“But Baby, it’s Cold Outside?”

Claims Arising from Ice on the Highway

By Philip Turton

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"Oh, the weather outside is frightful…"

Introduction

1. A Claimants' Solicitor, demoralised by the Jackson Report this January, perhaps needed to look no further than their own front windows for encouragement. The sight of the worst cold snap for a generation and a cursory reading of Section 41 of the Highways Act 1980 should have been enough to lift the spirits. On January 14th, the Nottingham Evening Post bore the front page headline:

"£500K of ice chaos - 123 collisions on County Roads".

Inside *"Sue from Clifton"* commented:

> *"I have seen far too many people on their bums today. God knows what the waiting times will be like at the QMC?"*

Other e-mailing citizens echoed Sue's comments. Any Claimants' Solicitor with a spark of intuition should have been rubbing his hands at the prospect of offering his services - the adverts may very well already have been in place at the QMC, waiting for Sue and her injured Clifton neighbours. As importantly, Nottingham was far from being the area worst affected by the recent weather - the ice and snow were countrywide. The newspaper coverage, which was extensive, swiftly turned to the prospect of litigation arising from the cold weather. Thus no lesser authority than the Daily Telegraph warned householders that they risked litigation if they cleared their drives. Apparently no such risk arose if they stood by and did nothing - another example apparently, as if Telegraph readers needed it, of "*Health and Safety gone mad*", and our "*compensation culture*".

2. When it comes to clearing the roads, a highway authority does not have the option of sitting by and doing nothing, even if the Daily Telegraph were to be right about that particular distinction. Thus, one consequence of the recent cold snap may be that a barrage of claims arising from accidents attributable to ice and snow now begin to be notified to local authorities. Such claims throw up a number of issues, not least those concerned with scarce resources and public funds. We were not long into the cold weather

when BBC Breakfast Time featured a number of local authorities complaining that they could not grit all locations because their supply of salt and grit was running low. In Lincolnshire, so it was said, beach sand was being used as a replacement. Such issues are likely to come to the fore when authorities begin to consider how they might defend such claims, something which, prudently, they ought to be doing now.

3. This article does not offer advice on safely avoiding accidents, purport to address policies for dealing with ice and snow, nor seek to bolt stable doors when the horse is already disappeared over the melted horizon. Rather the purpose of this article is to identify the basis of liability where a Claimant suffers injury because of ice on the highway, the nature of the defences available to highway authorities and to offer observations on the current state of the law dealing with the duty to remove ice from the highway.

"Get your motor runnin', head out on the highway"

Historical Liability to Maintain the Highway

4. Historically, responsibility for the maintenance of all ancient highways rested with the *"inhabitants at large"* of a parish, and the duty was discharged by the parish surveyor, later by the local highway authority. Highways adopted after the Highway Act 1835 became the statutory responsibility of local authorities under subsequent statutes. Since the surveyor was an officer discharging the duty of the inhabitants and because, at common law, proceedings for non-repair of the highway could be taken on indictment, no liability for damages arose in an action alleging failure to repair the highway - there was no liability in respect of non-feasance - see Russell -v- Men of Devon (1788) 2 TR 667; Young -v- Davis (1836) 2 H & C 197. Thus, liability would arise, but only in circumstances where the Authority had failed to perform some other statutory function or for its own positive acts of negligence - see Short -v- Hammersmith Corporation (1910) 104 LT 70.

5. In 1959 the law was consolidated and the various common law and statutory obligations brought together in the Highways Act 1959. Section 44, the forerunner to today's section 41 of the Highways Act 1980, placed a duty of maintenance on highway authorities and abolished both the liability of the inhabitants at large and the means of enforcement by remedy of indictment. The defence of *"non-*

feasance" in relation to repair was removed by Section 1(1) of the Highways (Miscellaneous Provisions) Act 1961, thus making Section 44 actionable in claims for breach of statutory duty. The 1961 Act, by way of balance, established the statutory defence now enshrined in Section 58 of the 1980 Act. Thus from 1959, a highway authority was liable for breach of its statutory duty to maintain the highway, subject after 1961, to its statutory defence whereby it could escape liability if it can show that it had taken reasonable care to secure that the highway was not dangerous.

