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CHAMBERS

# **Ways, Highways, & Highways Maintainable at Public Expense:- The Differences and Defences**

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## 1. Introduction

1.1 This talk (and handout) aims to ensure that those defending tripping claims in public places appreciate:-

(1.1.1) The difference between ways (i.e. routes which are not highways), highways, and highways maintainable at public expense; and

(1.1.2) Why understanding the difference matters.

1.2 This talk is given to insurers/defendant representatives. I give similar talks to mixed audiences of claimant/defendant representatives, and I have left in the notes some of the tips which I give to claimants:- it will help you to see what the other side might be thinking.

## 2. The relevant duties

### 2.1 Occupiers

(2.1.2) By s.2 of the Occupiers' Liability Act 1957, "*(1) An occupier of premises owes the same duty, the 'common duty of care', to all his visitors... (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*"

### 2.2 Highway authorities

(2.2.1) Highways Act 1980 s.41:- Highway authorities owe a duty to maintain highways maintainable at public expense for which they are responsible.

(2.2.2) A claimant must prove:-

- (i) that the highway was dangerous in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;
- (ii) that the dangerous condition was created by a failure to maintain or repair; and
- (iii) that the injury resulted from such failure.

(Mills v. Barnsley MBC [1992] PIQR P291).

(2.2.3) Highways Act 1980 s.58:- In the event that a claim is based on a highway which is actionably out of repair, the highway authority have a defence if they can prove that "*they took such care in all the circumstances as was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.*"

(2.2.4) In practice highway authorities seek to make out that defence by inspecting the relevant highway regularly and remedying any defects found. There have been some interesting developments on these issues recently (e.g. Wilkinson v. City of York Council [2011] EWCA Civ 207; AC & DC v TR v Devon County Council [2012] EWHC 796 (QB); [2012] All ER (D) 26 (Apr) (in the latter of which the author represented the defendant/Part 20 claimant)), but these issues fall outside the scope of this talk (questions are welcome on this if you're interested).

(2.2.5) Summarising the above:- A claimant has to prove a dangerous defect which caused the accident and the burden of proof then moves to the defendant to show that it took such care as was reasonable (but the accident happened in any event).

2.3 There are other potential duties owed (including nuisance, Landlord & Tenant Act, Defective premises Act, Workplace Regulations), but this talk is concentrating on the main duties which require consideration in respect of the public on highways i.e. under the Occupiers' Liability Act 1957 and the Highways Act 1980.

### 3. What is a highway?

3.1 You'd think that this part would be easy...

3.2 Statutory definition:-

(3.2.1) The whole of s.328 of Highways Act 1980 is given over to "*Meaning of "Highway"*". What we are told is that "highway"

(for the purposes of the Act) means the whole or a part of a highway other than a ferry or waterway, and includes bridges and tunnels which the highway passes over/ through.

(3.2.2) In other words, the "Highways Act" does not tell us what a "highway" is.

### 3.3 Common law definition:-

(3.3.1) A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. (Halsbury's Laws 21[1]).

(3.3.2) If you are that type of person, you can goad your opponent by referring to this as the "*jus spatiandi*".

### 3.4 Trap:- The path (or whatever) that you are looking at might not be a highway at all.

Ley v. Devon County Council (unreported, Dobbs J sitting in Truro, 28/2/07), Lawtel reference AC0115001.

*C lived in a flat which was part of a complex built by Exeter City Council. She was injured when she tripped on a dangerous defect on a path which was near to the flat. There was a "residents only" sign on the path. At first instance the judge determined that the sign was to prevent non-residents from parking in the area, that the path was not restricted as to who could use it, and that the path was therefore a highway maintainable at public expense. Alternatively, he said, the path was deemed to have been dedicated as a highway by virtue of public use for 20 years (and there was no evidence to rebut the dedication).*

*On appeal it was held that the path was clearly private property (on all the evidence, including the sign). Even if it could be inferred that there had been some use by the public over 20 years, the sign was sufficiently detailed to negative the dedication. Thus there was not a highway at all.*

3.5 Trap:- There is not a highway if there is no regular “way”, rather people pass and repass where they like.

3.6 Note that highways can be created by 2 methods:-

(3.6.1) Statute. There is some complexity here which need not trouble us, concerning the various methods to create a highway:- by construction, agreement, declaration, or order.

