PERSONAL INJURY BRIEFING

HIGHWAY CLAIMS

November 2020

CONTENTS

INTRODUCTION

from LAURA JOHNSON
Head of the Personal Injury Group

The Personal Injury team at 1 Chancery Lane bring you an early Christmas gift to usher out 2020: The Highways Compendium. A high point we hope as a difficult year draws to a close.

We recognise that normally our busy clients appreciate briefings that are just that: brief and informative. We also know however that from time to time it can be useful to receive a comprehensive document to save to your Resources folder that you can turn to when a knotty issue of law arises.

Highways law is incredibly complex and is an important part of our practice at 1 Chancery Lane. Members of Chambers have acted in many reported cases on highways law including the leading cases of *Sumner v Colborne* [2019] QB 430, *Foulds v Devon County Council* [2015] 1 WLUK 71, *AC v Devon County Council* [2014] RTR 1, *Mott MacDonald v Department of Transport* [2006] 1 WLR 3356, *Sandhar v Department of Transport* [2005] 1 WLR 1632 and *Goodes v East Sussex County Council* [2000] 1 WLR 1356. We regularly act for highways authorities and claimants in cases in the High Court and County Courts and also offer training to firms and teams who specialise in this work.

As a result we have produced a booklet covering many of the issues we encounter regularly in practice, from articles reviewing the key statutory provisions through to those that tackle some of the knottier problems of road design, signage and claims in nuisance. We hope that it will be a useful reference for you and your team as you continue to work remotely.


S.41 OF THE HIGHWAYS ACT 1980: THE SCOPE AND LIMITS OF THE STATUTORY DUTY TO MAINTAIN

Christopher Pask & Richard Collier

Introduction

1. Section 41 of the Highways Act 1980 imposes upon local authorities a duty to maintain their highways maintainable at public expense. Where an individual using such a highway suffers damage, for example to their vehicle or personal injury, as a result of an accident caused by a defect in the highway, they can bring a claim against the relevant local authority pursuant to Section 41. Crucially, this defect must have arisen from the local authority's failure to maintain the highway in question.

2. Most commonly these claims involve pedestrians tripping and injuring themselves on a pavement defect, or vehicles striking potholes in the road. They are very common claims, normally protected by the absence of costs on the Small Claims Track or by QOCS on the Fast Track, and from the perspective of local authorities the problem posed by this litigation is exacerbated the limited funds available to actually repair highways.

3. In this article we provide a summary of the guiding principles, as well as some hopefully useful evidential pointers and brief coverage of some of the less common claims in this area.

Statute and Guiding Principles

The statute

4. Section 41 itself provides the following:

> *Duty to maintain highways maintainable at public expense.*
>
> *1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway.*

Has the Claimant proved the defect caused the alleged damage?

5. Before looking at the defect itself, and considering the danger it poses to users of the highway, there is a preliminary factual hurdle the Claimant must overcome. In *James v Preseli Pembrokeshire Council* PIQR 114 Lloyd Jones LJ made clear that claimants must prove that the "particular spot" in question was dangerous. At P115 of his judgment he cites with approval the following extract from *Whitworth v The Mayor, Alderman and Burgesses of The City of Manchester,* June 17, 1971, C.A. (unreported):

> *"What is quite clear is that when a plaintiff in a trip case claims that she fell by reason of the dangerous condition of the pavement, she must indicate where and how she fell and she must prove it; and it is then for the court to consider whether the place where she fell constituted a danger for which the local authority could properly be held liable."* (my emphasis)

6. The critical words in this passage are "where and how". It is not sufficient for a Claimant to point to a stretch of uneven defect-ridden highway and say that they fell (if the claim involves a pedestrian) on one of the potholes; they must point to a specific defect which caused the accident and persuade the Judge of this. Similarly the Claimant cannot make a bare assertion that they slipped and suffered injury, and it is insufficient (in the writers' opinion) to give a vague account of injury i.e. "I came into contact with the defect, tripped and fell". They should provide a description of their intended journey across the highway, direction of travel, which foot struck the defect, mechanically how it caused them to fall etc.

How the duty can give rise to liability

7. The mere existence of a statutory duty does not give to a corresponding duty in common law (*Gorringe v Calderdale Metropolitan Borough Council* [2004] 1WLR1057, [2004] UK HL15). An exception to this is where the authority has positively done something to the highway to create a danger (for example installed something which caused the accident); in such a scenario a common law duty does arise, in accordance with ordinary principles of tort law. But without having done something (an act), a Claimant cannot pray in aid the existence of a common law duty for something the authority failed to do (an omission).

8. Another important distinction lies between danger that may exist owing to the design of the road, and that which exists owing to a failure to repair (i.e. maintain) a defect in the carriageway's surface. Only the latter can give rise to section 41 liability; the former could potentially constitute a form of entrapment under common law, but this must be pleaded.

9. To Claimant lawyers: do not plead in the Particulars of Claim that the Defendant has been negligent, without real thought as to how this case fits into the exceptional type of case where there is a common law duty in play. To Defendant lawyers: be prepared to give short shrift to any such pleading, requesting that the duty be identified and explained, in lieu of which that aspect of the pleading should be struck out as being wrong in law.

10. It is also important to remember that the Court's analysis should only move to considering the defence in section 58 of dangerousness once breach of section 41 has been proven by the Claimant.

'Danger' for the purposes of Section 41

11. The following principles are borne out by the authorities, in particular *Mills v Barnsley MBC* [1992] PIQR (as per Steyn LJ), the decision of Eady J in *Galloway v Richmond Upon Thames LBC* (2003) unreported, and the decision of Mrs Justice Swift DBE in *Cenet v Wirral MBC* [2008] EWHC 1407:

i. The burden is on the claimant to prove danger.

ii. The mere existence of a defect in the highway does not mean the authority has breached its duty under section 41; it is only those defects that can properly be called dangerous that establish breach of the duty to maintain.

iii. The claimant must show both that: 1) the defect posed a reasonably foreseeable risk of harm; and 2) a reasonable person would regard it as presenting a real source of danger.

iv. There should not be imposed on highways authorities an unreasonable burden 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. Indeed, the liability is not to ensure a bowling green that is entirely free from all irregularities or changes in level.

v. The Court must sensibly balance the private interests of the claimant against public interest in the prudent management of limited resources.

vi. The Court is entitled to consider, in its consideration of dangerousness, the number of complaints or similar accidents, and whether this is the type of defect not usually seen on the pavement or carriageway.

vii. The fact of repair does not constitute evidence of danger.

Application of the Principles to Commonly Occurring Claims

Verges and tree roots

12. The 'highway' may extend beyond the surfaced carriageway to the verge, and a claim could in theory arise out of a failure to maintain the verge. However the Court in *King Lifting Ltd v Oxfordshire CC* [2016] EWHC 1767 (QB) emphasised that the verge is there to support the carriageway, not as a buffer for vehicles, and the standard expected of its

S.41 OF THE HIGHWAYS ACT 1980: THE SCOPE AND LIMITS OF THE STATUTORY DUTY TO MAINTAIN (CONTINUED)

Christopher Pask & Richard Collier

maintenance will reflect this purpose. The Court of Appeal in *Thompson v Hampshire CC* [2004] EWCA Civ 1016 reiterated that section 41 is not the appropriate basis for a claim arising out of a dangerous design or layout of a highway.

13. Danger posed by tree roots can engage section 41 where they interrupt the surface of the carriageway or footpath, for example in the context of a public path in a park in *Barlow v Wigan MBC* [2020] EWCA Civ 696. In the unreported case of *Jayne Spencer v Wirral Metropolitan Borough Council* (2008) His Honour Judge Platt drew a distinction between trees and their roots; the latter of which are at sufficiently low level that the public can pass over them and as such can form part of the highway. For an example of a successful claim in the county court under section 41 in respect of tree roots see the unreported decision of HHJ Harrison in *JMP v Cardiff Council* (2018).

Drains

14. 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 section 41 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* 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."*

Similarly, in *Mott MacDonald* Carnworth LJ said:

> *"An effective drainage system is an intrinsic part of the design of a modern road, and like any other part of the road it needs to be properly maintained. It is difficult to see why a statutory duty to maintain the road should exclude it."*

Manhole covers

15. *Atkins v LB of Ealing* [2006] EWHC 2515 (QB) highlights that tipping manhole covers are likely to be considered dangerous and highlight a problematic area for defendant local authorities given the time consuming requirements of inspecting covers for that type of defect. Teare J, hearing the appeal, held that the trial judge had correctly balanced the private interests (the risk of very serious injury being caused to a person who stood on a cover which tilted) against the public interest (the burden on the defendant in terms of costs and impracticality in inspecting manhole covers to check that they were secure).

16. The case is likely to continue to be confined to its own facts however; it involved a cover on a very busy shopping street and was primarily concerned with the defence pursuant to section 58 of the Highways Act 1980.

The Limits of the Duty

17. The House of Lords decision in *Goodes v East Sussex CC* [2000] 1 W.L.R 1356 confirmed that whilst the duty under section 41 was absolute when it came to ensuring that the fabric of the highway was in a good state of repair, that duty did not extend to preventing or removing snow build up in order to prevent ice forming.

18. Snow and ice are now subject to a qualified "so far as reasonably practicable" duty by virtue of s.41(1A), which was introduced following the decision in *Goodes*. Likewise, as seen above, standing water is also distinct from other of types of surface lying material. The reasoning in *Goodes* still informs how the courts approach other types of transient dangers or material and generally, they will not be actionable unless they can be said to be part of the fabric of the highway or arise from a failure to maintain the fabric of the highway (including the drainage system).

Transient Material

Surface lying material (gravel and loose debris)

19. In *Valentine v Transport for London and Hounslow LBC* [2010] EWCA Civ 1358 the claimant's husband died after his motorcycle skidded on an accumulation of surface grit at the edge of the highway. Claims were brought against Transport for London (as the relevant highway authority) on the basis that it had breached the section 41 duty and against Hounslow LBC who were responsible for maintaining, inspecting and cleaning the road in negligence. The claim was struck out at first instance. In upholding the strike out as against TFL, the Court of Appeal said [13]:

> *"…this court is bound by Goodes to hold that the removal of surface-lying material is not required by section 41. That the surface-lying material in Goodes was snow and ice, and that therefore there were references in the speeches in the House of Lords to the particular difficulties presented by such emanations of weather conditions, does not mean that the rule is confined to snow and ice, and it is plain from the decision that it is not. There is no doubt some force in the argument that blockage of drains by debris is in some respects not unlike a surface danger caused by an accumulation of debris, but that is simply an example of the inevitable difficulties which will arise at the margins of any legal rule. If the duty to maintain applied the removal of grit on the road, it would also have to apply to oil spillage, landslip, mud, trees etc, and to rural footpaths as to motorways".*

20. It is worth noting that the claim against *Hounslow* was allowed to proceed apparently on the basis that the accumulation of grit in question may be proved by negligent sweeping which created a 'trap'.

Moss, algae, lichen or other vegetation

21. In *Rollingson v Dudley M.B.C* [2015] EWHC 3330 (QB) a claimant slipped on a patch of moss on the footpath outside his home. After initially succeeding at trial, Haddon Cave J overturned the trial judge on appeal, holding at [27] that:

> *"(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."*

22. The judgment contains a helpful overview of the authorities as they relate to the section 41 duty and is worth reading in full. In summarising the principles which can be derived, the judge set out at [24] that:

> *"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."*

S.41 OF THE HIGHWAYS ACT 1980: THE SCOPE AND LIMITS OF THE STATUTORY DUTY TO MAINTAIN (CONTINUED)

Christopher Pask & Richard Collier

23. It was in light of those considerations that he distinguished the present case (involving the presence of moss) from previous cases where local authorities had been held to be in breach of section 41 due to the presence of vegetation.

24. In *Hereford and Worcester CC v Newman* [1975] 1 W.L.R 901 the Court of Appeal, not without some hesitation, had found that two footpaths were out of repair due to vegetation which had actually become rooted in the surface of the paths (though did not hold that a fence obstructing the path meant it was out of repair). This was plainly distinguishable from a situation where moss had formed, which did not render the path impassable and did not interfere with the substructure of the path.

Cases where material has bonded to the surface

25. As Haddon Cave J's judgment in *Rollingson* makes clear, the question of what makes up the 'fabric of the highway' is paramount when considering s.41.

26. *Thomas v Warwichshire CC* [2011] EWHC 722 (QB) involved a concrete spillage which resulted in a 25mm lump of concrete to become bonded to the surface of a road such that it had become part of the fabric of the highway. Wilkie J held that the s.41(1) duty was engaged because the lump of concrete had become firmly bonded to the road or road surface. Wilkie J also conducted an extensive and helpful analysis of the highways authorities and explained his decision as follows:

> *"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."*

Conclusion

27. Cases will turn on their own facts when it comes to assessing whether the section 41 duty is engaged as well as whether a particular defect can be said to constitute a real source of danger. The above case law and discussion aims provide a helpful starting point when considering the scope of the duty owed and where its limits lie.

SECTION 41(1A) HIGHWAY ACT - COLD COMFORT FOR HIGHWAY AUTHORITIES

Jack Harding

Introduction

1. Pursuant to section 41(1A) of the Highways Act 1980, the Highway Authority is under a duty "to ensure, so far as reasonably practicable, that safe passage along a highway is not endangered by snow or ice".