6. In Section 329(1) of the 1980 Act, "*maintenance*" is defined in terms that it *"includes repair"* so that it was plain that the fabric of the highway itself had to be kept in repair. What was less clear over the years was whether the word "*maintain*" included anything else besides and particularly whether it included an obligation to clear transient dangers brought on by foul weather.

"The nearer your destination, the more you're slip, sliding away…"

Liability for Ice and Snow

7. At common law, prior to 1959, no indictment for non-repair could be raised simply for a failure on the part of the highway authority to deal with transient dangers attributable to passing weather conditions. Thus, historically, there was no liability on the part of the highway authority to remove ice, snow or other transient hazards - see Burgess -v- Northwich Local Board (1880) 6 QBD 264 in relation to flooding. Since the 1959 Act purported only to consolidate the law as it then stood, it might be thought that the position would have continued and that a highway authority would not be liable for damages where it failed to remove snow or ice. Lord Denning was certainly of that view in Burnside -v- Emerson [1968] 1 WLR 1490.

8. This ended in 1978, following the decision of the Court of Appeal in Haydon -v- Kent County Council [1978] QB 343. Lord Justices Goff and Shaw (presciently Lord Denning was the dissenter - following his own reasoning in Burnside) concluded that the duty to maintain meant more than simply keeping in repair the surface of the highway and extended to removing snow and ice or taking protective measures to render the highway safe in bad weather conditions. Whilst on the facts of that case both Lord Justices

considered that the Plaintiff failed, the decision opened up the prospect of liability attaching to a highway authority for failing to remove ice.

9. This raised a difficulty since, in principle, the duty under Section 41 is an absolute one. Once a highway was rendered slippery by icy conditions, a highway authority would be in breach of duty, subject only to the prospect, never easy, of discharging the Section 58 defence. To overcome this, Lord Justice Goff and Lord Justice Shaw purported to temper the duty. In Lord Goff's view:

> *"In my Judgment the Plaintiff must prove… either …that the highway authority is at fault apart from merely failing to take steps to deal with the ice, or,…that, having regard to the nature and importance of the way, sufficient time had elapsed to make it prima facie unreasonable for the authority to have failed to take remedial measures. Then the authority is liable unless it is able to make out the statutory defence."*

One of the reasons why Mrs. Haydon failed, in the view of Lord Justice Goff, was because the time which had passed between the onset of the cold snap and the accident was *"really very short"* (although the cold weather, it appears, had begun 4 days earlier and it is not plain for how long it had been forecast - how much time, one might wonder, would the Authority have required to make that particular path safe?).

10. Lord Justice Shaw considered that the presence of an icy patch on a footpath was not, of itself, evidence of a want of repair.

> *"I cannot see how the failure to deal immediately or promptly by some countermeasure with the outcome of weather conditions on the footpath in question could be said to be culpable so as to give rise to a liability on the part of the highway authority. I feel, as does Goff LJ, that there may be extreme cases in special circumstances where a liability for a failure to maintain, not related to want of repair, may arise. Such cases are not readily brought to mind although I would not wish to exclude them by confining the scope of maintenance to matters of repair and keeping in repair."*

Thus the door to such claims, whilst opened, was hardly thrown wide. Extreme cases and special circumstances would be required and it appeared that it was for the Claimant to show that steps taken were unreasonable before ever the section 58 defence was reached.

