways caused by drains blocked by silt, debris and/or vegetation. In both cases it was held that the s.41(1) duty related not only to the surface

of the road but to the whole structure or fabric of the highway in question, which included the drainage system. Diplock LJ in *Burnside* (*supra*) said:

> "Repair and maintenance thus includes providing an adequate system of drainage for the road and it was in this respect that the judge found that… the highway authority had failed in their duty to maintain the highway."

(d) Gravel and loose debris

21. In *Valentine v Transport for London* [2011] EWCA Civ 1358, the Respondent skidded on his motorbike on gravel and loose debris lying on the A4 and claimed against the relevant highway authority in respect of his injuries. The judge struck out the claim on the basis that the duty under s.41(1) to maintain did not extend to a duty to remove surface-lying material, obstructions or spillages, whether or not they resulted in danger. The Court of Appeal upheld the judge's decision. Hughes LJ said that the conclusion was inescapable because the law was clearly established by *Goodes* and *Haydon* (*supra)* and added:

> "8. …The duty imposed by s.41 is a duty to maintain the fabric of the road, including its substructure such as its drains. The removal of surface-lying material which creates a danger is not within the section."

22. Hughes LJ summarised the present legal position regarding highways in the following helpful and pellucid passage:

> "10. The reasons for the present legal position are set out very clearly in *Haydon* and in *Goodes* and it would not help to attempt here to re-state them in full. They boil down to a combination of the historical development of the duty to maintain highways and the extensive consequences of an absolute duty to remove all surface-lying material from all highways from motorways to country footpaths. In short, the original common law duty to maintain the highway was absolute but was limited to maintenance of the fabric of the road and did not extend to the removal of surface-lying material. The Highways Act 1959 and now the Act of 1980 do no more than give statutory effect to that same duty. When civil liability for damages for breach of the duty was first introduced by the Highways (Miscellaneous Provisions) Act 1961, it was realised that it ought not to extend to every breach of the absolute duty, but only to a breach which involved lack of reasonable care in all the circumstances. The statutory solution might well have been to take the opportunity to modify the general duty to maintain and to limit it to a duty to take reasonable care to do so. At the same time the duty could have been extended to cover the removal of surface-lying material. But, for whatever reason, that was not done. Instead, the statutory route taken was to impose

> civil liability but to create the statutory defence of reasonable care taken. Thus that statutory defence applies only where a Respondent seeks damages for breach of the duty. It does *not* limit the absolute duty of the highway authority, which remains absolutely bound, as a matter of public law, to maintain the highway without any qualification, and thus whether or not any lack of reasonable care is involved."

(e) Concrete

23. In *Thomas v Warwickshire County Council* [2011] EWHC 772 (QB), the Respondent came off his bicycle when his wheel hit a 25 mm lump of concrete stuck to the surface of the road. He suffered extensive head injuries for which he claimed against the highways authority. Wilkie J held that the s.41(1) duty was engaged because the lump of concrete had become firmly bonded to the road and had thereby become part of the fabric of the road or road surface. Wilkie J also conducted an extensive and helpful analysis of the highways authorities and explained his decision as follows:

> "74. In my judgment there is a difference in kind between, on the one hand, concrete which has hardened and bonded permanently to the surface of the road, unless and until removed by the action of a road mending gang, and, on the other, contamination of the road surface by surface lying contaminants such as ice, or oil, or mud or snow. In the former case the concrete has become part of the fabric of the road whereas in the latter it is merely lying on top of the surface of the road. The fact that the accretion to the fabric of the road surface was accidental rather than deliberate is irrelevant. The fact that, in the absence of specific intervention by a road mending gang, the change in the fabric caused by the bonding of the concrete to the previous road surface will be permanent, or at least long lasting, is, in my judgment, sufficient to bring it within s 41."

Summary of applicable principles

24. In my judgment, in summary, the following principles and themes may be derived from the above authorities:

(1) First, the s.41(1) duty to maintain the highway is properly to be understood as being to "repair" and "keep in repair" the highway.