2. Section 41(1A) has received relatively little judicial scrutiny since it was introduced in response to the decision of the House of Lords in *Goodes v East Sussex CC* [2000] 1 WLR 1356 to the effect that the primary maintenance duty under section 41 did not extend to the removal of surface-lying material.

3. The section is particularly unusual because it imports a legal concept – reasonable practicability – which has been the subject of extensive case law in the field of Employer's Liability but which has hitherto played little to no role in the Court's assessment of dangers on the highway, whether at common law or under the statutory codification in the Highways Acts 1959 and 1980.

4. In the recent case of *Smithson v North Yorkshire County Council* [2020] EWHC 2517, His Honour Judge Gosnell, sitting as a deputy High Court Judge, was required to consider the application of s.41(1A) in the context of a claim for contribution or indemnity between defendants. The claimant, a passenger in D1's car, was injured when the car skidded on ice that had formed on a road maintained by D2, the highway authority. D1 settled the claim and sought a contribution or indemnity from D2 under the Civil Liability (Contribution) Act 1978. The Court concluded that D2 was in breach of its statutory duty on the facts – it had not taken all reasonably practicable steps to ensure that passage along the road was not endangered by ice. In particular, the Court found that it had failed to respond to ad hoc requests to grit the road in question on the day of the accident.

5. This article considers three aspects of the s.41(1A) duty which fell to be considered by the court and tentatively suggests that, at least in one respect, the judge's conclusion was wrong as a matter of law, albeit almost certainly correct on the facts.

Danger

6. The first issue which logically arises under s.41(1A) is whether passage along the road is 'endangered' at all. This point was conceded on the facts of *Smithson*. It might be thought that wherever a person suffers injury as a result of snow or ice they have necessarily been 'endangered'. However, it is submitted that this fails to give proper weight to the wording of the section, which requires that 'safe passage…is not endangered'.

7. The duty under section 41(1A) is expressly worded as a subsidiary component of the overriding duty under section 41(1) to maintain the physical surface of the highway. The duty to maintain therefore now includes a sub-duty "*in particular*" to ensure safe passage is not endangered by snow or ice.

8. Accordingly, it appears that the use of the word 'endangered' is intended to impose a threshold requirement which must be crossed before C can establish a prima facie breach of duty. Just as tripping claims under section 41 cannot be proved unless a pedestrian proves that the authority failed to maintain the highway in *such a state of repair that it is reasonably passable for the ordinary traffic*

SECTION 41(1A) HIGHWAY ACT - COLD COMFORT FOR HIGHWAY AUTHORITIES (CONTINUED)

Jack Harding

of the neighbourhood without danger caused by its physical condition (*Jones v Rhondda* (2008) EWCA Civ 1497), it must also be correct that the mere presence of some snow or ice will not suffice under section 41(1A). There must be a real source danger and mere foreseeability of an accident is not enough.

9. This interpretation is supported by the Court's approach to the question of snow and ice prior to *Goodes*. For example, in *Haydon v Kent CC* (1978) 2 WLR 485 Goff LJ noted that "*The judge treated the statutory defence and the necessity for the plaintiff to make out a case beyond merely proving the dangerous condition due to the ice as very much one composite thing: but in my view they are separate*". (emphasis added)

10. This argument was accepted by HHJ Melissa Clark in the unreported decision of *Rogers v Oxfordshire County Council* (2017) in which the Court did not accept that simply because the Claimant had slipped on a small patch of ice (in a busy shopping street), 'passage' along the highway was thereby endangered for ordinary users of the highway.

Reasonable practicability

11. In *Smithson* the Court applied the well-known test of 'reasonable practicability' derived from *Edwards v National Coal Board* [1949] 1 KB 704 and refined in *Baker v Quantum Clothing Group* [2011] 1 WLR 1003. This requires a balance to be struck between the risk of injury on one side and the cost (in terms of time, money and effort) required to eliminate it on the other.

12. It is interesting to note, however, that although HHJ Gosnell cited from the judgment of Lord Mance, he nonetheless adopted the formulation preferred by Smith LJ in the Court of Appeal, which required the defendant to prove that the cost or difficulty of the steps required to prevent the risk to 'substantially' or 'grossly' outweigh the quantum of risk involved.

13. In fact, elsewhere in his judgment, Lord Mance was critical of Smith LJ's approach:

    "*A further aspect of para 84 in Smith LJ's judgment is the suggestion that "there must be at least a substantial disproportion" before the desirability of taking precautions can be outweighed by other considerations. This theme was developed in paras 82 to 84 of her judgment, on the basis of dicta in two cases prior to Marshall v Gotham.* ***But it represents, in my view, an unjustified gloss on statutory wording which requires the employer simply to show that he did all that was reasonably practicable"*** (emphasis added)

14. The convergence of the statutory and common law tests which was proposed by Lord Mance in *Baker* has since been followed in recent decisions by the Court of Appeal, for example *Berry v Ashtead Plant Hire* (2012) PIQR P6 at paragraph 23.

15. Standing back, it is submitted that the meaning of '*reasonable practicability*' in statutes which impose obligations on public authorities with limited resources is not necessarily the same as its meaning in the context of statutes which impose health and safety duties on employers (who have chosen, for commercial reasons, to carry out their activities). In *R (on the application of Friends of the Earth) v Secretary of State for Energy and Climate Change*

[2009] EWCA Civ 810, the Court of Appeal expressly acknowledged this point:

"Mr Fordham points to a number of statutory duties, from the Metropolitan Gas Act 1860 (23 & 24 Vict c 125) to the Health and Safety at Work etc Act 1974, which have obliged undertakers, occupiers or employers to ensure safety "so far as is reasonably practicable". He submits that an established approach to a form of words in previous legislation leads to at least a presumption that, when using the same form of words in a later statute, Parliament is investing them with the same established meaning: Bennion on Statutory Interpretation, 5th ed (2008), p 599. In my judgment, it is not appropriate to read across from previous legislation of the kind indicated in order to define the extent of a public law duty such as that imposed by section 2 of the 2000 Act" (paragraph 25, per Maurice Kay LJ).

and

"As Mr Coppel submits, the cost of eradicating fuel poverty is dependent upon factors beyond the direct control of the Secretary of State, in particular the cost of energy, and Parliament cannot have intended to impose upon him an obligation to meet that cost without reference to the discretion which would usually be accorded in fixing spending priorities and allocating resources. *That the reasonably practicable test does not bear the same meaning in all contexts, and particularly as between tortious and public law applications gains some support from R(Q) v Secretary of State for the Home Department [2003] EWCA Civ 364, [2004] QB 36*, where the test applied not to the decision of the Secretary of State but to the conduct of the applicant asylum seeker…**All this leads me to conclude that, both as a result of authority and as a matter of principle, the 'grossly disproportionate' approach does not apply in this case"** (paragraphs 35-37, per Maurice Kay LJ)

16. Although the duty under section 41(1A) is not purely public in character, it is plainly imposed only on the council in its capacity as a public authority. Just as the Secretary of State in the *Friends of the Earth* case had to make policy decisions, based on budgetary matters outside his immediate control, in accordance with "*the discretion which would usually be accorded in fixing spending priorities and allocating resources*" so, too, must a highway authority, using public money allocated to it. The situation is therefore far removed from the statutory duties imposed upon employers and a different, more restrained, approach is arguably warranted.

17. Unlike the position in England & Wales, the Courts in Scotland have recognised the existence of a duty on highway authorities in respect of snow and ice for some time. Accordingly, the case-law in that jurisdiction is more developed and provides a valuable (albeit not binding) source of jurisprudence. Overwhelmingly, the Scottish courts have emphasised the critical importance of exercising caution before holding that a public authority has wrongly exercised its discretion in terms of the policy it adopts for gritting or clearing snow and ice on the roads. The most recent authority (which reviewed previous case-law) is *Ryder v Highland Council* [2013] CSOH 95. Lord Tyre concluded that the decision of the Council not to operate a 24-hour policy was not properly justiciable, and in doing so made the following salient observations:

"It was recognized explicitly in the more recent cases that roads authorities have a discretion to decide on priorities, and that the court should not interfere unless that discretion is exercised unreasonably" (paragraph 49)

and

"*It seems to me that the decision whether or not to allocate sufficient resources to permit the operation of a 24 hour winter maintenance service…falls within the category of decisions which this court is not fitted to determine. It is, as I have indicated, a*

SECTION 41(1A) HIGHWAY ACT - COLD COMFORT FOR HIGHWAY AUTHORITIES (CONTINUED)

Jack Harding

decision ultimately taken by elected representatives, on the basis of information and advice from officials, with very significant financial consequences for the budgetary process of allocation of limited resources. It requires the balancing of competing public interests as the expense of a 24 hour service which according to Mr Guests's estimate would increase winter maintenance costs by almost 50 percent, could not be met out of the existing roads budget and would presumably require to be funded by cutting spending on some other council service"

18. The decision taken by a local authority about how to allocate its limited resources is plainly a delicate one requiring professional judgment. There is not necessarily a 'right' answer. It follows that there is bound to be a reasonable range of opinion - and room for differing conclusions and views - without there being any proper justification for criticising the outcome as *'unreasonable'*. In this regard the Court of Appeal has accepted that it is appropriate to apply the *Bolam* test to a Highway Authority's decision making process and policy (*TR v Devon CC* (2014) RTR 1). In other words, the court should be reluctant to find the defendant's conduct unreasonable unless it falls wholly outside the range of reasonable options available to an equivalent professional body in its position (per Hughes LJ at paragraph 22).

19. It remains to be seen whether the Courts in this country adopt a similar approach to the section 41 (1A) duty.

Causation

20. In *Smithson* the highway authority, having been found to be in breach of the duty under section 41 (1A), argued that the claim should nonetheless fail on causation. In particular, it submitted that even if it had responded to the request to grit, the gritting would not have prevented the accident because the police had mistakenly identified the location of a previous accident overnight and the gritters would have been sent to the wrong location. The judge rejected this submission on the evidence and was no doubt right to do so. However, he also concluded that it was not an argument available to the Defendant as a matter of law. This is more problematic.

21. The parties legal representatives had both conceded in *Smithson* that section 58 had no application because section 41(1A) 'contains its own limitation in terms of reasonable practicability'. However, the Court held that, by analogy with section 58, and in reliance on the decision in *Wilkinson v City of York Council* [2011] EWCA Civ 207, if the defendant could not make out the statutory defence (the burden resting with it) it was not open to it to argue that even if it had taken all reasonable care this might not have prevented the accident.

22. The difficulty with this analysis is two-fold.

23. First of all, there are conflicting authorities on the relevance of causation under section 58. In (admittedly obiter) comments in the Court of Appeal decision in *Day v Suffolk County Council* [2007] EWCA Civ 1436, Pill LJ stated as follows:

> *"12. Mr Cotter submits that the judge having found that there was no adequate inspection on 28 October 2001, and the duty being an absolute one, then the liability is established and the defence fails. He carried it to the extent of*

submitting that, following that principle, even if there were evidence of the pothole having been caused only the day before the accident happened, then there would be a good claim based upon the failure to conduct an adequate inspection in October 2001. It is not necessary to decide that point for the purpose of deciding this case. It has not been fully argued. It was not argued before the judge, and anything that is said about it in this court is obiter. I do have to say, however, that on what I know I am unable to accept that proposition as stated by Mr Cotter. There was a defect in the system of inspection, but the causative effect of that defect must, in my judgment, be considered in deciding whether liability occurs. It seems to me to follow from the wording of section 58(2) that merely to show some breach of a duty to inspect is not always sufficient. I have read the section earlier in this judgment. Section 58(2)(d) provides that a relevant factor is whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause dangers to users of the highway.

"13. If, on the example given by Mr Cotter, the pothole had been created the day before, so that the defendant had no knowledge of it and could not reasonably be expected to know of it, then it would appear to me to be that, even if there was a faulty inspection in October 2001, the claim for damages would fail".

24. It is not clear whether these comments were brought to the Court's attention in *Smithson*.

25. Secondly, whatever the position may be under section 58, the Court is concerned with a distinct legal duty – reasonable practicability – under s.41 (1A). In this regard, the Court of Appeal has, in a relatively recent decision, made it clear that causation is still an argument available to the defendant even when it is unable to prove that it has discharged its statutory duty. In *West Sussex v Fuller* [2015] EWCA Civ 189 the claimant tripped over whilst carrying a bulky post bag (a manual handling operation). The defendant was unable to discharge the burden of proving that it had taken all reasonably practicable steps to reduce the need for her to carry out the operation. However, the Court of Appeal found that that failure had not caused the trip – she had simply misjudged her footing. Tomlinson LJ started by setting out the comments of Longmore LJ in the earlier decision of *Ghaith v Indesit* (2012) EWCA Civ 642:

> "*If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred eg if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury.*"

26. Tomlinson LJ went on to state as follows:

> "*It may be that this passage has been misunderstood. It is not perhaps the easiest passage to follow, perhaps because Longmore LJ has run together the two separate concepts, breach of duty and causation. It is however important to note the context in which he has done so, which is in a case where the very risk inherent in the operation of repeated lifting of heavy or awkward loads has eventuated, viz, back injury, and where the employer had carried out no sufficient risk assessment. So it is one of those plain cases where the claimant demonstrates without more a prima facie causal connection between the inherently risky operation and the injury. Furthermore, it is a*

SECTION 41(1A) HIGHWAY ACT - COLD COMFORT FOR HIGHWAY AUTHORITIES (CONTINUED)

Jack Harding

case where the employer is in breach of duty in having failed to carry out a sufficient risk assessment, and in order to exonerate himself needs to show that he has nonetheless taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. Those are the circumstances in which Longmore LJ said that causation was not a separate hurdle for the employee. It was not a separate hurdle because the employee had already made out a prima facie case, based on the occurrence of the risk inherent in the manual handling operation he was asked to undertake. Longmore LJ recognised that, even in such a case, and where the employer cannot show that he has taken appropriate steps to reduce the risk to the lowest level reasonably practicable, it is only "usually" that he will be liable without more ado. It is still open to the employer to show that his breach of duty has not in fact been causative of the injury, as where for example the employee suffers a heart attack which can be demonstrated to be wholly unconnected with the manual handling operation. Longmore LJ is simply making the point that once a prima facie connection is established between the risky activity and the injury, it is for the employer to disprove causation, not for the employee to prove that, if all possible precautions had been taken, he would not have suffered injury."