11. The decision in Haydon was followed by Boreham J in Bartlett -v- Department of Transport (1985) 83 LGR 579 (although the Claimant again failed on the facts) but the matter raised its head again in Cross -v- Kirklees Metropolitan Borough Council [1998] 1 All ER 564. Once again the problem centred on the nature of the duty and the concern that the presence of ice would inevitably render the highway authority in breach. This difficulty was addressed by Lord Justice Evans by finding that although the duty to maintain was absolute (rather than a duty to take reasonable care to maintain) it was not a duty to keep the highway at all times entirely clear of snow or ice:

> *"The highway authority's performance can only be measured by reasonable standards. To this extent, a concept of reasonableness applies, but this is not to say that the duty is limited to taking reasonable care. There is an absolute duty to achieve a certain result, even though reasonable standards apply in establishing what that result must be. As regards snow and ice, and apart from the special case where ice is due to excessive surface water, which should not have been allowed to accumulate, in my Judgment a similar concept applies. The duty to maintain includes taking preventative or clearance measures which are sufficient to keep the surface reasonably safe. This means:*
>
> *(a) What measures are sufficient would depend in part on what use of the highway can be anticipated, and by whom;*
>
> *(b) That if no or insufficient measures are taken within a reasonable time, and injury is caused thereby then the Plaintiff may establish at least a prima facie breach of duty under Section 41. The authority can then rely, if it chooses to do so, on the statutory defence under Section 58."*

It is not easy to grapple with that jurisprudence, nor with the introduction of a notion of reasonableness into a duty, which from its wording, is absolute. Further, it was not wholly clear how the Section 58 Defence could arise in circumstances where the Court had already concluded that an authority had failed

to take reasonable steps. Finally, the burden of proof appeared still to require a Claimant to demonstrate that the road was icy because insufficient measures had been taken by the highway authority (rather than, as would have anticipated under Section 58, leaving the authority to prove what it was, in fact, they had done).

12. Lord Justice Millett, confirming that the occasional presence of snow or ice did not denote a failure to maintain concluded:

> *"I agree that the duty to maintain the highway is not a duty to keep it free from snow and ice at all times regardless of the character of the highway and the nature and extent of its use. It is merely a duty to keep the general state of the highway in an appropriate condition. A highway authority is not obliged to ensure that every footway in its area is free from overnight ice, either during the hours of darkness when there are likely to be few persons about or during the early morning before the rise in temperature causes the ice to melt. It is only if the highway authority allows snow or ice to persist for sufficient time that the general condition of the way can be properly described as treacherous that any question of its failure to maintain the way can arise."*

Sir Ralph Gibson was more circumspect and leant towards Lord Denning's dissenting Judgment in Haydon, but concluded that the decision of the majority in that case was binding. Thus liability would require proof to a high standard that sufficient time had elapsed to make it prima facie unreasonable for the authority to have failed to take remedial measures, the burden on the issue being on the Plaintiff. Further, pedestrians ought to be able to keep their own lookout for ice:

> *"The pedestrian on the footway, who knows that it is a very cold morning, can look for and either see or feel the presence of ice. The pedestrian, in the circumstances of the Plaintiff, who has arrived by car, would probably have been able to see that the carriageway had been gritted and to take appropriate care in moving on the footway which had not been gritted. If she has the misfortune to fall she will probably hurt only herself. The driver of a motor vehicle on a ungritted and icy carriageway may have less chance of perceiving the presence of ice; he may come to that point by roads which were not icy; and if his vehicle skids, it may hurt more people in addition to himself, and may inflict on them more serious injury. I see nothing to suggest that a highway authority may*

not sensibly give higher priority to carriageways than to footways in a city centre in deciding how to deal with a warning of ice on the roads".

13. It is unclear whether the sort of cold snap that we have recently seen (and which from time to time has affected this island) was in the minds of any of the Judges whose Judgements have so far been considered. Whilst finding there was a duty, all were astute to limit it and proper questions arose as to those limitations. Such tortuous reasoning is hardly satisfactory but should be kept in mind, because Haydon and Cross represent the "*pre-Goodes position*", to which we will return, later in this article.