(2) Second, the duty does not include a duty to remove surface-lying material, accretions, obstructions or spillages, whether or not dangerous.

(3) Third, the duty does include a duty to keep the drains and substructure of the highways clear and in good repair.

(4) Fourth, the question of whether or not a particular problem, defect, contaminant or accretion will render a road, pavement or pathway out of "repair" such as to engage s.41(1) will depend upon the precise nature thereof but relevant considerations will include (a) whether it is permanent or transient, (b) whether it amounts to, or comprises, material disturbance or damage to the road, pavement or pathway or the surface thereof, and (c) whether it can be said to have become part of the fabric of the road, pavement or pathway.

Analysis

Ground 1: Statutory Construction

25. Counsel for the Council, Mr McCracken, submitted that (i) the Judge wrongly held that the Council's duty to keep the fabric of the highway in repair extended, as a matter of statutory construction, to the removal of moss from the surface of the highway; (ii) in doing so, the Judge misdirected himself on the law and extended the scope of the duty to maintain the highway beyond its historical limits; (iii) the Judge failed to have any or any proper regard to the extensive consequences for the Council of the imposition of an absolute duty to keep the highway free from moss, which was plainly a factor relevant to the scope of the duty to maintain; (iv) the Judge placed too much weight on the fact that the moss had, to his knowledge, become "rooted" in the fabric of the highway as determining the scope of the duty to maintain; (v) the Judge placed too much weight on the fact that the Council already took measures to remove moss from the highway; and (vi) the Judge should have held that the removal of moss from the highway was analogous to the removal of ice from the highway, and that the duty to maintain did not as a matter of law extend to the activity.

26. Counsel for Mr Rollinson, Mr Thomas, sought to support the Judge's decision on the basis that it was consistent with *Hereford* and *Thomas Supra*, and the roots of the moss penetrated the fabric of the pathway and formed part of it.

27. In my judgement, however, none of the applicable principles or criteria enunciated in paragraph 24 above apply in the present case, viz.: (a) moss or algae is, by its nature, to be regarded as transient rather than permanent; (b) the presence of moss or algae cannot be said to amount to, or comprise, material 'disturbance or damage' to a road, pavement or pathway or the surface thereof; and (c) moss or algae cannot be said to have become part of the 'fabric' of the road, pavement or pathway.

28. In my view, the facts of *Newham* (*supra*) are plainly distinguishable from the present. The heavy vegetation in that case under consideration comprised mature hawthorn bushes which were rooted in the pathways causing them to be obstructed and impassable. The Court of Appeal decided on the facts, not without some hesitation, that these bushes caused the pathways to be "out of repair". In my judgement, patches of moss are quantitatively and qualitatively quite different from mature hawthorn bushes or heavy undergrowth and cannot, on any sensible construction, be said to render a pathway "out of repair". In the first place, moss does not cause the pathway to be obstructed and impassable. In the second place, whereas one can envisage mature bush roots causing

material physical damage to the substructure of a pathway, the same cannot be said of the vestigial root structure of moss.

29. In my view, the facts of *Thomas* (*supra*) are also plainly distinguishable from the present. In that case, as explained above, Wilkie J held that the lump of concrete had physically bonded to the road such that it could be said to have become part of the 'fabric' of the road and therefore s.41(1) was engaged. In my judgment, patches of moss or algae cannot sensibly be said to have physically 'bonded' to the pathway or to have become part of the 'fabric' of the pathway such as to render it "out of repair".

30. In summary, in my judgment, the reasoning of the Judge was flawed in at least four respects. First, he was wrong to find that because moss "puts down roots" it therefore "becomes part of the surface" or roadway. Second, he was wrong to find that there was any relevant comparison between concrete bonded to the highway and moss. Third, he was wrong to assume there was anything permanent about moss. Fourth, he was wrong to regard the fact that the Council had take steps to remove moss was relevant to the question of statutory construction.