27. Plainly, it will be difficult, in a section 41(1A) claim, for the defendant to 'disprove causation', since the very risk inherent in the use of the highway (i.e. slipping on snow or ice) is the one that has eventuated, and in respect of which the Defendant must prove it could not, subject to reasonable practicability, prevent. However, the critical point is that, conceptually, the causation argument is still available to the Defendant if the facts permit it. To this extent, therefore, it is tentatively suggested that the Court went too far in rejecting the defence in *Smithson* as a matter of law, albeit that it was plainly right to do so as a matter of fact.

Conclusion

28. It is clear that, as a relatively recent addition to the statutory liability framework in highways cases, section 41(1A) still merits further judicial scrutiny and is likely, under the pressure of reduced local authority budgets, to become an active and hard-fought battleground for practitioners in this area of the law.

UNDERSTANDING S. 58 OF THE HIGHWAYS ACT 1980

Ian Clarke

1. If an accident is caused by a dangerous defect on a highway maintainable at public expense the only complete defence to any claim is provided by Section 58 of the Highway Act 1980. The Defence in full provides:

> ***58 Special defence in action against a highway authority for damages for non-repair of highway.***
>
> *(1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.*
>
> *(2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters:—*
>
> *a) the character of the highway, and the traffic which was reasonably to be expected to use it;*
>
> *b) the standard of maintenance appropriate for a highway of that character and used by such traffic;*
>
> *c) the state of repair in which a reasonable person would have expected to find the highway;*
>
> *d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;*
>
> *e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed;*
>
> *but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.*
>
> *(3)This section binds the Crown.*

2. Given the ease with which street defects can occur and become dangerous and the seemingly infinite ways in which people are able to injure themselves, s.58 is a vital tool in the armoury of local authority defendants. The defence has been subject to wide ranging judicial comment over the years although it remains misunderstood by some and poorly deployed by others.

Wilkinson v York City Council [2011] EWCA Civ 207: Section 58 and Causation

3. The Claimant was a cyclist who had an accident when her front wheel hit a pothole. The local

UNDERSTANDING S. 58 OF THE HIGHWAYS ACT 1980 (CONTINUED)

Ian Clarke

authority defended the claim relying on the section 58 defence, i.e. that the road had been inspected at the frequency prescribed by its highway maintenance scheme. At trial, the Court found that the road was wrongly categorised as a local access road with a single annual inspection, because it had shops and a school nearby, and that it should instead have been categorised as a link road with 4 inspections per year. However as there was no evidence about how long the defect had been there prior to the accident the council submitted that it was still entitled to succeed on its section 58 defence because the Claimant couldn't show that even if it had inspected the road 4 times per year, the defect would have been present and marked for repair.

4. The Court of Appeal rejected that argument. It held that the scheme of liability under section 41 was strict unless the council demonstrated that it had done what was necessary to establish a section 58 defence. Causation had nothing to do with section 58. In dismissing the council's appeal the Court cited Diplock LJ in *Griffiths v Liverpool Corporation* [1967] 1 QB 374 at [§38]:

> *"Sub section 2 [of section 1 of the Highways (Miscellaneous Provisions) Act 1961 , which is now section 58 of the 1980 Act] does not in my opinion make proof of lack of reasonable care on the part of a highway authority a necessary element in the cause of action of a plaintiff who has been injured by danger on the highway. What it does is to enable the highway authority to rely upon the fact that it has taken reasonable care as a defence — the onus of establishing this resting upon it. A convenient way of expressing the effect of the subsection is that it does not qualify the legal character of the duty imposed by subsection (1) but provides the highway authority with a statutory excuse for not performing it …*
>
> *Unless the highway authority proves that it did take reasonable care the statutory defence under subsection (2) is not available to it.* ***Nor is it a defence for the highway authority to show that even if it had taken all reasonable care this might not have prevented the damage which caused the incident.***"

Wilkinson v York City Council [2011] EWCA Civ 207: Resources

5. If the Court's conclusion on causation was not enough of a blow to defendants, the Court additionally dealt with the defendant's argument regarding the allocation of resources. The defendant highway authority had argued that it had chosen to inspect the particular section of road only at 12-monthly intervals because of financial and manpower constraints. At first instance this argument did not find favour but the circuit judge who heard the first appeal held that he considered resources were always a factor and dealing with such cases involved striking a balance between what the ratepayers will bear and how resources should be allocated; that he considered was a matter for the elected members of the council.

6. In the Court of Appeal, Toulson LJ stated that this was the wrong approach:

> *"This was a wrong approach by the circuit judge*

to the defence provided by section 58. If this were a judicial review application of a decision by a local authority which involved having to determine how local government resources should be allocated between different good causes it will be a different matter, but Section 58 provides a defence where the authority has done that which was reasonably required to secure the part of the highway to which the action relates was not dangerous to traffic …

"That requires an objective judgment based on risk".

7. The fact that resources, or affordability, have no role to play in the assessment of the s.58 defence was later confirmed in *Crawly v Barnsley MBC* EWCA Civ 36.

8. The Courts' decisions on the question of affordability are in tension with the most recent Code of Practice: Well-managed Highway Infrastructure, that has applied since October 2018. The keystone of that code is the adoption of a risk-based approach to asset management in accordance with "*local needs, priorities and* ***affordability***".

9. In *Wilkinson* Toulson LJ did refer to the then applicable code referring to the suggested frequency of inspection for the particular type of road in question; under the new code no such specific guidance would be found. Rather, the new code leaves it to individual authorities to decide inspection frequency by reference to the risk-based approach taking into account local needs, priorities and affordability and that approach requires an objective judgment.

10. Can the *Wilkinson* approach therefore survive the new code? It would seem peculiar if the Courts reject the guidance the code provides and continue to hold that resources should play no part in decisions about inspection frequency given the proper deference professional judgment is normally afforded. In the absence of a crystal ball, all that can be said for the time being is that the *Wilkinson* issue will undoubtedly be litigated in the near future.

Crawly v Barnsley MBC [2017] EWCA Civ 36: Working nine to five?

11. The Claimant went for a jog one Saturday evening along Hill Top road, where he unfortunately tripped over a pothole. The road was classified as a local access road and was subject to annual inspections. It had been inspected four months prior to the accident and all of the noted defects had been repaired.

12. At 4:20pm on the Friday just before the Claimant's accident, a member of the public telephoned the council and reported deep potholes in Hill Top Road. He said that if his car was damaged by them, he would claim the cost of repair from the council. The council inspected on Monday morning. The inspector found the relevant defect and arranged for a category 1 repair (i.e. repair within 24 hours). It was repaired on Tuesday. Of course, all of this was too late for the injured Claimant who blamed the council for his injury. The council denied liability on the basis that it had a section 58 defence.

13. The claim was litigated and tried before a DJ who dismissed the claim on the basis of the section 58 defence.

14. The claimant appealed to the circuit judge who allowed the appeal. He held that the council should have inspected the defect on the day after the report was made, even if that day fell on a weekend. He held that it was unsatisfactory for the council to have waited until Monday morning before evaluating the defect.

15. The council appealed to the Court of Appeal. Lord Justice Jackson gave a judgment in which he stated that all section 58 required was for the council to take such steps as were reasonably required. They had done that. Most people do not work at weekends and that was a relevant factor. So was the fact that the caller did not say how deep the pothole was, and that the pothole was in a carriageway not a

UNDERSTANDING S. 58 OF THE HIGHWAYS ACT 1980 (CONTINUED)

Ian Clarke

footway, and that Hill Top Road was only a local access road that was not subjected to heavy traffic.

16. However, Lord Justice Jackson's judgment was a dissenting judgment. The other two judges, Briggs and Irwin LJJ, thought that the District Judge was wrong and that the Circuit Judge was right. They held that when a caller reports a defect, it is up to the council to ask sufficient questions on the telephone to be able to judge the seriousness of the defect. If, having done so, there is a "real risk" that the defect is a category 1 defect, it has to be inspected straightaway and not left over the weekend. If the council cannot judge the seriousness of the defect on the telephone then it has to inspect straightaway.

17. The council also sought to argue that the earliest that it could ever have inspected would have been Saturday and if it had assessed the defect on Saturday as a category 1 defect, it would not have been repaired until Sunday. By that time the Claimant would have had his accident anyway. So the breach of section 41 had not caused the accident. Lord Justice Briggs responded, echoing *Wilkinson*, that *"a section 58 defence is not concerned with questions of causation in that way*".

18. While *Crawly* involves a very specific set of facts, it does highlight the need for local authorities to have flexible systems in place to deal with complaints of road defects. However, what would have happened if the defect had been reported online? How is a council meant to assess the severity of the defect?

Practical tips and the shift towards *Bolam*

19. As can be seen, the section 58 defence can be more difficult to mount successfully than often thought. It is not simply a matter of calling the relevant highways inspector to say that he had not missed the defect at the time of the last inspection. Very often questions are raised about reasonableness of the frequency of the inspection; if a claimant can persuade a judge that the road was not inspected with proper regularity the section 58 defence will fail.

20. It is important therefore to understand properly the vulnerability of a case and to call evidence in support of the defence. That should mean that appropriate care is given to the selection of witnesses. For instance, a defendant will need to consider whether a highways inspector will be able to give evidence about the reason why the particular highway is designated the way it is, the appropriateness of the inspection frequency and the instructions provided regarding inspection and repair.

21. More often than not, it would be more appropriate for a senior manager to give that sort of evidence and many a trial has been lost due to the reluctance of more senior officials to enter the court room.

22. In the absence of such live evidence it may be appropriate to obtain evidence from other local authorities of their practices. Section 58 specifically provides that the Court should have regard to the character of the highway and the state of repair a reasonable person would consider appropriate. In considering those factors regard can be had to comparator local authorities. Moreover, the new (ish) code of conduct is explicit in its expectation that local authorities of a similar nature should collaborate in their working methods.

23. The move towards *Bolam* type arguments has already been foreshadowed in *AC v TR* [2013] EWCA. TR was the driver of a Land Rover on a country road. The road in question was part of a winding and hilly C-road travelling over the Blackdown Hills. While overtaking a Vauxhall Vectra the Land Rover went off the nearside of the road and crashed into trees. TR's passengers were seriously injured and sued him; TR brought Part 20 proceedings against Devon CC as the relevant highway authority, alleging that what had caused him to lose control was the defective state of the road. The passengers' claims settled leaving the third party claim to be resolved at trial.

24. At first instance Slade J found that the road was dangerous in places and that there had been a breach of s.41 of the Highways Act 1980 and further that Devon CC had not made out its section 58 defence as it had not justified its departure from the recommended monthly inspection interval recommended in the material code of practice. The Court of Appeal confirmed that the judge was entitled to conclude that the road was dangerous, but that the judge had erred in treating the code as a mandatory standard that could not be departed from without a positive reason.

25. Importantly, there had been evidence before the judge that showed several other local authorities departed from the code and it was contended that this demonstrated a respectably held view that six-monthly inspections of such roads was a reasonable response.

26. Hughes LJ giving the lead judgment noted:

> "*The evidence before the judge reinforced what the code itself says about its status. It showed several other local authorities adopting inspection intervals different from those set out in the code. Specific evidence was adduced from Kent, Cumbria, Tameside and Surrey, presumably selected as a spread of chiefly rural, urban or mixed areas …*
>
> *"The judge dealt briefly at [118] with the evidence of other authorities with six monthly inspection regimes. She held that it was "of little or no assistance in this case".*
>
> *She said that this was because she did not, except in the case of Kent, have evidence of the reasons why the other authorities had departed from the code. That might be a perfectly legitimate conclusion if it were once correct that the code provides a mandatory norm from which departure must be justified by reasons given, but it does not. At the very least, the evidence of the practice of other authorities pointed towards a respectably held view, amongst professionals charged with highways maintenance, that six-monthly inspections of local distributor roads were a reasonable response to the duty to maintain. On the well understood Bolam principle (Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582) that evidence went towards showing that Devon had exercised reasonable care in its general policy for such roads*."

27. While the Court of Appeal went on to find that there had been sufficient evidence to justify the finding that the particular road needed more frequent inspections, the case does perhaps point towards the sort of arguments we can all expect to be having in the future given the explicit drive towards a collaborative approach between different authorities.

Final thoughts

28. The s. 58 defence has generated a substantial amount of case law and this is only likely to continue. Experience suggests that it is often poorly understood by legal advisors in highways claims. Hopefully the above summary will assist those advising both claimants and defendants to assess the merits of any s. 58 defence properly and help highways authorities identify the evidence they are likely to need in order to mount a successful defence.