(3.6.2) Common law doctrine of dedication and acceptance.

(i) As for acceptance, use by the public is enough, and attention therefore usually focuses on dedication...

(ii) Dedication:- Whilst this can be express, it is usually inferred from conduct or the nature of the locality.

(a) *Dedication presumed by statute*:- Since the Rights of Way Act 1932 (repealed), public user for 20 years gives rise to rebuttable presumption that a way is a highway. This is now governed by s.31 of the Highways Act 1980.

(b) *Common law dedication*:- At common law, whether or not a highway has been dedicated is a question of fact to be determined on all the evidence. Use by the public is evidence, but is not conclusive. Duration of use is relevant but not conclusive. If all that is known about a way is that the public use it, all the evidence might point one way leading to the drawing of an inference (which could be rebutted). Note, however, that the inference could be drawn from a way serving an obvious purpose:- a way between two places is more likely to attract an inference of dedication than a way leading nowhere.

Land between the front of a shop and the highway creates problems:- if the use by the public is no more than a deviation from the highway, it carries little weight when trying to draw an inference of dedication. That is

particularly true when a shop has been built deliberately leaving land free at the front (for parking, perhaps), and the shopkeeper cannot exclude the public without excluding his customers.

- 3.7 Trick:- Parties often worry about inability to prove 20 years' use. Whilst it is sensible to try to prove such period of use to achieve a finding of common law dedication, it is not essential to do so. As noted above, if all that is known is that the public use the way, dedication might be inferred (accepted by the use), and the fact that a way is a highway is thereby established:- there is no need to prove 20 years' use. That said, since common law dedication and acceptance turn on all the facts (which will not be known at the outset of a case), proving the 20 years' use is a good idea for those who can prove this (and who want to). A hidden advantage of relying on common law dedication/ acceptance is that if all that is known is that the way is used by the public, that might well shift the burden to the other party to establish that it is not a highway. Whether or not this strategy is appropriate will turn on all of the circumstances (that being the relevant consideration for inferred dedication). A party faced with such argument who wanted to contend that the way was not a highway would want to show that usage could be explained by some reason other than dedication. If you are looking at common law dedication, I prefer Sauvain Q.C.'s *Highway Law* (4<sup>th</sup> Ed. chapter 2) to Halsbury's Laws.
- 3.8 Trap:- Absent a satisfactory explanation, repair of a way by public expense (or other work on/ use of the land by the highway authority) is strong evidence that it is a public way (and therefore a highway). If a highway authority wants to repair a way of uncertain provenance, they might want to budget to include it in their inspection regime to avoid creating a trap for themselves. [NOTE:- The risk identified here is of a highway authority unwittingly creating evidence that a way is a public way, and hence a highway; they run the additional risk of a court

inferring that the highway is maintainable at public expense - see paragraph 4.4 below.]