14. Unsurprisingly, within 2 years the matter was before the House of Lords in the leading case of Goodes -v- East Sussex County Council [2000] 1WLR 1356. The speech of Lord Hoffmann, which mirrored the judgment of Lord Denning in Haydon is worth 20 minutes of anyone's time for its potted history of the law relating to highway maintenance. In concluding that the duty in Section 41 was absolute, Lord Hoffmann identified a fundamental difference between a duty to maintain the fabric of the road in good repair and a duty to prevent the formation of or remove ice and snow. A duty to keep the highway free of ice would mean that the highway authority, unavoidably but periodically, would be in breach of duty, so that Lord Hoffmann had little difficulty in concluding that the duty under Section 41 was restricted to maintenance of the fabric of the highway and the taking of measures to prevent deterioration. A person injured through skidding or slipping on ice or other transient matter, accordingly, could not found an action for breach of Section 41 unless the product of some other failure to maintain the fabric of the highway itself. If the law was to embrace such a requirement, the matter was one for Parliament and not for the House of Lords.

15. The reasoning was applied in Sandhar and Another -v- Department of Transport, Environment and the Regions [2004] EWCA Civ 1440 which also confirmed that there was no duty at common law to clear ice. Thus, from 2000 and, as it turned out, for only a short period, no liability could arise on the part of a highway authority for a failure to remove or act upon ice or snow which had formed on the highway rendering it dangerous.

"Get Back! Get Back! Get back to where you once belonged…"

Section 41(1A) of the Highways Act 1980

16. The effect of the decision in Goodes was to cause Parliament quickly to act to overcome its effect. Thus followed the passage of the Railways and Transport Safety Act 2003, and, from 31st October 2003, the introduction of Section 41(1A) of the Highways Act 1980, as amended. Thus Section 41 now reads:

> *"(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 sub-section (2) and (4) below, to maintain the highway.*
>
> *(1A) 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."*

Section 41(1A) has yet to be considered at appellate level, although Recorder Keyser QC, being the first to draw a short straw, grappled with it in the Swansea County Court in Pace -v- Swansea City and County Council (Lawtel transcript AC0114943, LTL 4/10/2007).

17. The subsection is not a particularly happy one and raises immediate issues about burdens of proof and standards which will require, in due course, resolution at appellate level. At least 3 textbooks say that it has "*reversed the effect of Goodes*" or "*restored the law to its pre Goodes position*". If that was the intention, only a cursory reading demonstrates that it has done no such thing. Section 41 (1A) now places an absolute duty on the Highway Authority, subject only to a defence of reasonable practicability – the burden of which is invariably onerous. In other words the amended section has enacted exactly what Lords Justice Goff, Shaw, Evans and Millett were trying to avoid and that which Lord Hoffman regarded as clearly undesirable. It may be noted that the obligation in Scotland is rather different, being there contained in Section 34 of the Roads (Scotland) Act 1984:

> *"A roads authority shall take such steps as they consider reasonable to prevent snow and ice endangering the safe passage of pedestrians and vehicles over public roads."*

No element of reasonably practicable there, and the power is distinct from the imposed duty of maintenance. More importantly the steps required are those the Authority itself thinks reasonable.

18. In England and Wales however section 41(1A) now applies and requires careful construction. A number of matters are to be noted. First, the amended subsection is plainly an extension of Section 41(1) - the use of the words *"In particular"* make this plain. Since Section 41(1) is subject to the statutory defence within Section 58, the incorporation of the words *"so far as is reasonably practicable"* needs interpretation and is an area that may give rise to difficulty in future – indeed it is far from easy to see how a section 58 defence could be left to the Authority if they failed to show they had taken reasonably practicable steps. Assuming that the courts adopt the same approach as that taken in Employer's Liability cases, the burden of proving the defence will rest on the Defendant – see Larner -v- British Steel [1993] 4 All ER 102; Baker v Quantum Clothing [2009] PIQR P19. Further, "*reasonably practicable*" means more than physically possible and involves a computation of risk against sacrifice – see Austin Rover Group v HM Inspector of Factories [1990] 1 AC 619. If the same analysis is to be applied to section 41(1A) then, unlike the "pre-Goodes" position articulated in Haydon and Cross, it would be for the Authority to show that it had acted in a reasonable and practicable way to meet the risk and not for the Claimant to establish that measures were insufficient or delayed. This burden, involving proof not only of appropriate systems for safety but also their application and discharge, is evidentially cumbersome and will require careful marshalling of evidence to ensure the defence is made out.