A WALK IN THE PARK: AN IMPORTANT NEW DECISION ABOUT HIGHWAY AUTHORITIES' AND OCCUPIERS' LIABILITY

Roderick Abbott

A tale of Thamesmead

1. One of the curious features of my line of work is that I often find myself becoming an expert on the most unexpected subjects. A few years ago I was involved in a case which required me to know a surprising amount about the history of Thamesmead in south-east London.

2. Thamesmead was built in the 1960s on former marshland. Poor transport links and brutalist architecture discourages the casual visitor. Its dystopian feeling made it the perfect setting for parts of Stanley Kubrick's *A Clockwork Orange*.

3. The case I was involved with was about a young boy who had tripped over on a path in a Thamesmead park.

4. The occupier of the park denied liability on the basis that the path was a public right of way. That meant, they contended, that the boy was not a visitor to the park (in the legal sense) because he was using the path as of right. It followed (it said) that it did not owe him the duty owed by occupiers to visitors under s2 Occupiers' Liability Act 1957.

5. The highway authority denied liability too. It accepted that the path was a public right of way (and therefore a highway) but contended that it was not a highway maintainable at the public expense. If that was correct then it did not have any duty under s41 Highways Act 1980 to maintain the path because the duty imposed on a highway authority by that section only applies to highways maintainable at the public expense: see s41(1).

6. It looked at first blush as if the claim was doomed to fall between two stools. Hence my research into the history of Thamesmead: I needed to find out who had built the park, when, and in what capacity because that might determine whether the path was a highway, and, if so, whether it was maintainable at the public expense.

Barlow v Wigan

7. The Court of Appeal has recently addressed similar issues in *Barlow v Wigan MBC* [2020] EWCA Civ 696. This case (a second appeal) is essential reading for anyone who deals with highway and occupier liability.

8. Mrs Barlow (disappointingly for fans of *Coronation Street* her first name was not "Deirdre") tripped over on a path in a public park. The park was owned and occupied by the defendant Council.

9. The trial judge found that the accident was caused by the dangerous and defective condition of the path (a finding which was not challenged on appeal).

10. However, as in my Thamesmead case, the Council denied that it had any duty to maintain the path. It contended that the path was a public right of way and a highway but not one maintainable at the public expense. If that was right then it owed no duty as highway authority.

11. Before the claim was issued, Mrs Barlow's representatives had suggested in the alternative that the Council might be liable as the occupier of the path. The Council denied this with reference to *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233. In *McGeown* Lord Keith said at 243E:

> *Persons using rights of way do so not with the permission of the solum but in the exercise of a right. There is no room for the view that such persons might have been licensees or invitees*

of the land owner under the old law or that they are his visitors under the English or Northern Irish [Occupiers' Liability] Acts of 1957.

12. The Council therefore adopted the same position as the occupier in my Thamesmead case: that no duty of care was owed by an occupier to someone using a public right of way.

13. Mrs Barlow's representatives seemingly could not see a way around this reasoning, because they did not plead a claim under the 1957 Act. As it transpired, the Court of Appeal expressed serious doubts as to whether the Council's interpretation of *McGeown* was correct (which I will deal with later); but because the occupier claim had not been pursued it meant that for the purposes of the appeal the only claim was against the Council as highway authority, and the main question on which the appeal turned was whether the path was a highway maintainable at the public expense.

First issue – in what capacity did the Council build the park?

14. The park was built on land acquired by the Council's predecessor in 1920. The park and the paths in it were laid out in the early 1930s.

15. Mrs Barlow's first line of attack was to rely on s36(2)(a) of the Highways Act 1980, which reads:

> *(2) … The following highways … shall for the purposes of this Act be highways maintainable at the public expense:*
>
> > *(a)* a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority
> >
> > *(b)* […]

16. Simplifying somewhat, her argument ran as follows:

a. the path was constructed by the Council's predecessor,

b. the Council's predecessor was a highway authority,

c. that path was therefore "a highway constructed by a highway authority"

d. such highways are maintainable at the public expense by virtue of s36(2)(a).

17. By the time the case reached the Court of Appeal, the Council did not dispute that its predecessor was a highway authority and that it had constructed the path. A literal interpretation of the phrase "a highway constructed by a highway authority" would therefore include the path.

18. The Council contended that s36(2)(a) only applied where a highway authority has constructed a highway when acting in its capacity as a highway authority. Local authorities, of course, perform many functions, although they are one corporate body. It was likely that the Council's predecessor had laid out the park in the exercise of its public amenity functions (e.g. in exercise of its powers under s164 Public Health Act 1875) rather than as a highway authority exercising its powers to build new highways.

19. The difference in the parties' positions reflected the different views expressed in *Gulliksen v Pembrokeshire CC* [2003] QB 123. Neuberger J (as he then was), who heard the first appeal, preferred the Council's interpretation; but *obiter* comments of Sedley LJ in the second appeal supported Mrs Barlow's interpretation. The Court of Appeal in Mrs Barlow's case preferred Neuberger J's view and therefore Mrs Barlow's challenge based on s36(2)(a) failed.

Second issue – deemed dedication

20. Mrs Barlow had more success with her second line of attack, and it may have significant implications for future highway litigation.

21. Her argument (again, simplifying slightly) ran as follows:

    a. The path on which she tripped was a "public path" within the meaning that term in the

A WALK IN THE PARK: AN IMPORTANT NEW DECISION ABOUT HIGHWAY AUTHORITIES' AND OCCUPIERS' LIABILITY (CONTINUED)

Roderick Abbott

National Parks and Access to the Countryside Act 1949 at the time that Act came into force (16 December 1949).

b. By s47(1) of the 1949 Act all public paths in existence when it came into force became repairable by the inhabitants of the parish at large.

c. By s38(2)(a) Highways Act 1959, highways which were previously maintainable by the inhabitants at large of any area became highways "maintainable at the public expense".

22. By s36(1) Highways Act 1980 highways which were maintainable at the public expense before the 1980 Act came into force remained as such after it came into force. "Public path" was defined by s27(6) of the 1949 Act to include "a highway over which the public have a right of way on foot only, other than such a highway at the side of the road". The real question was therefore: was the path a highway on 16 December 1949?

23. A highway may be created by (a) express dedication by the landowner (b) deemed dedication under s31 of the 1980 Act or (c) dedication inferred at common law. The first two did not avail Mrs Barlow, so the appeal turned on whether she could rely on the third.

24. To infer dedication at common law there must be evidence of continuous and unobstructed use over a long period. The burden of proving dedication rests on the party asserting it.

25. At first blush this presented difficulties for Mrs Barlow. She needed to prove that the path was a highway on 16 December 1949. There was plenty of available evidence of long and continuous use of the path in the recent past from which it could be inferred that the path was now a highway. The park was never shut, for example, and the public enjoyed unrestricted access to it. But how on earth was she to prove what had happened between when the path was built in the early 1930s and 1949?

26. The doctrine of retrospective dedication rode to Mrs Barlow's rescue. This, following *Turner v Walsh* (1881) 6 HL 636, means that where a dedication is inferred from a long and continuous period of use, the dedication is deemed to have occurred at the beginning of the period of use. In this case, therefore, the dedication was deemed to have occurred when the park was laid out and started to be used in the early 1930s. That, obviously, was well before the coming into force of the 1949 Act.

27. The path was therefore:

a. Deemed to have been a public right of way (and highway) as from the point it started to be used in the early 1930s;

b. A highway on 16 December 1949;

c. On 16 December 1949 became a "highway repairable by the inhabitants of the parish at large" by s47(1) of the 1949 Act;

d. Became a "highway maintainable at the public expense" by s38(2)(a) of the 1959 Act.

e. Remained a "highway maintainable at the public expense" when the 1980 Act came into force;

f. As a highway maintainable at the public expense was a highway which the Council had a duty to maintain under s41 of the 1980 Act.

28. So Mrs Barlow's appeal (and her claim) succeeded. Given the combined effect of the 1949 Act and the doctrine of retrospective deemed dedication, future cases of this type are likely to require similar historical research to determine exactly when the paths in question were built.

Occupiers' Liability

29. Mrs Barlow's claim succeeded because of when the path was built. But on different facts it might not have become maintainable at public expense. Against whom (if anyone) could she have brought a claim then?

30. I noted earlier that the Council's reliance on *McGeown* was enough to persuade Mrs Barlow's representatives not to bring a claim under the Occupiers' Liability Act 1957. *McGeown* was based on a long-standing principle that owners of land over which public rights of way ran did not owe duties to maintain or repair them. That principle can be traced back to *Gautret v Egerton* (1867) LR 2 CP 371 where it was put thus:

> *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 may not.*

31. The reluctance to impose liability for landowner nonfeasance (rather than malfeasance) was clearly rooted in policy concerns about the implications of doing so. This was made explicit in *McGeown w*here Lord Keith said at 243E:

> *… Rights of way pass over many different types of terrain and it would place an impossible burden upon landowners if they not only had to submit to the passage over them of anyone who might chose to exercise the right, but also were under a duty to maintain them in a safe condition.*

32. Let us assume the path was a highway but not one maintainable at the public expense. If the Council's interpretation of *McGeown* is correct then it would mean that for as long as Mrs Barlow was on the path it would have owed her a duty neither as occupier nor as highway authority but, paradoxically, had she strayed off the path to the grass on either side of it the Council would have owed her a duty as occupier.

33. Bean LJ considered this situation "absurd": see paragraph 9. He did not, however, explain exactly how the absurdity was to be avoided. The closest he got was at paragraph 13 where he said (my emphasis):

> *I suspect that the true ratio of [Gautret] and [McGeown] is that if a person is only lawfully on a defendant's land because of the existence of a right of way which he or she is using, then there is no duty of care owed by the landowner either at common law (save in respect of dangerous acts such as digging pits) or under the Occupiers' Liability Act.*

34. "Only" is the key word in that sentence. It seems to suggest the possibility that where a person is or could be on land pursuant to a right of way and also in some other capacity then that person might be owed a duty by the occupier.

35. Although he did not say so, Bean LJ's observations echo what was said by Lord Browne-Wilkinson in *McGeown* when the latter expressed doubts as to the effect of the decision, and raised the possibility of occupiers owing a duty of care in certain circumstances. He said at 248A-E:

> *I am very reluctant to reach a conclusion which will leave unprotected those who, for purposes linked to the business of owners of the soil, are encouraged, expressly or impliedly, to use facilities which the owner has provided.*
>
> *[…]*
>
> *… it does not necessarily follow that the existence of a public right of way is incompatible with owner of the soil owing a duty of care to an invitee, as opposed to a licensee. In the case of an invitee there is no logical inconsistency*

A WALK IN THE PARK: AN IMPORTANT NEW DECISION ABOUT HIGHWAY AUTHORITIES' AND OCCUPIERS' LIABILITY (CONTINUED)

Roderick Abbott

> *between the plaintiff's right to be on the premises in exercise of the right of way and his actual presence there in response to the express or implied invitation of the occupier. It is the invitation which gives rise to the occupier's duty of care to the invitee. I do not understand your Lordships to be deciding that it is impossible to be an invitee (and therefore a visitor) on land over which there is a public right of way. I wish to expressly reserve my view on that point.*

36. The approach advocated by Lord Browne-Wilkinson reconciles the understandable reluctance to impose a repairing liability on those who give no encouragement to the public to use a way across their land (e.g. a farmer) and those who, for commercial or other reasons, effectively give that encouragement.

37. Applying that logic to the facts of Mrs Barlow's case, it could be said with some force that the Council had impliedly invited her into the park (including the paths within it) and that it therefore did owe her a duty of care as occupier of the path notwithstanding that it was also a public right of way. However, as the point did not fall to be decided on the facts the law remains unclear until such time as it is clarified by a later decision.

ROAD DESIGN CLAIMS: NON FEASANCE, MISFEASANCE AND THE *BOLAM* TEST

Thomas Yarrow

1. In recent years, there has been a spate of public body duty of care cases before the higher courts. Last year Lord Reed, giving the leading judgment in the case of *Poole BC v GN* [2019] UKSC 25, reviewed some of the key authorities in this area and affirmed two important principles for determining where public authorities may, and importantly where they may not, be vulnerable to common law negligence claims.

2. First, Lord Reed stressed that there is clear water between the operation of a statutory scheme by public authorities and the public authorities owing a common law duty of care to protect the beneficiaries of that scheme from harm. He said:

   > *"public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm"*

3. Second, and on the other side of the balance, Lord Reed acknowledged that public authorities **can** in some instances owe a duty of care at common law in circumstances where the principles applicable to private individuals would impose such a duty (unless inconsistent with legislation). These include a duty to protect from harm:

   > *"for example where the authority has created **the source of danger** or has assumed **a responsibility** to protect the claimant from harm"* (my emphasis).

4. In reaching these conclusions, and in a section addressing head-on some of the confusion generated by the way in which courts have approached the application of the well-known tripartite formula set out in *Caparo v Dickman* [1990] 2 AC 605, Lord Reed referenced the well known authorities in this area in the highways context of *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057 and *Stovin v Wise* [1996] A.C. 923. He noted that it took some time for the significance of those cases to be fully appreciated.