31. Further, in my judgement, the Judge's conclusion that the scope of a highway authority's absolute duty under s.41 extended to the removal of "moss" is with respect absurd. The Judge failed to give any consideration to the question whether the imposition of a duty to prevent or remove moss from every highway and byway of the United Kingdom was something which Parliament could sensibly have had in mind. It rationally could not. The absolute nature of the s.41(1) duty plainly militates against such any conclusion. The performance of such a duty would be impossible. As Mr McCracken points out, moss is ubiquitous in this country. The Judge's decision, if allowed to stand, would lead to the absurd situation whereby a highway authority would be obliged to consider removing or preventing the propagation of every patch of moss or algae on every road, pavement and pathway in the country in order to avoid being in breach of its duty to "repair". This would not be practical or sensible, let alone affordable.

32. Lord Denning MR in *Haydon v. Kent County Council* [1978] QB 343 (at p. 360) pointing out the absurdity of imposing an absolute duty to remove snow and ice under s. 44 of the Highways Act 1959 (the precursor to s.41). The following words are equally apposite to the notion of imposing an absolute duty on highway authorities to remove moss:

> "Any other view could lead to the most extraordinary consequences. If section 44 meant that the highway authority were under a duty—an absolute duty—to remove snow and ice, they would be given an impossible task. Section 44 applies to all highways without exception. It applies not only to major roads, but also to minor roads. It applies to main roads and country lanes. It applies to by-ways, bridle paths, and foot-paths. It applies to all such ways, no matter whether they are little used or much used. Every single one of them is likely to become slippery and dangerous when there is snow and frost. Every one of them may have "its own special dangers in times of snow and frost "—to use the judge's words. Every one of them must be made safe—without any exception—if

> section 44 is given the wide meaning contended for. The section gives no priority to main roads over country lanes; or to much-used footpaths over little-used footpaths. If the highway authority were bound to clear all those of snow and ice whenever they become slippery or dangerous, they would require an army of men with modem machines and tools stationed at innumerable *posts* and moving forward in formation whenever there was a severe frost."

33. For these reasons, in my judgement, the Judge erred in law when he held that, as a matter of statutory construction, the Council's s.41 duty to maintain the highway extended to taking steps to prevent the formation of "moss" on the surface of the highway, and removing "moss" from the surface of the highway once formed.

34. In view of my conclusion on Ground 1 which is determinative of this appeal, I shall deal with Grounds 2 and 3 only briefly.

Ground 2: Evidence

35. Counsel for the Council, Mr McCracken, submitted that (i) the Judge inappropriately drew on his personal knowledge regarding the process by which moss might become attached or rooted to the surface of the highway; (ii) he did so in the absence of a pleaded case from Mr Rollinson that the moss had in fact become rooted in the highway or any expert evidence on this point; (iii) the process by which moss does or does not become attached to the surface on which it grows is outside the common knowledge and is properly a matter for expert evidence; (iv) the Judge had the right to use his personal knowledge within reasonable limits, but for him to draw on such specific knowledge about the growth of moss, which was in effect knowledge in the field of botany, was impermissible; (v) there was insufficient evidence on which he could have properly inferred that the moss had become rooted in the highway; (vi) In all the circumstances the Learned Judge made a finding of fact that no reasonable judge properly directed could have made; and (vii) the Judge should have held that there was no evidence on which to find that the moss was rooted in the highway, and that the moss was a mere surface lying contaminant in respect of which the Council owed no duty under Section 41(1) of the Highways Act 1980, and dismissed the claim.

36. Counsel for Mr Rollinson, Mr Thomas, submitted that the Judge was entitled to use his own knowledge; and, in any event, it was obvious that moss had roots.

37. In the course of argument, HHJ Simon Brown QC displayed a knowledge of horticulture or botany. He told Counsel that, whereas lichen was "epithetic" and took its moisture from the air, moss had roots and was not "epithetic" and moss roots had to go into the "substrata" (transcript, p. 25). When Mr McCracken protested there was no evidence before the court as to any of this, the Judge said he could 'look it up' on the computer.