- 3.9 Trick/ trap:- When the issue in the case is whether or not a highway has been dedicated/ accepted, parties often fail to properly define the issues for determination. Claimants usually ought to take steps to ensure that they have done this, but defendants can be better served by letting a claim proceed without clarity as to the issues (although that strategy carries risk, and might well run contrary to the ethos of a public body defendant). If a defendant wants to prove that a way is a highway to spring the McGeown trap (see below), they *must* make sure that the issue is properly defined. It can be best to do that subtly on a pleading.
- 3.10 The question of which part of what might broadly be called 'the highway' is 'the highway properly so called' is omitted from this talk because of time constraints. Watch out for:- drains which serve the highway are part of the highway (useful in flooding claims); the highway can be wider than the metalled track; fences etc can define the width of highways. I've not included the "usual" cases in this talk (all of which are referred to in texts on highways). A case which sometimes passes beneath the radar of lawyers dealing with highway claims and is therefore worth mentioning is Kind v. Newcastle-upon-Tyne Council unreported, QBD, 31/7/01:- the verges of a highway do not have to be maintained to the same standard as the metalled carriageway.
- 3.11 If the accident location is not a highway, the appropriate cause of action will turn on the circumstances of the case:- negligence, nuisance, Occupiers' Liability Acts, Landlord & Tenant Act, Defective Premises Act, contract, Workplace Regs, Construction Regs etc.

#### 4. What is a highway maintainable at public expense?

4.1 The Highways Act 1980 is once again unhelpful. It tells us:-

- Definition in s.329 (1):- *“highway maintainable at public expense” means a highway which by virtue of section 36 above or of any other enactment... is a highway which for the purposes of this Act is a highway maintainable at public expense.”*
- Section 36 gives 2 broad types of highways maintainable at public expense:-
  - (1) *“All such highways as immediately before the commencement of this Act were highways maintainable at public expense for the purposes of the Highways Act 1959 continue to be so maintainable...”*
  - (2) Subject to some unusual circumstances, a list is given of categories of highway which are treated as maintainable at public expense.

#### The first s.36 type:- highways which were maintainable at public expense before commencement of the 1980 Act

4.2 This type leads us back to the Highways Act 1959. It provided:-

- Section 38(1) *“After the commencement of this Act no duty with respect to the maintenance of highways shall lie on the inhabitants at large of any area.”*
- Section 38(2) *“... the following highways shall for the purpose of this Act be highways maintainable at public expense, that is to say:-
  - (a) a highway which immediately before the commencement of this Act was maintainable by the inhabitants at large of any area or maintainable by a highway authority...”*

Thus if a highway was previously maintainable by the inhabitants at large or by a highway authority, it became a highway maintainable at the public expense.



4.3 That in turn leads us back to the question of whether a highway was maintainable by the inhabitants at large before the 1959 Act. To address that we need to look back to 1835:-

(4.3.1) Before 1835, the legal position was that the duty to repair highways fell upon the inhabitants of the parish in which the highway lay unless it could be shown that the duty fell on someone else (see Halsbury's Laws 21[13] and 21[247] for references).

(4.3.2) The Highways Act 1835 (s.23) provided that new roads would not be the responsibility of the inhabitants unless a formal adoption procedure was followed. The National Parks and Access to the Countryside Act 1949 extended that idea to public paths. Thus (subject to the below):-

- No one was liable to repair relevant roads built after 1835 unless the formal adoption procedure had been followed.
- No one was liable to repair public paths built after 1949 unless the formal adoption procedure had been followed.
- This "formal adoption procedure" now comes from various statutes, but the essential requirement is of a dedication and acceptance governed by one of the relevant statutes.

(4.3.3) So there are roads built between 1835 and 1959 and public paths built between 1949 and 1959 :-

- (a) which are maintainable at public expense (because the adoption procedure was followed); or
- (b) which no-one is liable to repair (because the adoption procedure was not followed).
- (c) [Note too that there is a complexity in respect of "private streets" which falls outside the scope of this talk, but is governed by Part XI of the Highways Act 1980].

4.4 The caveat to the above is that even a highway built after 1835 which was not formally adopted can be presumed to have been repairable by the inhabitants at large where the facts support such contention. Leigh

Urban District Council v. King [1901]1 QB 747 concerned a road laid out in 1842 (so after the 1835 statute provided that new roads did not become maintainable by the inhabitants at large unless formally adopted). There was no formal adoption of the road, but there were the following facts:- (a) the new road replaced an old one which was maintainable by the inhabitants at large; (b) there was a resolution to do with the road, just not in the proper format; (c) the local authority had repaired the road on one occasion. Those facts led to a finding that the road was maintainable by the inhabitants at large (although one judge seems to have dispensed with the formal adoption in such circumstances and the other said that the facts proved the formal adoption - I consider the latter view to be correct). This is obviously a little obscure, but can be used to argue for an inference that a highway is maintainable at public expense (if the facts support that) in the same way that an inference of dedication might be made on all the facts (see above). Note that judges do not tend to like the idea that there are highways which no-one is liable to repair, and they tend to try to avoid such a finding.