5. In *Stovin*, no common law duty of care arose merely because the local authority had the statutory power under section 79 of the Highways Act 1980 to require the removal of obstructions from the highway; in *Gorringe*, amongst other things, the existence of statutory powers to promote and improve road safety under section 39 of the Road Traffic Act 1988 did not create a parallel common law duty to do so. Importantly in *Gorringe*, Lord Hoffman had said that whereas 'reasonable foreseeability' was the standard criterion for determining the duty of care owed by people who undertake an activity which carries the risk of injury to others, the criterion was insufficient to justify imposition of liability upon someone who simply does nothing.

6. Consequently in highways cases, where the facts fall outside the scope of section 41 maintenance duty (which of course is a duty whose breach is actionable under the Act), the battleground issues become whether the relevant highway authority has assumed a responsibility to protect road users from coming to harm, or has itself created the source of the danger. These two exceptions were effectively conflated in the House of Lords' reasoning in *Gorringe,* with Lord Hoffman saying: ***"if a highway authority conducts itself so as to create a***

ROAD DESIGN CLAIMS: NON FEASANCE, MISFEASANCE AND THE *BOLAM* TEST (CONTINUED)

Thomas Yarrow

reasonable expectation about the state of the highway, it will be under a duty to ensure that it does not thereby create a trap for the careful motorist who drives in reliance upon such an expectation" (my emphasis), the language there on the one hand echoing the professional negligence principles of assumption of responsibility while folding in the ordinary common law principle that a person is liable for positive acts creating traps.

7. So, how have claimants sought to argue a creation of danger or a reliance on a reasonable expectation given by the local authority leading to a trap?

8. In *Kane v New Forest DC* [2001] EWCA Civ 878, the claim concerned a footpath which came to an end at the inside of a bend in a road, where tree and vegetation growth at the mouth of the footpath significantly reduced visibility onto and from the road. The claimant had emerged from the footpath to cross the road and was struck by a car. He originally sued both the highway authority and the planning authority (who in this case were distinct), but dropped the case against the highway authority when it became clear that they had consistently warned the defendant about the danger of the footpath. The matter came before the Court of Appeal, as an appeal against a successful strike-out action by the defendant, which had relied on there being no duty of care to protect the claimant from harm pursuant to *Stovin* (the case pre-dated *Gorringe*). Simon Brown LJ distinguished that case, saying:

> *"Here, by contrast [to Stovin], the starting point must surely be that the respondent Council did create the source of danger. They it was who **required this footpath to be constructed. I cannot** accept that in these circumstances they were **entitled to wash their hands of that danger and** simply leave it to others to cure it by improving the sightlines" (original emphasis).*

Lord Justice May put it another way, referencing the *'assumption of responsibility' test, stating:*

> *"the respondent District Council required, by the two section 52 agreements, the construction of what was to become a public footpath whose exit onto Main Road would, if nothing were done to improve matters, be dangerous. They thereby assumed a responsibility to those, including the claimant, who might wish to use the footpath to see that it was not open until the danger was removed. That is, in my view, an entirely orthodox application of common law principles of negligence. There is nothing in Stovin v. Wise [1996] 1 AC 923 which suggests a different conclusion."*

9. The appeal was allowed on the basis the claimant had an arguable claim that a duty of care on the part of the Council existed.

10. Some years later and after *Gorringe*, in *Lara Lovell (née Geraghty) v Leeds City Council* [2009] EWHC 1145 (QB), in an extensive judgment, Tugendhat J considered another road design creation of danger case. The facts of the case were that the claimant was travelling down an A-road, and came around a blind bend to meet the end of a stationary queue of traffic which she was not anticipating; she swerved to avoid the back of the queue and skidded onto the other side of the road hitting a vehicle coming the other way causing the passenger in her car to suffer

life-changing injuries. The stationary queue was building up before a roundabout which had recently opened to traffic linking a new site for Leeds Grammar School to the main road. She brought a claim for contribution against the Council for inter alia negligence in the design and build of the roundabout and the evaluation of the capacity of the new junction by the Council's experts. The claimant's contention was that the Council had created the source of the danger. The Council in response argued that the dangers for which a highway authority could be liable did not include the ordinary hazards of highway use – relying on Lord Brown in *Gorringe*.

11. Tugendhat J found against the claimant on causation, saying that the claimant had not proved that the queue was caused by the negligence of the design and build of the roundabout as opposed to the design of the school compound, and consequently did not need to go further. He did however accept (and it appears it was unopposed) that a duty was owed at common law in respect of the evaluation, design and build of the roundabout, but that the claim was effectively one pleaded on professional negligence principles and the *Bolam* test applied – that is, when appraising the actions of the experts in this case, they had to be judged against the range of acts or omissions open to reasonably competent traffic engineers. On the facts of this case, although one of the experts had accepted they might have done some things differently, this was not enough to amount to a breach.

12. One case where a substantive claim, brought on the basis of road design and the creation of a danger, has succeeded was *Yetkin v Mahmood* [2010] EWCA Civ 776. Here the claimant had crossed a dual carriageway at a pedestrian crossing, but her view was obstructed at the central reservation by shrubs planted in the reservation which had grown thick and tall. These caused her not to see an oncoming vehicle and she was struck when stepping out. The judge at first instance had found that, applying *Gorringe*, the local authority did not owe a duty of care for not exercising a statutory power to cut back the trees. This however, was overturned on appeal. The Court of Appeal (Smith LJ giving the leading judgment) explained that *Gorringe* did not gainsay the well-established law that a person who did a positive act where they created a hazard affecting the safety of the highway would owe a duty of care to users. Referring to some of Lord Brown's wording in *Gorringe*, Smith LJ explained that the hazard, did not have to be 'enticing' or amount to an entrapment. The Local Authority had created and maintained the crossing; they had planted the shrubs in the central reservation. They therefore owed a duty to the claimant to protect her from harm attributable to the hazard created by their positive act. Not then to trim the shrubs was not simply a failure to confer a benefit in exercising statutory powers but was a breach of duty at common law. The Court of Appeal also found that the claimant was 75% to blame as she did not wait for the traffic lights to turn in her favour.

13. Most recently in *Sumner and Colborne* [2018] EWCA Civ 1006 in the Court of Appeal, again considering an appeal in relation to a strike out application, it was held that the highway authority did not owe a duty of care to highway users to cut back vegetation on land adjacent to the highway which interfered with drivers' views. *Yetkin* was distinguished, first on the basis that the creation of the vegetation which caused a visibility obstruction was carried out by the Welsh Ministers (a Part 20 Defendant) and not by the Council and second on the basis that *Yetkin* was concerned with the creation of danger <u>on</u> the highway while this was a positive action done on land <u>adjacent</u> to the highway. The Court (Sir Stephen Richards) considered whether there were any precedent or comparator cases where duties of care had been found to be owed at common law by owners of land adjacent to the highway to highway users. No helpful comparators or precedents could

ROAD DESIGN CLAIMS: NON FEASANCE, MISFEASANCE AND THE *BOLAM* TEST (CONTINUED)

Thomas Yarrow

be found. As such it was right to consider the *Caparo* formula as this was a novel duty case. The Court of Appeal found that the Welsh Ministers had not created an expectation as to the extent of the visibility at the junction, the limited nature of which ought to have been obvious to any careful driver. More importantly, with reference to the third limb of *Caparo* the Court found that there were "very powerful" factors militating against the existence of a duty of care: it would have profound effects on owners of land adjacent to highways in general, who would find themselves owing common law duties to road users. The fact that such a duty would be limited only to positive acts (i.e. the creation of the vegetation) which would not transfer when land was conveyed to another only "underlined its undesirability". The Court reaffirmed the well-known principle that a highway user must take the highway as they find it.

14. In summary, the current state of the law is therefore one which acknowledges a narrow set of cases where a highway authority may owe a common duty of care in respect of dangers it has created on the highway, but not in respect of land adjacent to the highway. Even in circumstances where the creation of the hazard in the design of the road is accepted as giving rise to such a duty, a defendant authority may have a strong defence in reliance on *Bolam*, in that the actions of its traffic engineers in such design were within the reasonable range of actions by competent professionals.

HIGHWAYS AUTHORITIES, ROAD SIGNS AND ROAD MARKINGS: WHEN MIGHT LIABILITY ARISE?

Laura Johnson & Susanna Bennett

1. It is a fact of life that road accidents frequently occur at junctions. A misjudgement by a motorist on a minor road can lead to devastating consequences for themselves and for those travelling on the major road into whose path they travel. It is not unusual for the motorist on the minor road to blame inadequate signage warning them of the approach to the junction. This can lead to motor insurers seeking to redirect liability to the highways authority, particularly in high value claims.

2. Here we explore the question of whether a claim against a highway authority in respect of road signage can succeed? The short answer is that in the majority of cases it is unlikely that such a claim would be successful, but there are limited circumstances where there may be potential for a claim.

Statutory obligations relating to road signs

3. The starting point has to be a consideration of the statutory obligations of local authorities (which are, generally speaking, highway authorities[1]) in respect of road safety and road signage.

4. Local authorities owe a broad public duty to promote road safety under section 39 of the Road Traffic Act 1988:

> *"**39**…*
>
> *(2) Each relevant authority— (a) if it is a local authority, must prepare and carry out a programme of measures designed to promote road safety*
>
> *…*
>
> *(3) Each relevant authority*
>
> *(a) must carry out studies into accidents arising out of the use of vehicles*
>
> *(i) if it is a local authority, on roads or parts of roads, other than GLA roads or roads for which the Secretary of State is the highway authority (in Scotland, roads authority), within their area,*
>
> *…*
>
> *(b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for the maintenance of which they are responsible and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads, and in constructing new roads, must take such measures as appear to the authority to be appropriate to reduce the possibilities of such accidents when the roads come into use.*
>
> *…"*

5. A highway authority has the power to install road signs pursuant to sections 64 and 65 of the Road Traffic Regulation Act 1984:

> *"**64.— General provisions as to traffic signs**.*
>
> *(1) In this Act "traffic sign" means any object or device (whether fixed or portable) for conveying, to traffic on roads or any specified class of traffic, warnings, information, requirements, restrictions or prohibitions of any description—*

HIGHWAYS AUTHORITIES, ROAD SIGNS AND ROAD MARKINGS: WHEN MIGHT LIABILITY ARISE? (CONTINUED)

Laura Johnson & Susanna Bennett

(a)specified by regulations made by the relevant authority, or

(b)authorised by the relevant authority,

and any line or mark on a road for so conveying such warnings, information, requirements, restrictions or prohibitions.

…

(4) Except as provided by this Act, no traffic sign shall be placed on or near a road except

…

(c) a traffic sign placed on any land— (i) by a person authorised under the following provisions of this Act to place the sign on a road, and (ii) for a purpose for which he is authorised to place it on a road

…

65.— Powers and duties of traffic authorities as to placing of traffic signs.

(1) The traffic authority[2] may cause or permit traffic signs to be placed on or near a road, subject to and in conformity with such general directions or such other directions as may be given by the relevant authority…"

A positive duty to provide and/or maintain road signs at common law?

6. The combined effect of the above provisions is that a highway authority is required to promote road safety by the installation of road signs, whilst having the widest discretion as to how it goes about this. But this statutory framework does not provide a platform for private law claims. Why? The answer takes us back to the distinctions between statutory powers and duties and common law liability for acts versus omissions.

7. As is discussed in detail elsewhere in this briefing s. 41 of the Highways Act 1980 is an example of a statutory duty that provides a private law cause of action for liability for failure to maintain the highway. This enables a private law claim in damages to be brought for breach of the provision. The mere existence of a statutory duty without such provision does not in itself give rise to a right to a private law action and neither therefore does a statutory power. These propositions were considered by the House of Lords in two important cases that bear some detailed consideration:

8. *Stovin v Wise* [1996] AC 923 was concerned with an accident at a junction. A's motorcycle was hit by B when B came out of the junction. B brought the highway authority into the proceedings. The highway authority knew that the junction was dangerous because the road users' view was restricted by a bank on adjoining land. There had been at least three previous accidents over the preceding 12 years. Several months earlier the council's surveyor had recommended removal of part of the bank and the council accepted this advice subject to agreement by the landowner. The landowner did not respond to the local authority's request and nothing was done prior to the accident.

9. The case progressed to the House of Lords, who considered section 79 of the Highways Act 1980, a provision granting a highway authority the *power* to require obstructions near the road to be removed.

The majority ruled that the statutory power did not give rise to a common law duty of care, even if the exercise of the power would have prevented a collision. Lord Hoffmann, giving the majority judgment, stated that where a statutory duty did not (on principles of statutory construction) give rise to a private right to sue for breach, it would be unusual for it to give rise to a common law duty of care. This would be even more unlikely in the case of a statutory power. As Lord Hoffmann summarised the decision in the later case of *Gorringe* (see below):

> *"The decision of the majority [in Stovin] was that the council owed no private law duty to road users to do anything to improve the visibility at the intersection. Drivers of vehicles must take the highway network as they find it." (At p. 958). The statutory power could not be converted into a common law duty. I pointed out in my speech that the council had done nothing which, apart from statute, would have attracted a common law duty of care. It had done nothing at all. The only basis on which it was a candidate for liability was that Parliament had entrusted it with general responsibility for the highways and given it the power to improve them and take other measures for the safety of their users.*
>
> *"Since the existence of these statutory powers is the only basis upon which a common law duty was claimed to exist, it seemed to me relevant to ask whether, in conferring such powers, Parliament could be taken to have intended to create such a duty. If a statute actually imposes a duty, it is well settled that the question of whether it was intended to give rise to a private right of action depends upon the construction of the statute: see Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] 1 AC 58, 159, 168-171. If the statute does not create a private right of action, it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care."*

Accordingly, the claim against the local authority in *Stovin* failed.

