Ways, Highways, & Highways Maintainable at Public Expense: Avoiding the Trips

Matthew White, Barrister, St John's Chambers

February 2023

St John's Chambers
101 Victoria Street
Bristol
BS1 6PU

0117 923 4730
piclerks@stjohnschambers.co.uk
www.stjohnschambers.co.uk

Ways, Highways & Highways Maintainable at Public Expense: Avoiding the trips

1. Introduction and spoilers

1.1 This paper aims to ensure that those dealing with claims concerning accidents on the highway appreciate:-

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

(1.1.2) Why understanding the difference matters; and

(1.1.3) How the difference can be used to attack (claimants) or defend (defendants).

1.2 This paper does cover the basics, but I summarise some of the main points at the outset so that you can see where we are going:

(1.2.1) A highway authority only owes a duty of care to highway users who are using *highways maintainable at public expense*.

(1.2.2) If a highway user is injured on a highway that is *not* maintainable at public expense, then:

(i) The basic position is that the landowner owes no duty of care; but

(ii) There is a possible exception to that if a claimant is lawfully on the defendant's land for some reason other than the existence of a public right of way: that point requires testing in a suitable case.

2. The relevant duties

2.1 Occupiers

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

© Matthew White, February 2023.

premises for the purposes for which he is invited or permitted by the occupier to be there."

Note too s.1(7) of the Occupiers' Liability Act 1984:- "*No duty is owed by virtue of this section* [which otherwise imposes a duty on occupiers towards non-visitors] *to persons using the highway, and this section does not affect any duty owed to such persons.*"

2.2 Highway authorities

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

(2.2.2) A claimant must prove:-

(i) that the highway was dangerous in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;

(ii) that the dangerous condition was created by a failure to maintain or repair; and

(iii) that the injury resulted from such failure.

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

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

(2.2.4) In practice highway authorities seek to make out that defence by inspecting the relevant highway regularly and remedying any defects found. Note:

- Lack of resources is no defence Wilkinson v. City of York Council [2011] EWCA Civ 207;

© Matthew White, February 2023.

- Reasonableness can be considered on a <u>Bolam</u> basis. <u>Devon County Council v. TR</u> [2013] EWCA Civ 418; [2013] PIQR P19; [2014] RTR 1).

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

2.3 There are other potential duties owed (including nuisance, Landlord & Tenant Act, Defective Premises Act, Workplace Regulations), but this paper is concentrating on the main duties which require consideration in respect of the public on highways i.e. under the Occupiers' Liability Act 1957 and the Highways Act 1980. For completeness, note that despite the fact that it is often pleaded, there is no duty in negligence in relation to accidents on the highway caused by a failure to maintain. Many cases say as much, but I tend to use <u>Ali v. Bradford</u> [2011] 3 All ER 348 at para 19-20 simply because it also disposes of claims in nuisance (para 39).

3. What is a highway?

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

3.2 Statutory definition:-

(3.2.1) The whole of s.328 of Highways Act 1980 is given over to "*Meaning of "Highway""*. What we are told is that "highway" (for the purposes of the Act) means the whole or a part of a highway other than a ferry or waterway, and includes bridges and tunnels which the highway passes over/ through.

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

3.3 Common law definition:-

© Matthew White, February 2023.

> A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. (Halsbury's Laws (2019 Ed) 55[1]).

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

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

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

On appeal it was held that the path was clearly private property (on all the evidence, including the sign). Even if it could be inferred that there had been some use by the public over 20 years, the sign was sufficiently detailed to negative the dedication. Thus there was not a highway at all, so no question of it being highway maintainable at public expense.

3.5 Kotegaonkar v. (1) Secretary of State for Environment etc; and (2) Bury MBC [2012] EWHC 1976 (Admin).

C bought land between a health centre and shops and wanted to build on the land. There was a path on the land from the health centre to the shops. The public objected to the development on the basis that there was a right of way that would be blocked. A local planning inspector concluded that as the path

© Matthew White, February 2023.

connected 2 places to which the public had resort, a highway had been created.

The court held that the path was not and could not be a highway because it was unconnected to any other highway; it was an isolated route between two places over which the public did not have a right freely and at their will to pass and re-pass:- they could not get to it at all unless someone gave them licence to pass over privately owned land first.

