Gulliksen dead and McGeown fatally wounded? An important case for highway lawyers

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On 1/6/20 the Court of Appeal handed down judgment in Barlow v. Wigan MBC [202] EWCA Civ 696.

IN SUMMARY

- S.36(2)(a) of the Highways Act 1980 which says that a highway constructed by a highway authority is highway maintainable at public expense has been clarified: it only applies to highways constructed from 1980.
- A "highway constructed by a highway authority" has been interpreted as "a highway constructed by a highway authority exercising its highway authority functions". In other words Sedley LJ's obiter comments in *Gulliksen* that it does not matter what capacity a council with a highway authority function was acting in when constructing a highway have been disapproved.
- The Court of Appeal has suggested a way around the rule in *Gautret v. Egerton/ McGeown* to the effect that no duty of care is owed by the landowner to people when they are on highways on the landowner's land. The obiter suggestion is that it is only when a person is only lawfully on the land because of the existence of a highway that the rule applies.

BACKGROUND

Mrs Barlow fell on a path running through a park. A claim was intimated against the council occupier and highway authority ("the Council"), who contended that the path was highway, but not highway maintainable at public expense, such that Mrs Barlow had no cause of action: a position based on the rule in *Gautret v. Egerton* (1867) LR 2 CP 371, restated in modern times in *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233.

Mrs Barlow accepted the Council's position that the path was highway and that she was owed no duty of care at common law. She contended that the path was highway maintainable at public expense such that a duty of care was owed under Highways Act 1980 s.41 on 2 bases:

1) The path had been constructed by Abram UDC, the Council's predecessor, and Abram UDC was a highway authority. That meant that the path, which all agreed was highway, was "a highway constructed by a highway authority" so as to fit within s.36(2)(a) of the Highways Act 1980, which meant that it was highway maintainable at public expense.

2) In the alternative, the path was dedicated as highway before 1949 which meant that, by operation of ss.47 and 49 of the National Parks and Access to the Countryside Act 1949, it became maintainable by the inhabitants at large and was converted into a highway maintainable at public expense by s.38(2)(a) of the Highways Act 1959.

THE ISSUES AND OUTCOME IN RELATION TO THE HIGHWAYS ACT 1980 AND "A HIGHWAY CONSTRUCTED BY A HIGHWAY AUTHORITY"

Section 36(2)(a) of the Highways Act 1980 says that highway maintainable at public expense includes "*a highway constructed by a highway authority, otherwise than on behalf of some person who is not a highway authority*". There was never any question that the highway was built on behalf of someone else, so the key issue was the meaning of "*a highway constructed by a highway authority*".

The Council contended that the phrase should be read/ interpreted as "*a highway constructed* ***as such*** *by a highway authority* ***acting as such, after the coming into force of this Act.***" Note that the contention involves 3 limbs, which can be summarised as follows:

1) **The intent issue**: Does the highway authority have to intend to construct a highway when they do the constructing, or can a way that is only recognised as highway later, due to sufficient user as to lead to an inference of dedication, still be a "highway constructed"? Here the highway authority contended that they did not intend to construct a highway when they built it, so s.36(2)(a) did not bite.

2) **The capacity issue**: Does the highway authority have to be acting as highway authority when it constructs the highway, or will any capacity do? Here the Council contended that when they built the path they were acting in their capacity as local authority with power to construct parks, and not as highway authority, so s.36(2)(a) did not bite.

3) **The retrospectivity issue**: Does this section only apply to highways constructed after the coming in to force of the 1980 Act? Note in particular that the equivalent section of the 1959 Act said that it applied to "a highway constructed by a

highway authority *after the commencement of this Act*". The italicised words were not repeated in the 1980 Act.

The capacity issue

In *Gulliksen* Sedley LJ had said that because a county council is a single body corporate, it is not necessary for a council constructing a highway to be acting in its capacity as highway authority when doing the constructing. This Court of Appeal has disagreed with Sedley LJ's approach, preferring instead the approach of Neuberger J (as he was when he heard the first appeal in *Gulliksen*). The reasons are set out in the judgment of the Court of Appeal and I need not repeat them in detail. Singh LJ put in succinctly saying that the words "highway authority" are used by Parliament to mean "an authority exercising its highway functions". He compared the position with planning legislation referring to a "planning authority", housing legislation referring to a "housing authority" and suchlike.