10. The second case of importance is the House of Lords decision of *Gorringe v Calderdale* [2004] UKHL 15; [2004] 1 WLR 1057, which provides a clear answer to the question of whether a common law claim lies in respect of the highway authority's power to install and maintain road signs. Lord Hoffmann sets out the facts of the case and some might say he gives away his views about where fault really lies in his opening sentence: "On 15 July 1996, on a country road in Yorkshire, Denise Gorringe drove her car head on into a bus".

11. Lord Hoffmann went on to describe the essential facts thus:

> *"[The bus] was hidden behind a sharp crest in the road until just before [Mrs Gorringe] reached the top. When she first caught sight of it, a curve on the far side may have given her the impression that it was actually on her side of the road. At any rate, she slammed on the brakes and at 50 miles an hour the wheels locked and the car skidded into the path of the bus… On the face of it, the accident was her own fault. It was certainly not the fault of the bus driver. He was driving with proper care when Mrs Gorringe skidded into him. But she claims in these proceedings that it was the fault of the local authority, the Calderdale Metropolitan Borough Council. She says that the council caused the accident by failing to give her proper warning of the danger involved in driving fast when you could not see what was coming. In particular, the Council should have painted the word "SLOW" on the road surface at some point before the crest. There had been such a marking in the past, but it disappeared, probably when the road was mended seven or eight years before."*

12. The Claimant contended that the highway

HIGHWAYS AUTHORITIES, ROAD SIGNS AND ROAD MARKINGS: WHEN MIGHT LIABILITY ARISE? (CONTINUED)

Laura Johnson & Susanna Bennett

authority had breached a common law duty of care arising under or in parallel with section 39 of the Road Traffic Act 1988 (see above) by allowing the "SLOW" sign painted on the road to fade. Considering the provisions cited above, the House of Lords concluded that section 39 created a broad public duty, which did not give rise to a private cause of action or generate a parallel common law duty.

13. Lord Hoffman made clear in his judgment that the case was not concerned with arguments of assumption of responsibility or misfeasance (para 38):

> "*I must make it clear that this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty.*"

14. As a result, Lord Hoffmann concluded (para 44):

> "*My Lords, in this case the council is not alleged to have done anything to give rise to a duty of care. The complaint is that it did nothing. Section 39 is the sole ground upon which it is alleged to have had a common law duty to act. In my opinion the statute could not have created such a duty. The action must therefore fail.*"

15. Lord Hoffmann distinguished arguments where the highways authority had created the danger and / or assumed responsibility (para 43) saying:

> "*if a highway authority* ***conducts itself so as to create a reasonable expectation*** *about the state of the highway, it will be under a duty to ensure that* ***it does not thereby create a trap*** *for the careful motorist who drives* ***in reliance*** *upon such an expectation*."

16. These distinctions are of course central to the reasoning of the Supreme Court when considering the circumstances in which public authorities may be liable in common law negligence when exercising statutory functions in the recent case of *Poole BC v CN* [2020] AC 780.

17. Lord Scott in *Gorringe* (at para 71) stated:

> *"...In my opinion, if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty. I would respectfully accept Lord Browne-Wilkinson's comment in X (Minors) v Bedfordshire County Council , at p 739, that "the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts*

complained of were done". But that comment cannot be applied to a case where the defendant has done nothing at all to create the duty of care and all that is relied on to create it is the existence of the statutory duty. In short, I do not accept that a common law duty of care can grow parasitically out of a statutory duty not intended to be owed to individuals."

18. In the later case of *Sandhar v Department of Transport* [2005] 1 WLR 1632 May LJ summarised the legal position thus:

> *"Although statutory duties or powers which do not give rise to a private law right of action may constitute part of the relevant factual background, the existence of those duties or powers cannot reinforce parasitically the existence of a common law duty of care in the public authority. In short … the existence of a common law duty depends on unvarnished common law principles*."

Section 41 of the Highways Act

19. As Richard Collier and Christopher Pask explain in their article, section 41 of the HA, being the duty of highway authorities to "maintain" the highway, is limited to a duty to repair and keep in repair, the road. It does not extend to installing road signs. Lord Scott at paragraph 52 of *Gorringe* stated:

> *"…The duty "to maintain" was a duty limited to keeping the fabric of the road in such good repair as to render its physical condition safe for ordinary traffic…"*

When will a highway authority be liable for road signage?

20. In light of the above analysis it can be seen that there is no duty enforceable at common law either to install road signs in a dangerous area or to renew signs that have been damaged or faded away. In both cases, as in *Gorringe,* the highways authority will simply have done nothing at all.

21. Liability will only arise if a highway authority's positive acts in installing road signs have caused a hazard / created a danger, or if it has assumed responsibility in some way. A few examples will assist:

- As proposed at paragraph 102 of *Gorringe*:
  - *"If, for example, an authority were to signal a one-way street but omit to put "No Entry" signs at the other end"*
  - *"Or assume road markings indicating where it is safe to overtake and where it is not and that by some crass mistake in the painting of these a motorist were to be ensnared into the path of an oncoming vehicle previously hidden in a blind spot ahead."*
- *Levine v Morris* [1970] 1 WLR 71: the siting of a large road sign supported by 4 heavy concrete posts where a car could easily veer into one of the posts.
- *Yetkin v Mahmood* [2010] EWCA Civ 776; [2011] QB 827: the planting of tall shrubs in a central reservation by a pedestrian crossing, which restricted a pedestrian's view of the approaching traffic.

Implications

22. The commonest cases concerning signage tend to arise where a sign has become obscured, lost or faded, or where no sign warning of a danger has been erected at all. In those cases a highway authority, whose fault is essentially to do nothing, cannot be successfully sued. Responsibility for avoiding road traffic accidents belongs to motorists who are expected to take the necessary care to avoid injuring themselves or others. They must pay attention to the road and not rely heavily on road signs to warn them of potential hazards. Consistent with this principle, motorists have compulsory third party insurance.

23. Litigators should look out for those cases in which it is a road sign itself (or a set of road signs) that is the

HIGHWAYS AUTHORITIES, ROAD SIGNS AND ROAD MARKINGS: WHEN MIGHT LIABILITY ARISE? (CONTINUED)

Laura Johnson & Susanna Bennett

danger that has caused the accident. This might take the form of a trap (in the case of a one-way road signalled at one end of the road but not the other) or, more straightforwardly, dangerous placement of a sign. It is suggested that whilst these cases do occur, they are not particularly common.

24. Highway authorities must continue to make use of road signs pursuant to their duty to promote road safety. To avoid damages claims, they should be prudent to ensure that any message communicated by a road sign is accurate, and that road signs are positioned so as to avoid danger.

[1] Section 1 of the Highways Act 1980 and section 39(4) of the Road Traffic Act 1988.

[2] "Traffic authority" in this subsection includes a highways authority: section 80 of the same Act

CLAIMS ARISING OUT OF VEGETATION OBSCURING THE HIGHWAY

Henk Soede

1. This article considers the circumstances in which highways authorities or landowners will be liable for accidents caused by vegetation that poses a hazard due to the effect it has on visibility. The focus of the article is the Court of Appeal's decision in *Sumner v Colborne* [2018] EWCA Civ 1006, in which Andrew Warnock QC acted for the successful highways authority. In that case it was held that an owner of land adjacent to a highway does not owe a private law duty of care to highway users in respect of vegetation on his land that impairs the visibility for users of the way. In addition to *Sumner*, I will also consider three key authorities pre-dating that decision to provide a fuller understanding of the legal principles governing this area.

Orthodoxy: *Gorringe v Calderdale* and *Stovin v Wise*

2. In order properly to understand the law on highways and vegetation, it pays to keep in mind two leading authorities on the interaction between local authorities' statutory powers relating to highways and the common law duty of care – *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale MBC* [2004] 1 WLR 1057.

3. In *Gorringe* and *Stovin* the respective claimants were injured in road traffic accidents that were (allegedly) caused by the defendant local authorities' failure to exercise statutory powers to provide warning signs (*Gorringe*, per section 39 of the Road Traffic Act 1988) and remove dangerous obstructions (*Stovin*, per section 29 of the Highways Act 1980). In both cases, the claimants alleged the defendants' statutory power created a parallel duty at common law; that the failure to exercise these powers amounted to a breach of that common law duty; and that this breach had caused their respective accidents. The House of Lords dismissed those claims and held that the defendants were not under a common law duty of care to persons who suffered loss by reason of a failure to exercise its statutory power. At [32] in *Gorringe*, for example, Lord Hoffman summarised the position as follows: "*I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide*". Then, at [71] in *Gorringe*, Lord Scott went further: "*…if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there…*". The general essence of this principle can also be gleaned from the way Lord Hoffman carefully parses the 'two types' of cases: "*…I must make clear that this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationship or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty."* [38] (my emphasis).

4. The principles that were carefully extracted in *Gorringe* are still very much in play today. Accordingly, the key enquiry in these types of claims will be whether a local authority has undertaken a positive act, entered into a special relationship, or

CLAIMS ARISING OUT OF VEGETATION OBSCURING THE HIGHWAY (CONTINUED)

Henk Soede

assumed certain responsibilities in respect of the highway hazard. Unless the relevant highway hazard can be attributed to any of those acts or undertakings, the mere fact of a general statutory power to address road hazards will not itself ground a common law duty of care.

Gorringe distinguished: *Yetkin v Mahmood* [2011] QB 827

5. The Court of Appeal decision in *Yetkin v Mahmood* [2011] QB 827 is another key case that practitioners in this area need to understand. *Yetkin* concerned an accident on a dual carriageway with a central reservation on which the highway authority had planted various bushes. There was a pedestrian crossing, controlled by traffic lights, that went through this central reservation. The claimant walked into the central reservation and went to cross the final part of the carriageway without waiting for the lights to change and was hit by an oncoming car. The claimant brought proceedings against the highway authority, alleging that there had been a breach of the common law duty owed to her as a road user by failing to maintain the vegetation on the central reservation which had obscured her view of the traffic in the further carriageway. The Court of Appeal agreed and Smith LJ distinguished the case from *Gorringe* on the following grounds:

> *"I do not think that Lord Hoffmann* (at [38] in *Gorringe*) could *have made it more plain that Gorringe was not concerned with cases where the public authority has done something positive which has or may have given rise to a common law duty of care. The House was saying nothing to gainsay the well-established law that a person who does an act which affects the safety of the highway will generally owe a duty of care to road users and if there is a breach of that duty liability will follow. It is impossible to contend that Lord Hoffmann intended to lay down any new rules or conditions about the extent or scope of the duty of care of a highway authority which creates a hazard on the highway."* [25].

Then, Smith LJ found liability on the following basis:

> *"…This highway authority owed a duty to all road users (whether careful or negligent) to use reasonable care in the manner in which it exercised its powers when it created and maintained the crossing facility… The planting of vegetation in the raised beds of the central reservation is obviously a reasonable exercise of the authority's powers but to plant shrubs that will grow so large as to obscure the view and then not to ensure that they are trimmed back is a negligent exercise of those powers …. I have no doubt that, in the circumstances of the case, the local authority had a common law duty of care towards the claimant, notwithstanding her own negligence, that that duty was breached and that the breach was a cause of the accident."*

6. In other words, the highway authority assumed a duty of care due to positive acts it took to plant bushes and plants at the junction; these acts created a hazard on the highway (restricted visibility at the junction); the creation of the hazard amounted to a breach of the duty of care; and this breach was a cause of the claimant's accident. As will be seen, the fact a hazard is *on* the highway, as opposed to

adjacent to the highway, is of key relevance.

Sumner v Colborne v Denbighshire County Council & The Welsh Ministers

7. The claim in *Sumner* arose out of a road traffic accident. The claimant was cycling along an A-road when the defendant's vehicle emerged from a minor road on the claimant's left-hand side. The defendant collided with the claimant and the claimant suffered serious injuries as a result. The claimant brought proceedings in negligence against the defendant, who denied liability and alleged contributory negligence. In addition, the defendant alleged that visibility at the junction was severely restricted by vegetation on the right-side of the junction and Part 20 proceedings were brought against Denbighshire County Council (the "Council"), who were the highway authority responsible for the minor road, and the Welsh Ministers, who owned the relevant parcel of land and were the highway authority responsible for the A494. The defendant alleged that the failure to ensure the vegetation was cut back amounted to a breach of section 41 of the Highways Act 1980 and/or breach of a common law duty of care owed to users of the highway. On those grounds, the defendant sought a contribution in respect of any liability he might be found to have to the claimant.

Proceedings below

8. At an earlier hearing, the Council and the Welsh Ministers successfully applied to strike out the Part 20 claims against them. As regards the section 41 claim, it appears the claim was struck out as the relevant vegetation was not itself on or over the highway (it was on a parcel of land owned by the Welsh Ministers that was adjacent to the highway) and that section 41 did not therefore apply. This aspect of the decision was not appealed.