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

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

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

(3.7.2) Common law doctrine of dedication (by the landowner) and acceptance of the dedication (by the public).

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

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

(a) *Dedication presumed by statute:-* Since the Rights of Way Act 1932 (repealed), public user for 20 years gives rise to a rebuttable presumption that a way is a highway. This is now governed by s.31 of the Highways Act 1980. Note R (Godmanchester Town Council) v Secretary of State for the Environment, Food & Rural Affairs [2008]1 AC 221. If a landowner wants to rebut the statutory presumption of intention to dedicate, just saying "I didn't have that intention" won't do: there must be something to communicate to the public that there was no intention to dedicate.

© Matthew White, February 2023.

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

Land between the front of a shop and the highway creates problems:- if the use by the public is no more than a deviation from the highway, it carries little weight when trying to draw an inference of dedication. That is particularly true when a shop has been built deliberately leaving land free at the front (for parking, perhaps), and the shopkeeper cannot exclude the public without excluding his customers. The bottom line is that these cases turn on their *facts*, albeit the facts coupled with a proper understanding of what makes a highway (and what makes a highway maintainable at public expense).

3.8 Trick:- Parties often worry about inability to prove 20 years' use. Whilst it is sensible to try to prove such period of use to achieve a finding of common law dedication, it is not essential to do so. As noted above, if all that is known is that the public uses the way, dedication might be inferred (accepted by the use), and the fact that a way is a highway is thereby established:- there is no need to prove 20 years' use. That said, since common law dedication and acceptance turn on all the facts (which will not be known at the outset of a case), proving the 20 years' use is a good idea for those who can prove this (and who want to). A hidden advantage of relying on common law

© Matthew White, February 2023.

dedication/ acceptance is that if all that is known is that the way is used by the public, that might well shift the burden to the other party to establish that it is not a highway. Whether or not this strategy is appropriate will turn on all of the circumstances (that being the relevant consideration for inferred dedication). A party faced with such argument who wanted to contend that the way was not a highway would want to show that usage could be explained by some reason other than dedication. If you are looking at common law dedication, I prefer Sauvain K.C.'s *Highway Law* (6th Ed. chapter 2) to Halsbury's Laws.

3.9 Trap:- Absent a satisfactory explanation, repair of a way by public expense (or other work on/ use of the land by the highway authority) is strong evidence that it is a public way (and therefore a highway). If a highway authority wants to repair a way of uncertain provenance, they *might* want to budget to include it in their inspection regime to (a) fulfil their public function; and/or (b) avoid creating a trap for themselves. [NOTE:- The risk identified here is of a highway authority unwittingly creating evidence that a way is a <u>public</u> way, and hence a highway; that is not the same thing as repair at public expense risking a court inferring that the highway is maintainable at public expense as to which see paragraphs 4.4 – 4.5 below.]

3.10 Trick/ trap:- When the issue in the case is whether or not a highway has been dedicated/ accepted, parties often fail to properly define the issues for determination. Claimants usually ought to take steps to ensure that they have done this, but defendants can be better served by letting a claim proceed without clarity as to the issues (although that strategy carries risk, and might well run contrary to the ethos of a public body defendant). If a defendant wants to prove that a way is a highway to spring the <u>McGeown</u> trap (see below), they *must* make sure that the issue is properly defined. It can be best to do that subtly on a pleading.

3.11 Note that a highway can be a highway for a limited class of user:

© Matthew White, February 2023.

(3.11.1) Think "highway" and you probably think of a road. A road/ carriageway highway comes with very wide right of use (including, obviously, vehicles).

(3.11.2) The road in your mind might have a pavement (known in the Highways Acts as a "footway") at the side of it. There is no vehicular right to use the footway.

(3.11.3) A "footway" is not the same thing as a "footpath". A footpath is a highway in its own right – not merely the pavement at the side of a carriageway. The right of passage on a footpath does not include vehicles: the only public right of way is on foot.

(3.11.4) A bridleway is a highway over which the public have a right on foot, on horseback, or leading a horse. Cyclists also have a right to ride on bridleways, but must give way to pedestrians and horse-riders.

