



Case No: B3/2010/0143

**Neutral Citation Number: [2010] EWCA Civ 1282**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM BRADFORD COUNTY COURT**  
**HHJ Shaun Spencer QC**  
**8BD03622**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Wednesday 17<sup>th</sup> November 2010

**Before:**  
**LORD JUSTICE LONGMORE**  
**LORD JUSTICE WILSON**  
**and**  
**LORD JUSTICE TOULSON**  
-----

**Between:**

**KIM ALI**  
**- and -**  
**THE CITY OF BRADFORD METROPOLITAN**  
**DISTRICT COUNCIL**

**Appellant**

**Respondent**

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
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Official Shorthand Writers to the Court)

**Mr David Wilby QC and Mr Ian Pennock** (instructed by **Eatons Solicitors**) for the  
**Appellant**  
**Mr David Eccles** (instructed by **Berrymans Lace Mawer**) for the **Respondent**

Hearing dates: 20 July 2010

Judgment  
As Approved by the Court

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## **Lord Justice Toulson :**

### **Introduction**

1. The question on this appeal is whether a highway authority may be liable, by way of an action for breach of statutory duty under s 130 of the Highways Act 1980 and/or nuisance, for an accident suffered by a member of the public on a public footpath as a result of slipping on an accumulation of mud and debris.
2. The claim was brought by Mrs Ali against the defendant highway authority in the Bradford County Court. There has been no trial of the facts because Deputy District Judge Lobb held on a preliminary hearing that the claimant's pleadings disclosed no cause of action, and her judgment was upheld by Judge Spencer QC.
3. The footpath in question runs between Dick Lane and New Street in Laisterdyke, Bradford. It is accepted that it comes within the definition of a highway maintainable at public expense under s 36 of the Act.
4. The footpath is narrow. At the entrance from Dick Lane there are several stone steps. Photographs taken for the litigation show the steps covered with a considerable amount of mud, overgrown vegetation and all sorts of rubbish. The facts assumed for present purposes are that on 19 September 2006 Mrs Ali was walking with a friend. They came to the footpath and she started to go down the steps. When she reached the third or fourth step, she decided that they were too dangerous. As she turned to tell her friend not to follow, she slipped and fell. It is her case that the condition of the footpath had been long neglected by the highway authority.
5. Mrs Ali's heads of claim initially included breach of duty under sections 41 and 150 of the Highways Act, breach of duty under the Occupiers Liability Act 1957 and negligence; but by the time of the hearing before the deputy district judge her heads of claim were limited to breach of duty under s 130 of the Highways Act and nuisance.

### **Highways Act 1980**

6. The Highways Act 1980 is a consolidation Act. Like its immediate predecessor, the Highways Act 1959, the 1980 Act is "not a code which sprang fully formed from the legislative head but was built upon centuries of highway law" (Lord Hoffmann in *Goodes v East Sussex County Council* [2000] 1 WLR 1356, 1360). Its provisions have to be read in the context of the common law and statutory background.
7. Part IV of the Act (comprising ss 36 to 61) is headed "Maintenance of Highways".
8. Section 41(1) imposes a general duty on a body which is the highway authority for a highway maintainable at public expense to maintain it. Section 41 (1A) provides:

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

I will come back to the circumstances in which that subsection was enacted.

9. In an action against a highway authority in respect of damage resulting from failure to maintain a highway maintainable at public expense, s 58 provides that it is a defence for the authority to show that it had taken such care as in all the circumstances was reasonably required to secure that the relevant part of the highway was not dangerous for traffic.
10. Part IX of the Act (comprising ss 130 to 185) is headed “Lawful and Unlawful Interference with Highways and Streets”.
11. Section 130 is headed “Protection of public rights” and provides:
  - (1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.
  - (2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.
  - (3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—
    - (a) the highways for which they are the highway authority, and
    - (b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.
  - (4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.
  - (5) Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient.
  - (6) If the council of a parish or community or, in the case of a parish or community which does not have a separate parish or community council, the parish meeting or a

community meeting, represent to a local highway authority—

(a) that a highway as to which the local highway authority have the duty imposed by subsection (3) above has been unlawfully stopped up or obstructed, or

(b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority,

it is the duty of the local highway authority, unless satisfied that the representations are incorrect, to take proper proceedings accordingly and they may do so in their own name.

(7) Proceedings or steps taken by a council in relation to an alleged right of way are not to be treated as unauthorised by reason only that the alleged right is found not to exist.