The intent issue

Having determined that a council has to be acting *in the capacity of highway authority* when constructing a highway for it to be highway maintainable at public expense, and having determined that the Council was not acting in that capacity, it was not necessary for the Court to consider the intent issue.

The retrospectivity issue

The retrospectivity issue was newly advanced by the Council on second appeal. At first appeal they had argued that the 1980 Act cannot have been intended to apply to pre-1980 highways because legislation ought to be presumed not to have retrospective effect. That was a bad argument not because the principle of statutory interpretation is wrong, but because the effect of the 1980 Act, if it applied to highways constructed before 1980, was not truly retrospective, rather it was creating a future obligation in relation to highways constructed in the past. That argument was not pursued on second appeal, but at a hearing on the day before the hearing of the substantive appeal the Council were given permission to add a 6th ground of appeal, enabling them to argue a new iteration of the retrospectivity argument. They now argued that the Highways Act 1980 did 2 things: it consolidated the previous law, and it made changes recommended by the Law Commission. Because the equivalent section of the previous law (i.e. Highways Act 1959 s.38(2)(b)) only applied to highways constructed after the commencement of that Act, and because the Law Commission had not recommended a change of the law in that regard, s.36(2)(a) of the 1980 Act ought, the Council contended, be read as only applying to highways constructed after 1980 (with highways constructed after 1959 already caught by the 1959 Act).

Research carried out by the Council after the hearing of the appeal showed that Parliament had been told that the 1980 Act was exclusively to consolidate and make changes recommended by the Law Commission. Because the Law Commission had not recommended any change so as to make highways constructed by a highway authority maintainable at public expense *regardless of when they had been created*, it was correct to interpret s.36(2)(a) as applying only to highways constructed after the coming into force of that Act. To do otherwise would have been to ignore the known intention of Parliament.

Discussion

There is no question that the above is good news for highway authorities. It tends to reduce the numbers of highways maintainable at public expense. In particular to my mind it makes it *much* less likely that a highway authority will find itself with responsibility for a highway maintainable at public expense without realising that it has such responsibility. That is because there is now no question of a pre-1959 highway being hm@pe merely because it was constructed by the highway authority or its predecessor. Also, whilst post-1959 highways still have potential to catch highway authorities out, it is *much* less likely that they will do so because since 1959 (and more so since 1980) if a highway authority intended to create a highway they generally have a clear record of that fact.

More good news for highway authorities is that even for post-1959 highways that have been constructed by highway authorities, if the council was not exercising a highway authority function when creating the highway (for example if they were creating a park), it will not be highway maintainable at public expense.

THE OUTCOME IN RELATION TO McGEOWN

The rule in *Gautret v. Egerton* was not in issue in this case. The Claimant accepted the Defendant's assertion that the way was highway and accepted that that meant that she was owed no duty of care under the Occupiers' Liability Act 1957 in relation to acts of nonfeasance (e.g. letting the highway degrade; the position is different in cases of positive misfeasance). Bean LJ observed that this meant that she was owed a duty of care when walking on the grass, but not when walking on the paths. If that was right, he observed that "*the traditional notices saying KEEP OFF THE GRASS ought in fairness to park users be replaced by notices saying KEEP OFF THE PATHS.*"

The point was not argued in the case, and what the Court said about *McGeown* is obiter, but Bean LJ's interpretation of *Gautret* and *McGeown* is that the rule applies where 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. That point will no doubt be tested in future litigation. If Bean LJ's interpretation is correct, it serves to reduce the number of highways which no-one is liable to repair.

This point is not such obviously good news for highway authorities. Whilst they have previously been able to use McGeown to avoid liability, the question will now arise as to

whether a person is only lawfully on the defendant's land because of the existence of a highway. In the case of most land owned/occupied by councils, it would seem unlikely that the only lawful basis for being on the land is the existence of a highway. This will make it less likely that highway authorities will be able to avoid claims on the simple basis that they owe no duty of care.

Whilst the hearts of some within councils might sink at this news, it should not. Councils are public bodies. Their very existence is to serve the public good. It runs against public expectation in modern times for there to be places where councils (indeed where any landowner) can rely on the fact that they owe no duty of care to people that they *know* will be there. If Bean LJ's comments about *McGeown* are right, it simply means that the council is likely to owe some duty of care rather than none. Importantly, that duty of care is **not** the same as the duty owed under the Highways Act 1980. In Highways Act claims claimants have long relied on the national codes of practice for highway maintenance which, historically, suggested certain inspection frequencies. Whilst the latest iteration of the guidance is based on a risk assessment approach, the historical approach is ingrained in the way that courts (and indeed highway authorities) approach the taking of reasonable care in relation to highways maintainable at public expense with a view to making out a defence under s.58 of the 1980 Act. That is not so in relation to claims brought against councils as occupiers. See further below for consideration of the appropriateness of a reactive system of maintenance.