The second s.36 type:- the "magic list"

4.5 This list is important. A way which looks like a highway (and which has not been formally adopted) is often a highway maintainable at public expense not because it was built before 1835, but rather because it falls within one or another of the s.36(2) categories. The categories are:-

- (a) *"a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority"*;
- (b) highways constructed by a council in their own area pursuant to Housing Act powers;
- (c) a highway that is a trunk road or special road;
- (d-f) footpaths/bridleways created in consequence of various orders;

[Note that it is on occasion necessary to look back to the "magic list" in the 1959 Highways Act s.38, although that list is in broadly similar terms.]

4.6 The most important of those categories is s.36(2)(a). If the highway was constructed by a highway authority, unless they built it for someone else (who is not a highway authority), it is maintainable at public expense. This has the potential to catch highway authorities out:- many of them did not appreciate that when they built highways under Housing Act powers, they were creating highways maintainable at public expense subject to the onerous Highways Act 1980 s.41 duty. If such a highway has subsequently passed into private ownership (e.g. a social housing entity which took over housing built by a local authority), the way does not stop being highway maintainable at public expense merely because of the transfer. It might, therefore, be necessary in such situation for a non-highway authority defendant to refer the claimant back to a highway authority. Take care when doing so:- you do not want to find yourself positively encouraging joinder of another party if it increases your costs exposure. You also need to watch out for any indemnity clause in the agreement under which the highway maintainable at public expense passed to the non-highway authority defendant. Such indemnity clause will need to be considered very carefully. It is usually the case in such circumstances that the parties have not appreciated that a highway maintainable at public expense is changing hands, and the indemnity clause might not have been drafted widely enough to catch such situation. [If it has, the insured has a problem which it needs to resolve for the future – it is legally responsible for a highway authority’s failure to carry out its statutory duty, and cannot allow that to remain the position.]

4.7 Section 36(2)(a) is not time limited. On the face of it, if the highway authority ever built the highway, it is maintainable at public expense. Many highways are likely to be caught by this provision. There are some arguments which highway authorities might try to use to avoid the consequences of this provision:-

- (i) It could be argued that s.36(2)(a) is time-limited, even though it does not appear to be on its face. The argument could be constructed by reference to s.38(2)(b) of the Highways Act 1959

which provided (in its “magic list”) that highways were maintainable at public expense if they were “*constructed by a highway authority after the commencement of this Act, otherwise than on behalf of some other person not being a highway authority*”. The 1959 Act provided that the highway had to have been constructed after commencement. It could be argued that the 1980 Act cannot have been intended to render highways which were not rendered maintainable at public expense by the 1959 Act so maintainable. There are obvious problems with that argument.

- (ii) It has been argued that if a highway is built by a local authority *in its capacity as local authority and not in its capacity as highway authority*, that does not count as a highway constructed by a highway authority. See Gulliksen v. Pembrokeshire County Council [2002]3 WLR 1072 (facts summarised below). The Court of Appeal did not need to determine the answer to this issue in that case, but there is *obiter* comment that this argument is a dud:-

*“By s.2(1) and (3) of the Local Government Act 1972 a county council, like every other local authority, is a single body corporate. A local authority may well have to take care from time to time (for example when considering whether to grant itself planning permission) to keep its various capacities distinct, but it is one body in law...”* (per Sedley LJ at [18]).