(3.11.5) BOATs sometimes cause confusion, but need not: they are byways open to all traffic. A BOAT is a vehicular highway, but the term is used to distinguish those vehicular highways that are mainly used by the public as a footpath or bridleway.

(3.11.6) A restricted byway excludes right of passage for mechanically propelled vehicles.

3.12 The question of which part of what might broadly be called 'the highway' is 'the highway properly so called' is worthy of its own separate paper. Some simple pointers:

(3.12.1) drains which serve the highway are part of the highway (useful in flooding claims);

(3.12.2) the highway can be wider than the metalled track;

(3.12.3) fences etc can define the width of highways.

I've not included the "usual" cases in this paper (all of which are referred to in texts on highways). A case which sometimes passes beneath the radar of lawyers dealing with highway claims and is therefore worth mentioning is Kind v. Newcastle-upon-Tyne Council unreported, QBD, 31/7/01:- the verges

© Matthew White, February 2023.

of a highway do not have to be maintained to the same standard as the metalled carriageway.

3.13 If the accident location is not a highway, the appropriate cause of action will turn on the circumstances of the case:- negligence, nuisance, Occupiers' Liability Acts, Landlord & Tenant Act, Defective Premises Act, contract. Since the Enterprise & Regulatory Reform Act 2013 claims can no longer be pursued under health and safety legislation alone (Workplace Regs, Construction Regs etc).

4. What is a highway maintainable at public expense?

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

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

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

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

- Section 38(1) *"After the commencement of this Act no duty with respect to the maintenance of highways shall lie on the inhabitants at large of any area."*

© Matthew White, February 2023.

- Section 38(2) "*… the following highways shall for the purposes of this Act be highways maintainable at public expense, that is to say:-*

  (a) *a highway which immediately before the commencement of this Act was maintainable by the inhabitants at large of any area or maintainable by a highway authority…*"

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

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

(4.3.1) Before 1835, the legal position was that the duty to repair highways fell upon the inhabitants of the parish in which the highway lay unless it could be shown that the duty fell on someone else (see Halsbury's Laws (2019 Ed) 55[13] and 55[250] for references).

(4.3.2) The Highways Act 1835 (s.23) provided that new roads would not be the responsibility of the inhabitants unless a formal adoption procedure was followed. The National Parks and Access to the Countryside Act 1949 (s.47) extended that idea to "public paths". "Public paths" are not defined in the Highways Act 1980, but s.66(1) of the Wildlife & Countryside Act 1981 gives the meaning as either a footpath or bridleway. Thus (subject to the below):-

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

© Matthew White, February 2023.

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

(a) which are maintainable at public expense (because the adoption procedure was followed); or

(b) which no-one is liable to repair (because the adoption procedure was not followed).

(c) [Note too that there is a complexity in respect of "private streets" which falls outside the scope of this paper but is governed by Part XI of the Highways Act 1980].

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

4.5 A judge who wanted to use Leigh to infer that a highway was maintainable at public expense (from the fact of maintenance at public expense) might be

© Matthew White, February 2023.

dissuaded from doing so with the simple observation that a "highway maintainable at public expense" is a term with a precise statutory definition within the Highways Act 1980, and if that definition is not met then the highway is not a legal "highway maintainable at public expense" even if it is both (a) a highway; and (b) maintained at public expense. Leigh, of course, relates only to the period after 1835 but before the 1959 Highways Act (which gave us the notion of a legal "highway maintainable at public expense"), so the logic of Leigh ought not apply to post-1959 highways.

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

4.6 This list is important. A way which looks like a highway (and which has not been formally adopted) is often a highway maintainable at public expense not because it was built before 1835 (roads) or 1949 (paths), but rather because it falls within one or another of the s.36(2) categories. The categories are:-

(a) "*a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority*";

(b) highways constructed by a council in their own area pursuant to Housing Act powers;

(c) a highway that is a trunk road or special road;

(d-f) footpaths/bridleways created in consequence of various orders.