12. Section 149 has the sidenote “Removal of things so deposited on highways as to be a nuisance” and provides:

(1) If any thing is so deposited on a highway as to constitute a nuisance, the highway authority for the highway may by notice require the person who deposited it there to remove it forthwith and if he fails to comply with the notice the authority may make a complaint to a magistrates’ court for a removal and disposal order under this section.

(2) If the highway authority for any highway have reasonable grounds for considering—

(a) that any thing unlawfully deposited on the highway constitutes a danger (including a danger caused by obstructing the view) to users of the highway, and

(b) that the thing in question ought to be removed without the delay involved in giving notice or obtaining a removal and disposal order from a magistrates’ court under this section,

the authority may remove the thing forthwith.

(3) The highway authority by whom a thing is removed in pursuance of subsection (2) above may either—

(a) recover from the person by whom it was deposited on the highway, or from any person claiming to be entitled to it, any expenses reasonably incurred by the authority in removing it, or

(b) make a complaint to a magistrates' court for a disposal order under this section.

(4) A magistrates' court may, on a complaint made under this section, make an order authorising the complainant authority—

(a) either to remove the thing in question and dispose of it or, as the case may be, to dispose of the thing in question, and

(b) after payment out of any proceeds arising from the disposal of the expenses incurred in the removal and disposal, to apply the balance, if any, of the proceeds to the maintenance of highways maintainable at the public expense by them.

(5) If the thing in question is not of sufficient value to defray the expenses of removing it, the complainant authority may recover from the person who deposited it on the highway the expenses, or the balance of the expenses, reasonably incurred by them in removing it.

(6) A magistrates' court composed of a single justice may hear a complaint under this section.

13. Section 150 has the sidenote "Duty to remove snow soil etc. from highway" and provides:

(1) If an obstruction arises in a highway from accumulation of snow or from the falling down of banks on the side of the highway, or from any other cause, the highway authority shall remove the obstruction.

(2) If a highway authority fail to remove an obstruction which it is their duty under this section to remove, a magistrates' court may, on a complaint made by any person, by order require the authority to remove the obstruction within such period (not being less than 24 hours) from the making of the order as the court thinks reasonable, having regard to all the circumstances of the case.

(3) In considering whether to make an order under this section and, if so, what period to allow for the removal of the obstruction, the court shall in particular have regard to—

(a) the character of the highway to which the complaint relates, and the nature and amount of the traffic by which it is ordinarily used,

(b) the nature and extent of the obstruction, and

(c) the resources of manpower, vehicles and equipment for the time being available to the highway authority for work on highways and the extent to which those resources are being, or need to be, employed elsewhere by that authority on such work.

...

14. Part XII of the Act (comprising ss 238 to 271) is headed “Acquisition, Vesting and Transfer of Land etc”.

15. Section 263(1) provides:

Subject to the provisions of this section, every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway.

### **Development of the law**

16. The history of the responsibility of highway authorities and their common law predecessors for the upkeep of highways was reviewed by Lord Denning MR in *Haydon v Kent County Council* [1978] QB 343, and by Lord Hoffmann in *Goodes* and, more shortly, in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

17. In *Haydon* a pedestrian slipped on an icy footpath and sued the highway authority under the equivalent of s 41(1) of the 1980 Act (then s 44(1) of the Highways Act 1959). Lord Denning was in a minority in holding that the section gave no rise to no liability for keeping the path free from snow or ice, but his judgment was approved by the House of Lords in *Goodes*. In *Goodes* the claim was similar except that the claimant was a motorist whose car skidded on black ice and crashed into the parapet of a bridge. In *Gorringe* the claimant was a motorist whose car skidded on a bend hidden behind a crest in the road and collided with an oncoming vehicle. She blamed the highway authority for failing to provide a warning sign.

18. In all three cases the central issue was whether the highway authority had failed in its statutory duty to “maintain the highway”. In *Haydon* there was an additional claim that by failing to remove the ice the highway authority was in breach of s 129 of the 1959 Act, the terms of which were similar but not identical to s 150 of the 1980 Act. In *Gorringe* there was an additional claim for common law negligence. None of the cases involved a claim for breach of duty under s 130. Indeed, as far as counsel have been able to tell from their researches, the present claim appears to be novel, although Lord Scott in *Gorringe* referred to s 130 in a passage on which Mrs Ali places reliance. I will come to that in due course.