THE OUTCOME BASED ON THE NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT 1949

There is no change in the law here, merely an application of well-established but not necessarily well-known law in relation to public paths. It merits short restatement:

- Before 1835 highways were generally maintainable by the inhabitants of the parish at large.
- The Highways Act 1835 changed that, saying that *new roads* would not be maintainable by the inhabitants at large unless a formal adoption process was gone through.
- Thus roads created after 1835 were maintainable by no-one unless the adoption process was undertaken.
- The 1835 Act did not apply to public paths, but the National Parks and Access to the Countryside Act 1949 extended the principle of the 1835 Act to public paths. That is, all pre-1949 public paths were maintainable by the inhabitants at large, but public paths dedicated as highways after 16/12/49 would only be so maintainable if an adoption process was gone through.
- Thus public paths dedicated after 1949 were maintainable by no-one unless the adoption process was undertaken.

Mrs Barlow succeeded in her claim because, on the facts, the path was dedicated before 16/12/49. The path had been opened in 1932, and the Court was prepared to infer dedication from user at a point in time before 16/12/49.

KEY POINTS FOR HIGHWAY AUTHORITIES

As I have been saying for many years, think *very* hard before you assert that a way on your land is a highway. It means that you lose the right to block it up and you *might* end up creating a trap for yourself if it turns out that the way that you have contended is a highway is in fact highway maintainable at public expense. Note that as a result of the above decision the trap has got a lot smaller. The main traps for highway authorities now will be:

(a) the *Gulliksen* trap: if it is a highway and was built under Housing Act powers, it will be highway maintainable at public expense;

(b) the pre-1949 paths trap: if a path is a highway and was dedicated before 16/12/49, it will be highway maintainable at public expense (i.e. the trap in this case);

(c) the pre-1835 roads trap: if a road is a highway and pre-dated 1835, it will be highway maintainable at public expense. That is a rare trap these days, although this law is sometimes relevant in relation to the land between the front of buildings and the edge of what a highway authority actually maintains, particularly in my experience in old market towns.

Have a think about any locations on your patch where you have been assuming that you owed no duty of care on a *McGeown* basis. If Bean LJ is right (and that is yet to be determined), you will not be able to avoid owing a duty of care in relation to many (most?) such locations. Do not panic! Attention will probably need to be given to the question of a reactive system of maintenance. Whilst highway authorities invariably have a system of proactive inspection for carriageway highways, roads, pavements, urban paths and suchlike (as suggested in editions of the Code of Practice for many years), that is not necessarily so for what councils often call their "public rights of way network". Many councils have either *very* infrequent inspection of the PROW network, or even simply a reactive system of inspection.

The obligation on occupiers is to take *reasonable* care for the safety of visitors. Depending on the facts of any given case there is a good chance that an approach as is commonly used for PROW networks will be sufficient for highways on council land that are not highway maintainable at public expense. Take for example a path in a park such as this one. If a council can show that they have thought about it and determined, on a reasonable basis, that a reactive system of inspection will suffice, they might well be able to show that they have taken reasonable care. They would put themselves in an even better position by, for example, putting up signs with a contact number for the public to

report problems, or demonstrating that they have trained the people who empty the bins, cut the grass, or whatever, to report any problems with paths that they see. The watchword of the law in relation to occupiers' liability is still ***reasonableness***.

KEY POINT FOR BOTH SIDES

The law here is complicated. Be wary of embarking on litigation involving these issues, or at least of getting too far into such litigation, without input from someone who knows this law well. I find that most of these cases are at Fast Track level where I no longer operate, particularly in claimant CFA work. I recommend Ben Handy, who dealt with *Barlow* at first instance, and knows the issues well, and David Forster, my former pupil. David attended trial with Ben when he was in pupillage, and it was David's research into Victorian legislation that led to the Council having to concede in this case that Abram UDC was highway authority: an impressive piece of research which led to a *volte face* on the part of the Council.

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