9. As regards the common law negligence claim, the Judge below found that the relevant duty of care to users of the highway related to the creation of dangers *on* the highway, not to the creation of dangers on land *adjacent* to the highway. In terms of the factual question of whether the vegetation that caused the obstruction was on the highway, the Judge considered that very little of the vegetation was on or over the highway and that there was "*no real prospect of the defendant showing that it was the very small amounts of vegetation that were on or over the highway, rather than general dense vegetation that was on the Welsh Ministers' land, that was the cause of the obstruction*". The defendant appealed both findings – namely, 1) the issue of whether a landowner owed users of the highway a duty of care in respect of vegetation on their land (i.e., vegetation not itself on or over the highway) that impaired visibility for users of the highway and 2) the issue of whether the Judge should have found that the defendant had a real prospect of establishing that a small amount of vegetation *on or over the highway itself* was causative of the accident.

Issue (1): duty of care

10. Sir Stephen Richards started by considering the decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595, where the Supreme Court clarified the correct approach to the question of whether a duty of care exists. In essence a duty of care should either be established by direct precedent with other similar cases or, alternatively, by application of three-stage test set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. Counsel for the Defendant sought to allege that *Yetkin* was a direct precedent or provided a close analogy insofar as *"this is an extreme case of reduction of visibility, arising out of the positive act of one or other of the Part 20 defendants in changing the use of the land by the junction in such a way as to create a recognised risk to visibility unless the vegetation were maintained thereafter."* It was submitted that the *"judge's distinction between hazards on the highway and hazards on the adjacent land affecting users of the highway"* was *"artificial and would*

CLAIMS ARISING OUT OF VEGETATION OBSCURING THE HIGHWAY (CONTINUED)

Henk Soede

produce absurd and unfair consequences": see [21]. Sir Stephen Richards made three preliminary observations:

- First, although there was a serious visibility problem, the extent fell to be determined at trial: see [22];
- Second, the only positive act to which the growth of the land could be attributed is creating a fenced in area of vegetation, which was carried out by the Welsh Ministers. The most that could be said of the Council was that it *failed* to cut back the vegetation and it was clear from *Stovin* and *Gorringe* that such a failure does not give rise to a liability in negligence. The position was not affected by the fact the Council had carried out work of maintenance on the vegetation in the past: see [23]. This point justified the strike out against the Council.
- Third, *Yetkin* was not a direct precedent as to the existence of a duty of care because "*it was concerned specifically with the creation and maintenance of a crossing facility on the highway, and the observations of Smith LJ have to be read in that context*": see [24]. By contrast, the positive act relied on in *Sumner* "*related to things done on land adjacent to the highway, not on the highway, and the vegetation complained of was on that land and not on the highway*" [25]. Counsel for both parties were unable to find any authorities "*where an owner of land adjoining the highway has been held to owe a duty of care to highway users in respect of vegetation on that land or indeed in respect of any comparable circumstance*."

11. Even though the Welsh Ministers had positively acted in a limited sense to create the vegetation on their land (see [5]), the question remained whether a landowner owed a duty of care to highway users for vegetation on their land which was not itself on the highway but adjacent to it. Having determined there was no direct precedent for the existence of a duty of care, Sir Stephen Richards turned to the application of the incremental approach summarised in *Robinson* to decide whether a duty of care should be recognised in this novel situation. The following factors were considered to militate decisively against the existence of a duty of care:

- "The imposition of a duty of care on owners of land to ensure that vegetation in their fields and gardens did not affect sightlines on neighbouring highways (at least where they had themselves planted that vegetation or had allowed its growth by positive acts such as the erection of fencing) would be profound." [32].
- As emphasized by Lord Hoffman in *Stovin*, the "road network is imperfect and drivers must take it as they find it. Everyone knows that there are hazardous bends, intersections and junctions. It is primarily the duty of drivers of vehicles to take due cares. And if… they do not, there is compulsory insurance to provide compensation to the victims. There is no reason of policy or justice which requires the highway authority to be an additional defendant." [958C-E]. Sir Stephen Richards considered "similar considerations apply to this case" [35].
- "…if a duty of care were found to exist in the present case, it would be liable to encourage a marked growth in claims by drivers' insurers for contributions from owners of land adjacent to highways in cases where visibility was an issue (and

such owners would not necessarily have public liability insurance) and a marked growth in claims by drivers' insurers for contributions from owners of land adjacent to highways in cases where visibility was an issue (and such owners would not necessarily have public liability insurance) and a marked growth in the business of providing expert advice to landowners on the implications of vegetation and structures on their land for visibility on the adjoining road network. These are potentially serious and costly consequences for very little practical gain".

12. For those reasons, Sir Stephen Richards concluded that it would not be fair, just and reasonable to impose a duty of care on the Party 20 defendants.

Issue (2): location of vegetation

13. This concerned the question of whether the judge was right to find that "*there is no real prospect of the defendant showing that it was the very small amounts of vegetation that were on or over the highways, rather than the general dense vegetation that clearly on the [Welsh Ministers'] land, that was the cause of the obstruction*" [38]. Sir Stephen Richards was not convinced – "*the judge was entitled to conclude on the basis of the photographs…that there was no real prospect of the defendant establishing at trial that the vegetation on or over the highway, as distinct from the vegetation on the land by the junction, was causative of the accident*." [38].

Conclusion

14. Taking the above together, if a highway user alleges that vegetation caused or materially contributed to an accident it is suggested that the chain of enquiry should be as follows:

    1) Is the vegetation (or some of the vegetation) located on the highway?

    2) If so, did the vegetation create a hazard on the highway? If only part of the vegetation is on the highway, did the part of the vegetation that was on the highway create the hazard?

    3) If so, did the hazard arising from the vegetation cause the accident?

    4) If so, did the vegetation arise as a result of (for example) a positive act undertaken by the council / highways authority as opposed to (for example) a failure to maintain the vegetation?

15. If the answer to all of those questions is yes a highways authority may well find itself liable for the relevant accident in common law negligence. In the vast majority of vegetation cases however the criticism of the highways authority will be one of omission: failure to cut back vegetation growing alongside the highway that it did not plant. In those circumstances a claim will not succeed.

NUISANCE ON THE HIGHWAY

Henk Soede

1. It is very common to see Particulars of Claim in highways cases that allege nuisance. It is far less common to hear this cause of action argued. One might speculate that the inclusion of nuisance in so many pleadings is more to do with the use of pro formas than considered reflection on the doctrine. This article explains the rules of nuisance, particularly public nuisance and its application to highways cases. It will focus on two cases in particular: the first (*Wandsworth LBC v Railtrack Plc* [2002] QB 756) involves a highway authority alleging public nuisance against a private landowner on behalf of the public pursuant to section 130 of the Highways Act 1980, whereas the second (*Ali v City Bradford MDC* [2012] 1WLR 161) involves a member of the public alleging nuisance against a highway authority. Both are leading modern authorities on public nuisance, and by looking at each case in detail it is hoped this article will facilitate a deeper understanding of this rather unusual cause of action.

Starting point

2. Public nuisance is both a criminal and tortious concept. In *R v Rimmington and Goldstein* [2006] 1 AC 459 the House of Lords stated that public nuisance is committed when a person does an act not warranted by law, or omits to discharge a legal duty, and the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone. In the tortious context, the criteria for establishing public nuisance was set out by Lord Atkins in *Sedleigh-Denfield v O'Callaghan & Ors* [1940] A.C. 880 at 889:

> "…*Where the occupier has knowledge of a public nuisance, has the means of remedying it and fails to do so, he may be enjoined from allowing it to continue…If an individual could have proved special damage caused by the nuisance…he could surely have recovered damages.*" (my emphasis).

3. So, in other words: the problem must be deemed a "nuisance"; the proposed defendant must have knowledge of the nuisance; the proposed defendant must have the means of remedying it; and the proposed defendant must have failed to do so within a reasonable time frame. Furthermore, in order to be actionable, the claimant must show that they suffered special damage that is specific to them and not suffered by the public at large.

Illustrations

4. Before looking at the modern authorities, there are a few illustrative cases predating the Highways Act 1980 that are worth considering.

5. The first is *Holling v Yorkshire Traction Co Ltd* [1948] 2 All E.R. 662. The defendant in *Holling* operated a coke oven and every hour the oven omitted a considerable quantity of steam, which passed across a highway fifty yards away. In certain weather conditions the steam would form a dense fog, which would obscure all vision on the highway. On one such occasion the dense fog obscured visibility to such an extent that an accident was caused. The claimant successfully sued the defendant for nuisance and negligence - the fog and smoke constituted a public nuisance; the defendant had knowledge of a public nuisance; the defendant had the means of remedying it; the defendant failed to do so; and the claimant suffered provable special

damage (i.e., personal injury) as a result.

6. A second case is *Crane v South Suburban Gas Company* [1916] 1 K.B. 33. The defendants were engaged in the repair of a gas main in a public highway and needed to use molten lead. The defendant's workmen placed a fire pail a few feet from footpath and on the fire pail containing molten lead. A child passing by accidentally knocked over the fire pail and some of the molten lead spilled out onto the claimant's foot. The claimant claimed damages for personal injuries on the basis of negligence or alternatively nuisance. Avory J considered the claim was best cast as a nuisance claim: "*what the defendants were doing was a nuisance in the sense that they were doing something on or adjacent to the highway of a character which was dangerous unless steps were taken to guard persons using the highway from the danger*" (p35-36). It was, on Avory J's analysis, "*clear on the authorities that a person doing something on the highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper precautions*" (p36).

7. A third example of a case where damages for public nuisance were awarded is *Slater v Worthington's Cash Stores* [1941] 1 K.B. 488. The claimant, while on the pavement looking through the window of the defendant's shop premises, was injured when a mass of snow fell on her from the sloping roof. The claimant sued for damages, alleging that her injuries were due to the negligence of the defendants or, alternatively, their failure to abate the nuisance created by the snow. On nuisance the claimant submitted that the defendant, by allowing snow to accumulate and/or to remain on the roof, created a nuisance which was dangerous to persons lawfully using the highway and, in fact, caused the injuries to the claimant. Oliver J first set out the test: "*I think it is plain that an occupier is not liable for nuisance on his premises, unless he has either create the nuisance, or, knowing its existence or being in a position that, with reasonable care, he would have known of its existence, he has done nothing to remedy it*" (p491). Applying that test, Oliver J held that: a) it was clear the accumulation of snow was a nuisance as it was liable to fall at any time on the heads of highway users; b) the nuisance was by the operations of nature, not by the defendant, but four days had elapsed between the blizzard and there was therefore reasonable opportunity to remove the snow; c) the defendant demonstrated an awareness of the danger posed by the snow; and, therefore, d) the defendant was liable in nuisance for the damage occasioned by the claimant.

Nuisance and the HA 1980

8. It is important to note that the early common law rules on nuisance overlap considerably with the provisions in the HA 1980, particularly sections 130, 149 and 150. Section 149 and 150 provide alternative routes to remedy a nuisance – specifically, **section 149(1)** empowers the highway authority to serve notice on the person who deposited the nuisance to remove the same or, alternatively, to seek an order of removal from the magistrates court, whereas **section 150(1)** requires highways authorities to remove any obstruction on a highway and, if they fail to do so, **section 150(2)** empowers highway users to seek an order of removal from the magistrates' court. But what of the remedies at common law?

9. Crucially, **section 333** of the HA 1980 negatives any presumption that the remedies available under the HA 1980 with regard to obstruction or other interference supersede the pre-existing common law remedies. In essence, the position is that if individual members of the public can meet the criteria for public nuisance *and* evidence special damage – or, in other words, damage which affects them specifically and is over and above that which the public at large have suffered – they *may* sue for damages at common law: see 2-489.5,

NUISANCE ON THE HIGHWAY (CONTINUED)

Henk Soede

Encyclopaedia of Highway Law and Practice. As will be seen, however, the existence of the remedies in the HA 1980 has influenced the modern development of the common law remedies: see, for example, Coulson LJ at [39] in *Ali v The City of Bradford MDC* below.

Wandsworth LBC v Railtrack [2001] EWCA Civ 1236

10. *Railtrack* is a useful judgment as the Court of Appeal sets out a brief explanation of the history of the doctrine of nuisance and clarifies the criteria for establishing liability. Additionally, it is an interesting example of a public authority exercising its power under section 130 of the HA 1980 to sue a private landowner for public nuisance on behalf of the public.

11. The source of the dispute in *Railtrack* was a flock of pigeons roosting on the underside of a railway bridge in Balham, South London. The pigeon droppings fouled the pavement and presented a hazard to pedestrians using the highway beneath the bridge. The claimant was the highway authority for the part of the road under the bridge and the defendant was the owner of the bridge. Pursuant to section 130 of the HA 1980 and on behalf of the public the claimant brought proceedings against the defendant alleging public nuisance, private nuisance and negligence and sought a declaration that the defendant was liable to abate the nuisance; an injunction requiring the defendant to abate the nuisance; and damages in the sum of £10,000 (the cost of cleaning the pavement).

12. The judge at first instance found the defendant, as landowner, liable in public nuisance – it was aware of the pigeon infestation, the infestation and the excess droppings on the pavement qualified as a public nuisance, the defendant had the means to remedy it, and no attempts to remedy had been undertaken. The defendant appealed.

Decision

13. The Court of Appeal dismissed the defendant's appeal and took the opportunity to clarify the key elements of the public nuisance tort. Kennedy LJ's judgment, which was the only substantive judgement, is in three parts.