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

4.7 The most important of those categories are ss.36(2)(a) and (b).

Highways constructed by a highway authority

4.8 If the highway was constructed by a highway authority, unless they built it for someone else (who is not a highway authority), it is maintainable at public expense. It used to be thought (following obiter dicta of Sedley LJ in Gulliksen v. Pembrokeshire County Council [2003] QB 123) that because local authorities are a single body corporate, the *capacity* in which they

© Matthew White, February 2023.

constructed a highway did not matter: if an authority with a highway authority function built a highway when exercising *any* function, then it was highway maintainable at public expense. That has now been determined to be wrong in Barlow v. Wigan MBC [2021] QB 229: the highway has to be constructed by a highway authority *acting as such*. That will significantly reduce the numbers of highways previously thought to be accidentally created highways maintainable at public expense.

Housing Act powers highways

4.9 Many councils did not appreciate that when they built highways under Housing Act powers, they were creating highways maintainable at public expense subject to the onerous Highways Act 1980 s.41 duty.

4.10 An example of this is seen in Gulliksen v. Pembrokeshire County Council [2002]3 WLR 1072:

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

4.11 The path was not appreciated by the highway authority to be highway maintainable at public expense, yet it was. This error is made less frequently by highway authorities now, but the error is still made.

4.12 Another mistake made by highway authorities, and this one remains more common, relates to stock transfers. If a highway constructed by a council in its own area pursuant to Housing Act powers (such that it is highway maintainable at public expense) has subsequently passed into private ownership (e.g. a social housing entity which took over housing built by a

© Matthew White, February 2023.

local authority), the way does not stop being highway maintainable at public expense merely because of the transfer. It might, therefore, be necessary in such situation for a non-highway authority defendant to refer the claimant back to a highway authority. Query whether there is an indemnity clause in the transfer of property which entitles (on its face) the highway authority to avoid liability for defects on highways maintainable at public expense by reason of the transfer. Even if there is such an indemnity clause, query whether it is binding. For claimants, the important point is to have the courage of your convictions: if the highway was built by (any) council in its own area pursuant to Housing Act powers, a highway maintainable at public expense is created, and the highway authority is the defendant to look to. Their protestations that they transferred housing stock and/or have an indemnity clause with a social housing entity should fall on deaf ears.

Other

4.13 Note that it is possible for highway authorities to adopt highways by agreement under s.38 of the 1980 Act such that they become maintainable at public expense. Floyd v. Redcar & Cleveland Borough Council (unreported, CA, 5/8/09) concerned just such a highway. The dispute in that case concerned whether the location of the claimant's accident was adopted pursuant to a s.38 agreement when the location of the accident looked somewhat different from the footpath which was envisaged to be put there at the time of the agreement.

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

© Matthew White, February 2023.

5. Identifying highways maintainable at public expense

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

5.2 Trap:- The list kept by reason of the s.36(6) obligation is not definitive even though it is often called "the definitive list" (similarly the "definitive map" under the Wildlife and Countryside Act 1981 is not truly definitive for our purposes). If the relevant highway is on the list, a claimant (or other non-highway authority party) can rest easy: it is highway maintainable at public expense. If it is not on the list, a non-highway authority party should not necessarily give up and a highway authority defendant should not assume that it will win. The highway might still be a highway maintainable at public expense if it complies with the provisions set out above that turn highways into highways maintainable at public expense.

5.3 Gulliksen (above) was just such a case: the highway was not on the "definitive list" but was nonetheless a highway maintainable at public expense because of the operation of the Highways Acts. Note that there are practitioner texts which say that if a way is not on the map/list, it is not a highway maintainable at public expense; that is wrong.

6. Asking the right questions in the right order

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

(6.1.1) In Gulliksen the path was a highway. It was built pursuant to s.36(2)(b) of the 1980 Act and was thus a highway maintainable at public expense. All this case does is make clear that s.36 means what it says.

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

© Matthew White, February 2023.

6.2 I treat the first question (for fans of the laws of thermodynamics this is really the zeroth question) as "is it a way?", to distinguish open space. The next question is "is it a highway?" If that question is answered in the affirmative, it is necessary to ask "is the highway maintainable at public expense?"

7. Who/ what is the highway authority?

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

8. Highways not maintainable at public expense

8.1 Trap/ trick:- It has long been thought that you cannot win a claim against the occupier of a highway on the basis of the Occupiers' Liability Act 1957.