19. At common law, responsibility for repairing highways and keeping them in repair rested on the inhabitants at large, but the meaning of repair was confined to

making good defects in the surface of the highway itself, so as to make it reasonably passable without danger for ordinary traffic. Ruts, potholes or bushes rooted in the highway might make a highway out of repair, but not things which obstructed the surface without damaging it. The responsibility was a public responsibility which was enforceable only by proceedings on indictment in the nature of a prosecution for public nuisance. No action for damages would lie against the inhabitants at the suit of a person who suffered an accident as a result of a highway being in a dangerous condition through lack of repair. Over the course of time, statutes were passed which transferred responsibility for the maintenance of highways to statutory bodies, but for a long time statutory highway authorities were no more liable as a matter of civil law for non-repair of highways than had been the inhabitants. The House of Lords so held in *Cowley v Newmarket Local Board* [1892] AC 345.

20. A cause of action was first given to a person injured as a result of the failure of a highway authority to repair the highway by the Highways (Miscellaneous Provisions) Act 1961. Section 1(1) of that Act provided that the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways was thereby abrogated. In its place, Parliament introduced the “reasonable care” defence now contained in s 58 of the 1980 Act.
21. In *Goodes* the House of Lords held, in agreement with Lord Denning in *Haydon*, that the scope of a highway authority’s duty under s 41(1) to “maintain” the highway was no wider than the previous common law duty of repair of the inhabitants, and that the effect of the 1961 Act was limited to enabling a person who suffered an accident as a result of a defect in the surface to recover compensation, subject to the new “reasonable care” defence. It followed that a highway authority’s duty of maintenance did not extend to keeping a highway free from ice or snow.
22. In addition to the duty to maintain the highway (ie keep it in proper structural repair), from time to time statutory duties were imposed on highway authorities or their equivalent to keep highways clear from obstruction by snow or other causes. Section 150 of the 1980 Act can be traced back, in substance, to s 26 of the Highways Act 1935, and there were other statutory provisions which imposed duties of a similar kind. One such was s 29 of the Public Health (London) Act 1891. Its particular relevance is that it led to a claim for damages by a pedestrian who slipped on an icy pavement. The case was *Saunders v Holborn District Board of Works* [1895] 1 QB 64. It was decided by the Divisional Court that a breach of the authority’s statutory duty to remove snow no more gave rise to a private law cause of action than a breach of its duty to maintain the highway. Lord Denning reached the same decision in *Haydon* regarding the duty under s 129 of the 1959 Act, and no relevant distinction can be drawn between that section and s 150 of the 1980 Act (set out at para 13 above).
23. Lord Hoffmann observed in *Goodes*, at page 1367, that there was an obvious case for saying that a person who suffered an accident as a result of the presence of ice which, in modern conditions, the highway authority could reasonably have prevented or removed should have a remedy, but that Parliament had not yet provided such a remedy.

24. Parliament's response was to amend the 1980 Act by s 111 of the Railways and Transport Safety Act 2003 so as to insert s 41(1A). Two things are noteworthy about the form of this amendment. First, the method of reform chosen was to expand the duty of maintenance under s 41, to which the "reasonable care" defence under s 58 was available, rather than to create a private law action for breach of s 150. If Parliament had chosen to create a private law action for breach of s 150, it is inconceivable that it would not also have created some form of defence similar to s 58, as it had done in 1961 when it created a private law action for injury suffered as a result of failure to maintain the highway. Secondly, s 41(1A) is expressed to be aimed in particular at the perils of snow and ice. In view of its terms and the subsequent decision in *Gorringe*, it has not been argued on Mrs Ali's behalf that the intention behind s 41(1A) was to bring about a more general broadening of a highway authority's duty of maintenance. In *Gorringe* the House of Lords regarded the obligation to remove snow and ice as a different type of obligation from that imposed by s 41(1), which has been added to the repairing duty by s 41(1A), and held that otherwise the limitations on the s 41(1) duty established by *Goodes* remain. (See Lord Hoffmann at para 15 and Lord Scott at para 52.)

#### **Claim under s 130**

25. Mr Wilby, QC submitted on behalf of Mrs Ali that on the assumed facts she has a valid cause of action against the highway authority for breach of its duty under s 130 in failing to prevent, as far as possible, the obstruction of the footpath by mud, vegetation and rubbish, which made it dangerous for pedestrians. He submitted that it would be unjust if Mrs Ali were not entitled to maintain such a claim, and he relied on the following passage from the speech of Lord Scott in *Gorringe* at para 51:

"In a case, therefore, where the damage complained of has been caused not by a failure to maintain the highway but by something done by the highway authority, or for which the highway authority have become responsible (c/f *Sedleigh-Denfield v O'Callaghan* <http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1940/2.html>) [1940] AC 880 and see section 130(3) of the 1980 Act), liability continued after 1961 as before, to be determined by the common law principles of negligence or, as the case may be, public nuisance. It is only where the alleged liability arises out of a failure "to maintain" the highway that the section 41(1) duty and the section 58(1) defence come into play."