Note that this comment is *obiter*, and it differs from the ratio of Neuberger J who heard the first appeal (although Neuberger himself differed from HHJ Hickinbottom in this conclusion).

4.8 In short, therefore, if the local/ highway authority ever built the highway, it is probably maintainable at public expense, although there are arguments against that.

4.9 Note that it is possible for highway authorities to adopt highways by agreement such that they become maintainable in public expense. Floyd

v. Redcar & Cleveland Borough Council (unreported, CA, 5/8/09) concerned just such a highway. The dispute in that case concerned whether or not the location of the claimant's accident was adopted pursuant to a s.38 agreement when the location of the accident looked somewhat different from the footpath which was envisaged to be put there at the time of the agreement.

4.10 I look forward to a case in which a public authority has maintained (but not built) a way and the way has then passed into private hands, thereby (1) handing the defendant the potential argument that the path was a public way (so that the defendant can run the McGeown defence – see 8.1 below); but also potentially (2) giving the claimant the argument that the way was a public way *maintainable at public expense*. My suspicion is that in such a case (which would have to turn on its facts) a defendant's best bet would be to stay quiet about the point and simply prove dedication and acceptance in the usual way.

4.11 For the sake of completeness, note that highways maintainable at public expense can be created by various other statutes, although issues concerning personal injury practitioners arise infrequently when a highway has been created by such method (since it is usually common ground that the highway is maintainable at public expense).

## 5. Identifying highways maintainable at public expense

5.1 Councils are obliged to keep a list of streets within their area which are highways maintainable at public expense (Highways Act 1980 s.36(6)).

5.2 Trap:- The list kept by reason of the s.36(6) obligation is not definitive even though it is often called "the definitive list" (similarly the "definitive map" under the Wildlife and Countryside Act 1981 is not truly definitive for our purposes). If the relevant highway is on the list, a claimant (or other non-Highway Authority party) can rest easy. If it is not on the list, a non-Highway Authority party should not necessarily give up and a

highway authority defendant should not assume that it will win. The highway might still be a highway maintainable at public expense if it complies with the provisions set out above that turn highways into highways maintainable at public expense.

(5.2.1) Gulliksen v. Pembrokeshire County Council [2002]3 WLR 1072

*C was walking on a path through a council estate and was injured when he tripped on a dangerous defect in the path. The Court of Appeal held that since no local authority could provide housing except under statutory authority (Housing Act powers), it was to be taken that the paths which were part of the council estate were constructed pursuant to Housing Act powers and by operation of the Highways Act the path was therefore a highway maintainable at public expense.*

(5.2.2) This is an excellent example of a trap for the unwary:- the path was not on the "definitive list", but was nonetheless a highway maintainable at public expense because of the operation of the Highways Acts. Note that there are practitioner texts which say that if a way is not on the map/list, it is not a highway maintainable at public expense:- that is not correct.

(5.2.3) Highway authorities need to be very aware of this:- there might be highways maintainable at public expense in their area which they are ignoring. The Gulliksen trap has now been closed by most if not all highway authorities in respect of highways which they still 'own', but there is a category of highways maintainable at public expense which passed to non-Highway Authority bodies where the position is more likely to have been left unclear.

5.3 To draw together paragraphs 4.7(ii) and 5.2.1 above, note what happened in Gulliksen:- The parties had missed the point that the path was built pursuant to Housing Act powers and was therefore a highway maintainable at public expense. They had focussed their attention on s.36(2)(a) as quoted above, and the Council were arguing that whilst they had built the path, they had not built it in their capacity as highway

authority, rather it was built in their capacity as local authority such that they did not fall within s.36(2)(a). The Court of Appeal did not need to decide this point (basing their decision on the Housing Act point instead), but commented *obiter* that the argument was not good.