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

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

Whilst it has been suggested that such claims might succeed under the Occupiers' Liability Act 1984, s.1(7) of that Act prevents that conclusion being drawn.

8.2 McGeown re-stated the rule in Gautret v. Egerton (1867) L.R. 2 C.P. 371:-

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

© Matthew White, February 2023.

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

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

Held: (1) the local authority had conducted themselves so as to lead the public to infer that they had a right of passage – there was dedication. The way had been accepted (through use) such that the bridge was a highway. The fact that uninterrupted public user was for less than 4 years did not prevent common law dedication and acceptance; (2) that being so, C had no good claims in negligence or the OLA 1957 following McGeown, since the erosion of the bridge constituted nonfeasance rather than misfeasance. McGeown was described as an "unlaid ghost" of the old nonfeasance principle with regard to highways. The result (judgment for the Defendants) was described as "harsh", but the legal position was "quite clear".

8.4 I have defended a number of cases that have been decided the same way.

8.5 Another example is seen in Crowther v. Sonoco Cores & Paper (unreported, Bradford County Court 7/7/09). A cyclist on a track through private land claimed under the Occupiers' Liability Acts, but the landowner successfully argued that the path was highway on the basis of common law dedication

© Matthew White, February 2023.

and acceptance. Since the cyclist could not prove misfeasance, he fell into the Gautret and McGeown trap.

8.6 But wait! What I have just described is a situation in which members of the public, walking where they have a right to walk, i.e. on highways which are not highways maintainable at public expense, are owed no duty of care by the landowner. That runs contrary to modern notions of public protection. There has been a move away from the strictness of the rule in Gautret v. Egerton:

(8.6.1) This arguably started in McGeown itself in which, starting at 247H Lord Browne-Wilkinson said the following (with my bold used to show the potential limits of this comment):

"*To my mind it would be unfortunate if, as a result of the decision in this case, the owner of a railway bridge or shopping centre could, by expressly dedicating the land as a public highway or submitting to long public user, free himself from all liability to users whose presence he had* ***encouraged****. Who, other than the occupier, is to maintain these* ***artificial structures*** *and protect from injury those encouraged to use them by the occupier for the occupier's own business reasons?*

For these reasons, I am very reluctant to reach a conclusion which will leave unprotected those who, for ***purposes linked to the business of the owners*** *of the soil, are* ***encouraged****, expressly or impliedly, to use* ***facilities which the owner has provided****.*

In the present case, I can see no escape from the logic of Lord Keith's conclusion that, after the presumed dedication of the pathway as a public right of way, the housing executive ceased to owe any duty of care to the plaintiff. The plaintiff would, at best, be the licensee of the housing executive. Once the public right of way came into existence, those seeking access to the dwellings on the estate did not need any licence from the housing executive: they could go there as of right. Nor could the housing executive exclude anyone from the pathway. It would be an abuse of language to describe a person who is entitled to

© Matthew White, February 2023.

be on land without permission and who could not be excluded by the occupier of that land as being 'a licensee' of that occupier. Therefore the plaintiff was not a visitor to whom a duty of care was owed.

But it does not necessarily follow that the existence of a public right of way is incompatible with the 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 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 an 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 expressly to reserve my view on that point.*"

(8.6.2) This limitation on the strictness of the rule in Gautret has not received careful judicial attention, and it did not do so in Barlow. Nonetheless, in Barlow Bean LJ (at paragraphs 9-13) took what seems to me to be a significant further step in encouraging claimants to seek a way around the rule in Gautret:

"*Since there may be other cases of this kind in the future, and since the proposition that a local authority can owe a greater duty to park users walking on the grass than to park users walking on a path is to my mind absurd, I should put on record why I consider that McGeown does not require any such conclusion…*

I suspect that the true ratio of both Gautret and McGeown is that if a person is ***only lawfully on a defendant's land because of the existence of a public 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 the digging of pits) or under the Occupiers' Liability Acts. But whether that is the case will have to await a decision in another claim. I only add that if I am wrong about this, and there really is no duty on anyone to maintain paths in*

© Matthew White, February 2023.

municipal parks which have become rights of way, the traditional notices saying KEEP OFF THE GRASS ought in fairness to park users to be replaced by notices saying KEEP OFF THE PATHS."