38. A judge is entitled to use his personal knowledge, within reasonable limits, of matters which are within the common knowledge *(Reynolds v Llanelly Associated Tinplate Co Ltd* [1948] 1 All ER 140). I doubt whether the fact that moss, algae and lichen can be categorized as "epithetic" is within common knowledge (not least because the word "epithetic" is not in common usage in this context). However, the fact that moss has some sort of shallow root structure is probably within common knowledge of most

people and is therefore something to which the Judge could have regard from his own knowledge. However, as presaged above, the fact that moss has roots which may have gripped the path surface does not mean that the moss had become 'part of the fabric' of the footpath or pavement, still less become a permanent part of it. His conclusion that it did is puzzling given his own acknowledgement during argument that moss can be removed by a 'power-hose'.

Ground 3: Contributory negligence

39. Counsel for the Council, Mr McCracken, submitted that the Judge was plainly wrong not to make a finding of contributory negligence against Mr Rollinson in circumstances where (i) Mr Rollinson accepted that he was aware of the presence of the moss; (ii) the photographs before the Learned Judge demonstrated that there was room for Mr Rollinson to avoid walking on the moss; (iii) Mr Rollinson's decision to walk on the moss was therefore seriously blameworthy and of major causative significance in the accident; (iv) it followed from that that an apportionment of liability was clearly appropriate.

40. Counsel for Mr Rollinson, Mr Thomas, submitted that the Judge's decision was justified, or not obviously wrong, and the court should not interfere with it save unless it was outside the ambit of reasonable disagreement (*c.f. Jackson v. Murray* [2015] UKSC 5).

41. In my judgement, there is force in this third ground of appeal. In the course of Mr McCracken's cross-examination of Mr Rollinson, Mr Rollinson admitted both that before the accident he was aware of the moss and considered the moss 'dangerous'. When asked by Mr McCracken why he was nevertheless walking on the moss, Mr Rollinson said there was no room to avoid it. However, as Mr McCracken pointed out, it is clear from the photographs that on both sides of the path there were clear strips where people habitually walked and had worn away the moss. The Judge suggested that prickly bushes would have impeded these routes, but it is difficult to see any justification for this assertion from the photographs.

42. An appeal court is reluctant to interfere with a judge's finding as to contributory negligence. However, in my judgement, the decision of the judge in this case was plainly flawed and wrong. In my view, he should have held that Mr Rollinson's personal responsibility for the accident was significant, and made an apportionment of 50% for contributory negligence.

CONCLUSION

43. In conclusion, I find for the Council on the primary ground of Appeal, Ground 1 which is determinative of this apeal. The Judge erred in holding that the Council had a duty under s.41(1) of the Highways Act 1980 to prevent or remove moss on the surface of the highway. For the reasons set above, there is plainly no such duty. The appeal is allowed.

44. Whilst Mr Rollinson's pleaded case was that he slipped on "moss and algae", in evidence he only referred to slipping on "moss". The Judge dealt with the case on the basis of moss alone and did not mention algae. As pointed out above, however, the Judge did mention "lichen" in the course argument and remarked that the result might have been different if Mr Rollinson had slipped on lichen rather than moss because lichen was not "epithetic" (see transcript, p. 25). For the avoidance of doubt, the present judgment

allowing this appeal should be taken as applying equally to moss, algae and lichen on the highway and to be stating clearly that there is no duty under s.41(1) of the Highways Act 1980 to ensure that highways are clear of moss, algae, lichen or similar vegetation.

Postcript

45. The Judge published three articles about this case in the July, August and September 2015 editions of the New Law Journal entitled *"Mind the Slips and Trips (Pt 1-3)"*. In my view, it is inappropriate for a judge to publish articles in relation to his or her own judgments whilst they are under appeal.