## 6. Asking the right questions in the right order

6.1 Beware of misinterpreting Gulliksen and Ley. Any suggestion that they constituted a radical shift first in favour of claimants (Gulliksen) and then back in favour of defendants (Ley) is wrong. The two cases are decided on, effectively first principles, but different first principles:-

(6.1.1) In Gulliksen there was no question that the path was a highway. It was built pursuant to s.36(2)(b) of the 1980 Act and was thus a highway maintainable at public expense. All this case does is make clear that s.36 means what it says.

(6.1.2) In Ley the path was not a highway, so no question of it being a highway maintainable at public expense arose.

6.2 The first question is "is it a highway?" If that question is answered in the affirmative, it is necessary to ask "is the highway maintainable at public expense?"

## 7. Who/ what is the highway authority?

7.1 This one is pretty easy. See s.1 of the Highways Act 1980.

## 8. Highways not maintainable at public expense

8.1 Trap/ trick:- You cannot win a claim against the occupier of a highway on the basis of the Occupiers' Liability Act 1957.

McGeown v. Northern Ireland Housing Executive [1995]1 AC 233 (HL).

*C lived on a housing estate owned by the defendant housing authority. She tripped in a hole on a path through the estate. She sued the housing authority under the Occupiers' Liability Act 1957. She lost on the basis that a person using a public right of way did so by right and could not, therefore, be a visitor/ licensee.*

Whilst it has been suggested that such claims might succeed under the Occupiers' Liability Act 1984, s.1(7) of that Act seems to me to militate against that conclusion.

8.2 McGeown re-stated the rule in Gautret v. Egerton (1867) L.R. 2 C.P. 371:-  
*"It may be the duty of the Defendants to abstain from doing any act which may be dangerous to persons coming upon the land by their invitation or permission... But, what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not."* [See further below on the distinction between doing something (misfeasance) and doing nothing (nonfeasance).]

8.3 An example of the large trap for the unwary created by McGeown is Young (now Phillips) v. Merthyr Tydfil CBC & another [2009] PIQR P23 (in which the author represented the local authority).

*The local authority decommissioned a coal mine on their land. During that process, a charity suggested creating a park where the mine once was, and it was agreed that the charity would create such a park. They did so and put a path network through the park, including a bridge. The bridge had been open for public use since 2001. C crossed the bridge less than 4 years later and fell on a dangerous defect which had arisen where the non-slip surface of the bridge had eroded. The claim was originally put on the basis that the path was a highway maintainable at public expense. Following a summary judgment application (because there was no evidence that the path was a highway maintainable at public expense) C changed tack and amended the claim to assert that the bridge was not a highway at all.*

*Held:- (1) the local authority had conducted themselves so as to lead the public to infer that they had a right of passage:- there was dedication. The way had been accepted (through use) such that the bridge was a highway. The fact that uninterrupted public user was for less than 4 years*



*did not prevent common law dedication and acceptance; (2) That being so, C had no good claims in negligence or the OLA 1957 following McGeown, since the erosion of the bridge constituted nonfeasance rather than misfeasance. McGeown was described as an “unlaid ghost” of the old nonfeasance principle with regard to highways. The result (judgment for the Defendants) was described as “harsh”, but the legal position was “quite clear”.*

8.4 The point was decided the same way in Huggett v. Cardiff Council unreported, Cardiff County Court, 13/12/11 (again the author represented the highway authority).

8.5 Another example is seen in Crowther v. Sonoco Cores & Paper (unreported, Bradford County Court 7/7/09). A cyclist on a track through private land claimed under the Occupiers’ Liability Acts, but the landowner successfully argued that the path was highway on the basis of common law dedication and acceptance. Since the cyclist could not prove misfeasance, he fell into the Gautret and McGeown trap.

8.6 An issue which might require consideration is who is liable for highways which are not maintainable at the public expense. The main concern here is who is liable to repair by reason of service of a notice upon them (rather than who might be responsible in an injury claim). To give a flavour:-

(8.6.1) Individuals (or bodies politic/ corporate - referred to hereafter as “individuals” for ease) can be liable to repair, but note that that does not mean that a claim for damages in respect of breach can necessarily be brought. Halsbury’s Laws (at 21[259]) describes this as an “open question”.