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

(8.7.1) Individuals (or bodies politic/ corporate - referred to hereafter as "individuals" for ease) can be liable to repair, but note that that does not mean that a claim for damages in respect of breach can necessarily be brought. Halsbury's Laws (2019 Ed) (at 55[291]) describes this as an "open question".

(8.7.2) Individual liable for highway by tenure:- This is achieved by showing that the individual has repaired the way for a number of years and therefore an assumption of immemorial usage arises (unless the contrary is proved, and subject to some exceptions). See Halsbury's Laws 55[293].

(8.7.3) Liability can also attach to an individual by prescription (acquisition by long use over a servient tenement without the servient owner's permission). See Halsbury's Laws 55[294].

(8.7.4) Liability can attach by inclosure (a highway crosses land and the public have acquired a right to deviate onto the land when the highway is impassable; if the landowner then incloses his land, he becomes liable to maintain the highway) - see Halsbury's Laws 55[298].

(8.7.5) Liability can also be imposed by statute. See Halsbury's Laws 55[292].

9. Litigation strategy

9.1 There is enjoyable law to be handled here. It is a situation in which you can win cases by knowing what you are doing and lose them by not knowing what

© Matthew White, February 2023.

you are doing. Consider Barlow as a fairly typical example: This was a path through a park. The highway authority attempted to spring the McGeown trap by contending that the path was highway. One can doubt whether the path was ever a highway at all, but it suited the claimant to accept that it was a highway because (a) it appeared to have been constructed by a highway authority (albeit that the claimant lost on this point given the finding on the capacity in which the authority built the path); and (b) it was a public path built before 1949 such that the 1949 Act made it highway maintainable at public expense. Had Wigan simply accepted that it owed a duty of care pursuant to s.2 of the Occupiers' Liability Act 1957 (reasonable care duty), the complicated highway issues would probably never have come up. Supposing that Wigan simply operated a reactive system of maintenance in their park, query whether or not that would have been sufficient to defend the claim.

9.2 So the big take home message is that there is tactical benefit to be gained by properly understanding:

(9.2.1) When a way is a highway;

(9.2.2) When a highway is a highway maintainable at public expense;

(9.2.3) That there is (probably) no duty owed if the way is a highway and the only reason for the claimant's presence is exercise of a right to be there;

(9.2.4) That there might well be a duty owed (under the OLA 1957) if the claimant was there for some other reason than merely exercising a statutory right, particularly if they were encouraged or invited by the landowner; and

(9.25) If the way is highway maintainable at public expense, the duty arises under s.41 of the Highways Act 1981 and the burden of proof is reversed.

A claimant should pick his/her battle carefully. A defendant should think twice before trying to spring a trap that might backfire.

© Matthew White, February 2023.

9.3 As practical rules of thumb:-

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

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

(9.3.3) Defendants ought to consider a "nonfeasance" defence based on Gautret v. Egerton and McGeown, but they ought to be increasingly careful of the gaps left in that defence by McGeown and Barlow: any hint of a reason for presence at the accident location other than the exercise of a highway right and the defendant should think twice.

(9.3.4) If getting into the question of highway or highway maintainable at public expense, be careful re proof. In Sinclair v. Kearsley and Kearsley [2010] EWCA Civ 112 the Court of Appeal re-stated the proposition that it is for the party asserting the existence of a highway to prove its existence. See too Akhtar v. Singh [2013] EWCA Civ 570. Parties have to be active in running this point.

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

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

(9.3.7) The next case of legal significance in this field will probably be a claimant injured by reason of a dangerous defect on a highway (which is not highway maintainable at public expense) owned/ occupied by the defendant. Lord Browne-Wilkinson's thinking in McGeown (that liability might still arise if the claimant is expressly or impliedly

© Matthew White, February 2023.

encouraged/ invited to be there) has been extended in Barlow, such that if the claimant has any reason for presence, particularly if connected with the raison d'être of the landowner, there is a potential "in" to a duty of care being owed.

MATTHEW WHITE

St John's Chambers,

101 Victoria Street,

Bristol, BS1 6PU.