26. Mr Wilby also relied on a statement in Halsbury's Laws of England, vol 21, 2004 reissue, para 335, that at common law a highway authority is under a duty to remove obstructions, for which *Bagshaw v Buxton Local Board of Health* (1875) 1 Ch D 220 and *Harris v Northamptonshire County Council* (1897) 61 JP 599 are cited as authorities.
27. Mr Eccles on behalf of the highway authority submitted that it cannot have been Parliament's intention that the duties imposed by s 130 should give rise to an



action for damages for a number of reasons. Section 130(1) is far too broad and general. Subsection (3), on which Mrs Ali relies, applies not only to highways maintainable at public expense but also to other highways if in the highway authority's opinion their stopping up or obstruction would be prejudicial to the interests of their area. That involves a discretionary judgment by the highway authority. Further, ss 130A to 130D of the Act (introduced by s 63 of the Countryside and Rights of Way Act 2000) provide a carefully calibrated procedure for enforcement of a highway authority's duties under s 130. Under that procedure a person who complains that a highway has been obstructed may serve a notice on the highway authority requiring it to secure the removal of the obstruction. If the highway authority fails to do so, the complainant may apply to a magistrates' court and the court may make an order requiring the highway authority, within such reasonable time as may be fixed by the order, to take such steps as may be specified for the removal of the obstruction. This procedure is similar to the procedure for enforcing a highway authority's duty under s 150, which has been held not to be enforceable by a private law action. In short, submitted Mr Eccles, any duty owed under s 130 is a public law duty and enforceable only as such. He also submitted that the appellant's argument is not only novel, but runs counter to the central reasoning in *Goodes* and is inconsistent with Parliament's intention in enacting s 41(1A), since its effect would be to create wider liability than under s 41(1A), without affording a highway authority the benefit of a defence under s 58, and would render s 41(1A) largely if not entirely otiose.

28. At the court's invitation Mr Wilby has investigated the history of s 130 (and other sections of the 1980 Act) and I acknowledge our indebtedness to him for the results of his research.
29. Section 130 can be traced back to s 26 of the Local Government Act 1894, which provided:
  - (1) It shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping up or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereafter would in their opinion be prejudicial to the interests of their district, and to prevent any unlawful encroachment on any roadside waste within their district.
  - (2) ...
  - (3) A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient.

...

30. Under this section it was for the council to consider whether in their opinion the stoppage or obstruction was prejudicial to the community and, if so, what action they deemed expedient to try to prevent it. By no stretch could it be read as intended to create a private law right of action.
31. As to the judicial and textbook sources relied on by Mr Wilby, Lord Scott's reference to s 130(3) in *Gorringe* was no more than a passing reference, and I doubt the correctness of Halsbury's statement that at common law a highway authority is under a duty to prevent and remove obstructions. Highway authorities were created by statute. They succeeded to the common law duties of the inhabitants, and additional statutory duties have from time to time been imposed on them. I am unaware of any authority for the proposition that the inhabitants were under a common law duty to prevent and remove obstructions, and it is inconsistent with Lord Denning's judgment in *Haydon*. Lord Denning traced the duty of a highway authority for the removal of obstructions which did not damage the surface of the highway to s 26 of the 1835 Act (which led in turn to s 129 of the 1959 Act and s 150 of the 1980 Act) and not to any antecedent common law duty of the inhabitants. I do not read the cases cited in Halsbury (*Bagshaw* and *Harris*) as providing authority for the proposition advanced, but in any event the point is strictly academic because neither case provides any support for the existence at common law of a right of action for damages against a highway authority for failing to prevent or remove obstructions.
32. The arguments advanced by the highway authority against interpreting s 130 as intended to give rise to a civil action for damages are compelling. For the reasons stated, I regard it as clear that no such right of action was intended to be created by s 26 of the 1894 Act, from which s 130 of the 1980 Act descends. There is nothing in the language of s 130 to suggest that Parliament intended differently.
33. As its heading and language indicate, s 130 is concerned with the protection of the legal rights of the public at large. The rights in question are the rights of the general public to use the public highway. The section is about legal rights of access; it is not about the safety of the condition of the highway. It places no express obligation on the highway authority to remove obstructions, and there is no justification for the implication of such an obligation, especially since express provision is made about the duty of a highway authority to remove obstructions in s 150. The duty under that section is itself a public law duty, with its own statutory method of enforcement, and the same is true of s 130. After *Goodes*, Parliament considered whether the law should be extended to create greater rights of compensation against a highway authority for a person who slips on a highway. It extended the law but only to the limited extent set out in s 41(1A), on which Mrs Ali does not seek to rely for reasons already explained.