14. The first part was concerned with whether it was legally relevant that the defendant had not itself created the nuisance: the pigeon infestation was not attributable to any culpable act or omission on the part of the defendant. The defendant submitted that public nuisance should be approached in a similar way to common law negligence, with the effect being that the defendant could defend itself on the grounds that it did not itself create the nuisance. Kennedy LJ disagreed: "*in my judgment, it has been clear, at least since Tod Heatley was decided in 1897, that where there is a public nuisance on the defendant's land it does not matter whether it was created by the defendant or some third party, or by natural causes*" [22]. Then, Kennedy LJ reiterated the relevant criteria for establishing public nuisance:

- "*If the defendant is aware of [the nuisance]*";
- "*Has had a reasonable opportunity to abate it*";
- "*Has the means to abate it*"'; and
- "*Has chosen not to do so*"; then
- "*He is liable*"; and

- "*There is no reason to approach the matter as though it were a claim in negligence or private nuisance*". [22].

15. The second part of the judgment was concerned with whether the judge was wrong to find liability for a public nuisance which a) did not involve a nuisance causing physical damage to neighbouring land, but only an interference with the enjoyment of that land; and b) arose out of the activities of wild birds, which were (allegedly) present due to the activities of the community the claimant represented, and not out of the state of the defendant's land: [23]. Kennedy LJ addressed these issues as follows:

- First, although it may be easier for a claimant to prove nuisance where there is physical damage to land or injury to a claimant, it was "*clear beyond argument that interference with the right of the public to enjoy the highway in reasonable comfort and convenience can amount to a public nuisance*": [23]. The wide-reach of public nuisance was thus preserved.

- Second, the fact the nuisance arose out of the activities of wild birds and not out of the condition of their land was "*immaterial if the defendant had the necessary knowledge, opportunity and means to abate the nuisance*". The defendant argued that the problem arose out of the fact the community provided food and that the claimant, representing the community, should solve the problem pursuant to the statutory powers given to it in section 74 of the Public Health Act 1961 to abate any nuisance. Kennedy LJ rejected that submission: "*this case is not concerned with the problem of pigeons in general*", but rather "*the nuisance caused by the pigeons which roost under the railway bridge which crosses Balham High Street*" and this was a nuisance that the defendant, as landowner, had a clear legal duty to address: [24].

16. The third part of the judgment related to the scope of the duty that the defendant owed the claimant and whether the fact they had offered the claimant the option of re-installing pigeon-proof netting discharged that duty. Kennedy LJ considered those issues were misconceived – this was a public nuisance claim and so the three core considerations were: 1) does the matter complained of constitute a hazard (defined as "being dangerous or materially affecting the comfort and convenience of the public on the highway"); 2) did the defendant have knowledge of the hazard; and 3) has the defendant taken reasonable steps to prevent the foreseeable effects of the hazard [27]. In the case of the defendant, Kennedy LJ held, these questions were all answered in the affirmative. The appeal was dismissed and judgment entered for the claimant.

Ali v The City of Bradford Metropolitan District Council [2010] EWCA Civ 1282

17. The decision in *Ali* raised an entirely different set of issues. The ratio of the decision is that the Court of Appeal clarified that a breach of section 130(1) of the Highways Act 1980 does not give rise to a private action for damages. For the specific purposes of this note however, the key relevance of this decision is that the Court of Appeal delimited the circumstances in which highways authorities could be found liable for nuisance in common law. For obvious reasons I have focused largely on the latter aspect of this judgment.

Background

18. The footpath in question fell within the definition of a highway maintenance at public expense under section 36 of the Highways Act 1980. As the Claimant was walking down the footpath, the Claimant slipped and fell due (allegedly) to mud and debris that had accumulated on the steps. The claim was originally for breach of duty under section 41 and 150 of the HA 1980, breach of duty under the Occupier's Liability Act 1957 and negligence. But the mud and debris were not part of the fabric of the road, so by the time the claim was heard before a Deputy District Judge (a preliminary hearing) the

NUISANCE ON THE HIGHWAY (CONTINUED)

Henk Soede

heads of claim were limited to breach of duty under section 130 of the HA 1980 and nuisance.

Section 130

19. Coulson LJ considered that the duty expressed at section 130 of the Highways Act 1980 did not include a right to a private action damages in the event of breach. The reasons advanced by the defendant, which Coulson LJ accepted as "compelling", were that section 130(1) related to the general rights of the public to use the highway, not about the safety or condition of the highway, and that there was already a carefully calibrated procedure for enforcement of a highway's duties under section 130 contained at section 130A to 130D of the HA 1980: see [27]. In this respect, it was considered that a separate right to damages would plainly be inconsistent with parliament's intention. Coulson LJ analysed the history underlying section 130 and considered the legislative history supported this conclusion: [33].

Nuisance

20. In terms of the claim in nuisance, the claimant submitted that "*where a highway authority has actual knowledge of a dangerous deposit on a public highway, or sufficient time has elapsed that it had the means of acquiring the knowledge by a system of inspection, it is to be regarded as having continued the nuisance, and therefore liable to a person who suffers a slipping accident*" [34]. Reliance was placed on the decision in *Sedleigh-Denfield* and specifically Viscount Maugham's assertion at p894 that: "*an occupier of land "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so*." As set out above, that is an orthodox statement of the relevant criteria, but the contentious issue in *Ali* was whether that criteria should apply to a highway authority in the same way it applies to a private landlord.

21. Coulson LJ considered that the doctrine of public nuisance should not impose the same obligations on highway authorities as it does on private landlords. The reason given was that the relationship between, for example, neighbouring private landowners was fundamentally different to the relationship between a highway authority and users of the highways: see [37]. Accordingly, Coulson LJ held that "*to apply the ruling in Sedleigh v Denfield* [which was concerned with private landowners] *to the present case would involve extending its ratio to a very different type of situation*" [35]. As for the reasons why the relationship between highway users and highway authorities was fundamentally different, Coulson LJ alighted on two points in particular:

- First, "*to require highways authorities to carry out regular precautionary inspections of public footpaths of all descriptions to see that they are kept free from obstructions would have substantial economic implications for local authorities*" [39]. Put slightly differently, it would be economically unsustainable to impose on highway authorities the same inspection requirements that are placed on private homeowners and the imposition of such obligations would thus be unjust. There are miles and miles of country paths and highways and requiring the same degree of inspection was simply impracticable.
- Second, sections 149 and 150 of the HA 1980

already regulated the powers and duties of highway authorities with respect to the removal of highway obstructions and these sections provided for a method for enforcement of the duty: see [39]. In these circumstances, Coulson LJ held, "*for the courts to impose such a liability through the law of nuisance would be to use a blunt instrument to interfere with a carefully regulated statutory scheme and would usurp the proper role of Parliament*": ibid. Crucially, Coulson LJ stressed that the case in question was not concerned with a nuisance that was *created* by a highway authority and that it was not in any way being suggested that a "*highway authority would not be liable at common law for a nuisance which it created*".

22. This second point deserves further comment. Coulson LJ considered that the appropriate route to remedying a public nuisance that was not itself created by the highway authority would be under the Highways Act 1980, specifically section 149 or 150. It was accepted by both parties that Parliament did not intend that breach of a highway authority's duty under section 150 for the removal of obstructions should give rise to a private action for damages. Given that clear and deliberate legislative intent, Coulson LJ considered it would be wrong to enable a pedestrian to obtain damages for personal injury that resulted from a nuisance the highway authority did not create. At any rate, the duty to remove such obstructions has never existed at common law: see Longmore LJ at [44].

23. Accordingly, *Ali* provides that a highway authority will not be liable in nuisance for 'special damages' to highway users so long as the highway authority did not itself create the nuisance. Clearly this is an important decision. On the other hand, if the highway authority created the nuisance and the nuisance subsequently caused an injury to a pedestrian, Coulson LJ was at pains to emphasize that it would still be viable to claim damages for nuisance at common law.

Conclusion

24. In cases involving nuisance on highways, there may be a range of available remedies, including those at common law (discussed above), those under the Highways Act 1980, and those contained in other statutes such as the Environmental Protection Act 1990. It is hoped this article has set out the boundaries of the common law action of nuisance and given a sense of how this doctrine is likely to apply.

HIGHWAYS THIRD PARTY CLAIMS

Ella Davis

1. Sometimes a highway authority will find itself liable for an accident which was wholly or partly the fault of a third party. Liability under section 41 of the Highways Act 1980 is strict, and therefore if a person is caused injury by the highway being out of repair, the highway authority will be liable even if that disrepair is the responsibility of a third party (although the fact that a highway authority has contracted out routine maintenance may be relevant to any section 58 defence). That does not, however, mean that the highway authority has no means of redress against that third party. Anyone advising a highway authority who is or is likely to be found liable to a claimant should consider whether there is any scope to recover some or all of the highway authority's loss from a third party.

Types of Claim

2. Third party claims will often arise where a highway authority has contracted out routine inspection and maintenance to a third party, or where a third party has carried out some work on the highway which has caused it to be in disrepair. There are three potential types of claim which most commonly arise.

- First, where the third party is liable to the claimant for the same damage as the highway authority, the highway authority can claim a contribution under the Civil Liability (Contribution) Act 1978. It is important to note that the third party will only be liable for a contribution where they are also liable to the claimant (whether or not the claimant pursues a claim against them). The third party will not owe the strict statutory duty which the highway authority does, but if the third party has created a danger the claimant may have other causes of action in negligence or nuisance.
- Second, where there is a contractual relationship between the highway authority and the third party, if the third party is in breach of its contractual obligations they can be sued for that breach of contract.
- Third, many such contracts will contain an indemnity which may permit the highway authority to recover its losses from the third party regardless of whether the third party is in breach of any of the contractual terms. It is necessary to examine the terms of any such indemnity very carefully. Many are drafted so as to be so narrow in scope that they only apply where the third party is in breach of contract or has acted negligently, in which case they may add little. Often indemnities apply only to specific defined losses and it is important to check that that definition covers the relevant loss. However, a widely drawn indemnity may be a powerful tool for recovering both the damages paid to the claimant and the costs associated with defending the claim.

Practical Considerations

3. The limitation period under the Civil Liability (Contribution) Act 1978 is (in simplified terms) 2 years from when the highway authority is held liable to the claimant in civil proceedings, or where a settlement is agreed, from the earliest date on which the amount to be paid in compensation is agreed between the highway authority and the claimant (section 10 of the Limitation Act 1980). A claim founded on contract must be brought within 6 years of the cause of action accruing.

4. An important consideration where a claimant has brought a claim which might give rise to a

claim against a third party is when and how to pursue the third party.

5. One option is to make an additional claim in the proceedings brought by the claimant. A claim for a contribution or indemnity against a person who is already a party to the proceedings can be made by filing and serving a contribution notice (CPR r.20.6 (1)). If the contribution notice is filed and served with the defence or, where the other party is added to the claim later, within 28 days of that party filing his defence, the court's permission is not required. At any other time the court's permission is required (CPR r.20.6(2)). Any other additional claim is made when the court issues the appropriate claim form. (CPR r.20.7(2)). A defendant does not require the court's permission if the additional claim is issued before or at the same time as the defendant files his defence. At any other time the court's permission is required (CPR r.20.7(3)). In determining whether to permit an additional claim to be made or whether to require it to be dealt with separately, the court may have regard to the matters at CPR r.20.9(2).

6. If the issues in the case are particularly complex, and there is an overlap in the issues which are relevant to both the claimant's claim and the third party claim, it is likely to be more convenient for them all to be tried together. The judge who hears the claimant's claim may also be better placed to make any necessary findings as to any apportionment of blame between the highway authority and third party. Dealing with both claims at once of course usually leads to a quicker resolution and avoids a situation where the highway authority has to make full compensation to the claimant and then wait to be reimbursed by the third party.

7. However, in a straightforward case where the highway authority has a good defence to the claim, and particularly where any third party liability is contingent on the claimant's claim being successful (for example where the only remedy would be under the Civil Liability (Contribution) Act 1978), it may be prudent to fight the claimant's claim first and seek to recover from the third party if the defence is unsuccessful. The risk otherwise is that the highway authority successfully defends the claimant's claim, but finds itself liable for the costs of the third party which it joined into proceedings. The involvement of a third party might also increase the overall costs of proceedings, for example by increasing the length of the trial.

8. An alternative option is therefore to resolve the claimant's claim first and then to seek recovery from a third party in the event that the defence fails. It is important in such a case to keep an eye on limitation dates for any additional claim for breach of contract. Further, in a case where a highway authority is considering a claim against a third party at a later stage, it may be prudent to put that third party on notice of the claimant's claim and of the intention to bring an additional claim. They may have relevant evidence which would assist in defending the claim. The third party may want to be joined into the proceedings which would mitigate the costs risk and may make it easier to agree an apportionment. In particular, if the claim is high value or there is any concern about whether the claimant's claim is genuine, the third party may wish to help challenge the claim for which it is at risk of being ultimately liable. It should be noted, however, that pursuant to section 1(4) of the Civil Liability (Contribution) Act 1978 if the highway authority has made a payment in bona fide settlement of the claim, the third party shall be liable for a contribution regardless of whether the highway authority ever was liable in respect of the damage, as long as it would have been liable assuming that the factual basis of the claim against it could be established.

9. There is thus no single approach which fits every case. However, it is always worth asking if there is a potential third party liability and if so giving early thought to the most efficient way to recoup any losses from that third party.

1 Chancery Lane
London, WC2A 1LF

clerks@1chancerylane.com
020 7092 2900