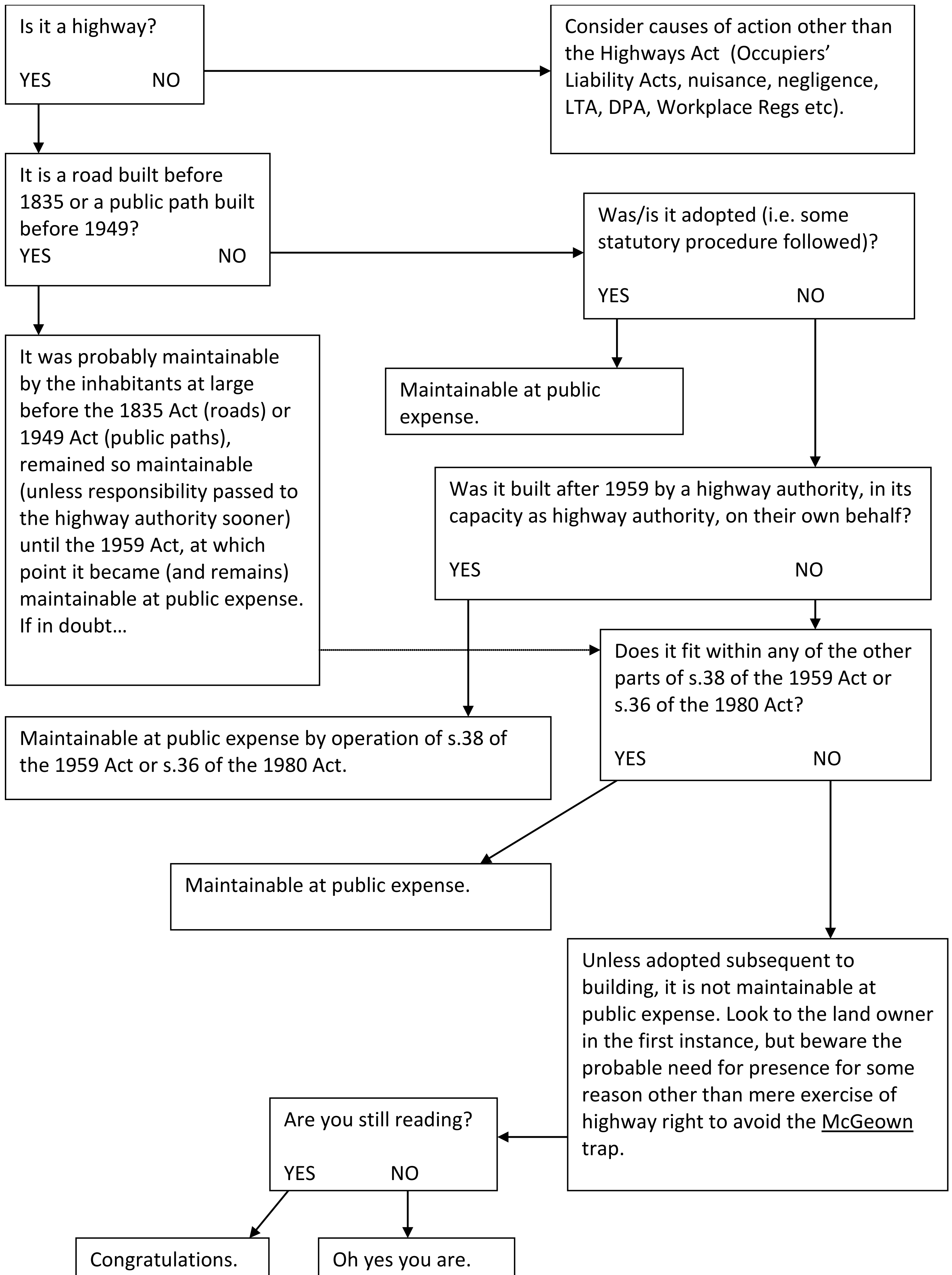
Tel:- 0117 921 3456

February 2023

© Matthew White, February 2023.

Ways, Highways & Highways Maintainable at Public Expense: Avoiding the Trips

Flow chart



© Matthew White, February 2023.