### **Claim in nuisance**

34. Mr Wilby 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, under the principle established in *Sedleigh-Denfield v O'Callaghan* as expressed by Viscount Maugham at page 894:

“In my opinion, 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. ”

In support of his proposition Mr Wilby relied on para 51 of Lord Scott’s speech in *Gorringe*, cited above.

35. To apply the ruling in *Sedleigh-Denfield* to the present case would involve extending its ratio to a very different type of situation from that which the court was considering.
36. The legal issue in *Sedleigh-Denfield* concerned the standard of conduct ordinarily required of an occupier of land towards his neighbour. This point was identified in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42, by Lord Nicholls, at paras 32-3, and by Lord Hoffmann, at para 62. Lord Hoffmann commented that it was fair to impose reciprocal duties on each land owner to take whatever steps were reasonable to prevent his land becoming a source of injury to his neighbour.
37. To compare the relationship between neighbouring private landowners with the relationship between a highway authority and users of the highway is not to compare like with like.
38. Section 263(1) of the 1980 Act provides for the vesting of public highways in the highway authority, but the legal interest thereby created is an unusual and limited form of ownership. Section 263(1) can be traced back to the Towns Improvement Clauses Act 1847, which provided for public highways to be vested in local boards. In *Bagshaw* Jessell MR referred to this as meaning “vested *sub modo*, as far as a highway can be – not giving them necessarily a right to the soil”. Significantly, a highway authority is not an occupier of the highway and does not owe to highway users a common duty of care, as Lord Hoffmann noted in *Gorringe*, at para 10.
39. The Highways Act provides a complex statutory code governing the obligations of highway authorities. To require highway 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. The courts do not have the tools for carrying out a cost benefit analysis for deciding the merits of imposing such an obligation, analogous to the impact assessment which a department putting forward a proposal for legislative change would be required to carry out. Furthermore, the current legislation contains specific provisions which regulate the powers and duty of highway authorities with respect to the removal of highway obstructions and establish a method for enforcement of the duty: see ss 149 and 150. That method includes provision for the balancing of risks against resources in individual cases: see s 150(3). It is accepted that Parliament did not intend that breach of a highway authority’s duty under s 150 for the removal of obstructions should give rise to a private action for damages. In these circumstances, 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. I should stress that we are not here concerned with a nuisance which was created by the highway authority. There has never been a suggestion that a highway authority would not be liable at common law for a nuisance which it created.

40. I can see room for possible debate about what Lord Scott may have intended by his reference to *Sedleigh-Denfield* in *Gorringe*, which he did not himself fully explain. From the tenor of the surrounding part of his speech I am doubtful whether he had in mind a case of pure omission; but, be that as it may, his observation was obiter and pre-dated the discussion of *Sedleigh-Denfield* in *Marcic*.

### **Conclusion**

41. I would dismiss the appeal.

### **Lord Justice Wilson:**

42. I agree with both judgments.

### **Lord Justice Longmore:**

43. Any dictum of Lord Scott of Foscote deserves immense respect and has to be considered with great care. But it was not necessary for him in *Gorringe* to consider whether the *Sedleigh – Denfield* line of authority applied to highway authorities whom a claimant sought to make liable in public nuisance or whether s. 130(3) of the Highways Act 1980, if breached, gave rise to a cause of action in favour of a private individual or indeed whether a highway authority's obligation to remove obstructions was to be found in section 130 or in some other section of the 1980 Act.
44. For the reasons given by Toulson LJ in his judgment, I am persuaded that the dictum contained in para 51 of Lord Scott's speech in *Gorringe* does not require us to allow the appeal. To put the matter in my own words, the duty to remove obstructions has never existed at common law for the reasons set out by Lord Denning MR in *Haydon* which was recognised as good law in *Goodes* and *Gorringe*. Secondly the relevant statutory provision is more rightly section 149 or 150 which are both set out under the group heading "Obstructions of highways and streets" rather than section 130 which is set out under the group heading of "Protection of public rights". Thirdly whichever is the appropriate section it does not give a right to an individual to sue in tort.