(8.6.2) Individual liable for highway by tenure:- This is achieved by showing that the individual has repaired the way for a number of years and therefore an assumption of immemorial usage arises

(unless the contrary is proved, and subject to some exceptions).  
See Halsbury's Laws 21[262].

(8.6.3) Liability can also attach to an individual by prescription (acquisition by long use over a servient tenement without the servient owner's permission). See Halsbury's Laws 21[261].

(8.6.4) Liability can attach by inclosure (a highway crosses land and the public have acquired a right to deviate onto the land when the highway is impassable; if the landowner then incloses his land, he becomes liable to maintain the highway) - see Halsbury's Laws 21[266].

(8.6.5) Liability can also be imposed by statute. See Halsbury's Laws 21[260].

8.7 As practical rules of thumb:-

(8.7.1) If the land is registered, claimant lawyers should approach the owner. They might refer you to a tenant, but at least you are going in the right direction.

(8.7.2) If the land is unregistered, it can be hard to find any "owner" (although local knowledge might help). In such circumstances a claim might well face real problems.

(8.7.3) Defendants ought to consider a "nonfeasance" defence based on Gautret v. Egerton and McGeown.

(8.7.4) Defendants should be careful with proof on the above point. In Sinclair v. Kearsley and Kearsley [2010] EWCA Civ 112 the Court of Appeal recently re-stated the proposition that it is for the party asserting the existence of a highway to prove its existence. Parties have to be active in running this defence. They cannot simply hope that their opponent will fail to prove that a way is not a highway (for the relevant type of traffic). This can be dealt with by crafty pleading (depending on the content of the Particulars of Claim; if a claimant alleges that a way is a highway (or highway maintainable at public expense) a defendant can simply admit that the way is highway (whilst perhaps denying that it is maintainable

at public expense). Take care with this strategy:- if the PoC also alleges negligence, that can be sufficient for a judge to say that the pleading is alleging 'in the alternative' that the way is not a highway (since otherwise there is no negligence liability absent misfeasance).

(8.7.5) In appropriate circumstances a claimant might wish to try the argument that (wait for it) the individual is liable to repair by reason of tenure, prescription or inclosure, and there has never been an exemption from liability to individuals in respect of nonfeasance where the repair obligation arose in those three ways. If you're into this sort of thing, that will be an interesting case if it ever comes up.

(8.7.6) Claimants will want to be looking to find misfeasance rather than nonfeasance. A negligently carried out previous repair might be sufficient to avoid the lack of liability in nonfeasance cases.

## 9. A checklist

9.1 I don't claim that this is a comprehensive checklist for all claims which look like they might have a highway element involved in them, but I hope that it is a useful reference tool for insurers of social housing entities having to consider such issues:-

(9.1.1) Did the accident happen? [Check the medical notes; look for suspicious clusters of accidents (more than one family member? Claims from several Facebook friends?). Deal with this issue in the normal way.]

(9.1.2) Is there a "danger" which caused the accident? Courts tend to apply a different standard of "danger" in s.41 cases, domestic occupier cases and professional occupier cases, so you might need to go on through the checklist and come back to this issue.

(9.1.3) Is the location of the accident a highway? I.e. is there a public right to pass over a defined route? Has there been dedication and acceptance? If so, consider a McGeown defence.

(9.1.4) Is the location a highway maintainable at public expense? If so, should the claim be redirected to the highway authority? Is there an indemnity clause in the agreement under which the highway authority can pass liability to the insured? (if so, what's the point of passing the claim to the HA? Quite what does the indemnity clause say? Consider the fact that the landowner might well not be liable, the HA only being liable as a result of a failure to appreciate the need to include the highway in its inspection/repair system.)

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# Ways, Highways, and Highways Maintainable at Public Expense: Flow chart