19. Thus the position may well now be that a Claimant will have to show little more than that s/he slipped on ice, or at least on a road where safe passage was rendered dangerous by the presence of ice, in order to move the burden to the Highway Authority to prove their systems were reasonable and practicable and were being discharged at the time of the accident. This is no small change, and goes some way to opening a large door for Claimants, which Highway Authorities will need to consider carefully. In the case of Pace -v- Swansea City and County Council (Lawtel transcript AC0114943, LTL 4/10/2007), Recorder Keyser QC approached the matter upon the basis that the Council had a reasonable system of gritting and therefore could escape liability, presumably because they had taken reasonably practicable steps (although it might, as easily, have been under section 58). Such an approach is probably closer to the pre-Goodes position

than the re-worded sub-section would easily allow but the matter cannot be said to be clear until there has been some guidance from above.

"I get knocked down, but I get up again, you're never gonna keep me down…"

Preparing and Meeting Claims

20. It would be prudent, for the moment and pending any further judicial guidance, for both sides to prepare cautiously. Claimants might consider that they need prove only the fact of their accident, and that it was caused by ice, to establish a prima facie case, but any evidence of shortcoming will strengthen their hand greatly. A highway authority ought to prepare on the basis that they will have to discharge the burden of showing that it was not reasonably practicable to keep that highway clear of snow and ice and/or justify their Winter Maintenance policies. Thus, whilst a Claimant will need evidence of what occurred to make him/her fall, a Defendant's evidence will need to be directed towards the weather conditions and the warning of them, the winter safety policy, including hierarchies of gritting/salting, the steps actually taken and may extend to budgetary considerations (if a Council runs out of grit, for instance, it *might* be acceptable to show that the budgetary provision was a reasonable one but that weather conditions were exceptional). .

21. It can safely be assumed that some documentation is going to be common to the vast majority of cases. Claimants may seek it at the Protocol stage, by application for pre-action disclosure if necessary, and highway authorities should make sure that they have it to hand. The following list assumes that a Claimant can establish that s/he has suffered an injury due to the presence of ice or snow on a highway maintainable at public expense. I would venture the following documents will be required as a minimum:

(i) The Winter Safety Plan or comparable policy document;
(ii) Any applicable generic document of guidance such as a general Code of Practice, with which it can be shown the Safety Plan is compliant;
(iii) Evidence of the gritting/salting programme intended to be implemented (if separate to the safety plan);
(iv) Weather reports (which should be available from the Met. Office);

(v) Records of the gritting/salting in fact undertaken during the cold period;

22. Since the duty is to ensure safe passage, it will be necessary for both parties to consider the applicable policy for dealing with icy conditions. The policy should be compared to any relevant general Code of Practice for Winter Maintenance and compliance or non-compliance identified – the Authority would need to explain the latter. To the extent that a hierarchy of preventative measures is adopted, the reason for adopting such a hierarchy will need to be considered. In cases where they come into play, relevant budgetary constraints could be identified (and the Court is usually live to the reality that local authority resources are finite and have to be managed prudently). An obvious point is that carriageways will be salted and gritted before footpaths but, to the extent that cold conditions persist, it may not be the case that a highway authority can simply neglect to salt pavements altogether. It will be necessary for the authority to show that it has considered the matter and formulated a proper policy- a failure to do so opens a door to a Claimant. This may require an explanation as to why some roads were gritted first - perhaps by reference to bus routes, traffic usage or geography - a steep hill needing more by way of care, perhaps, than a flat road.

23. The discharge of a defence of reasonable practicability however, depends not only upon establishing a proper policy, but also that the same is implemented as a matter of practical application. As a result records of gritting and salting will need to be obtained and scrutinised. Vulnerability in a Defendant's case often lies not in the policy itself, which may be proper, but in showing that the man on the ground actually did what was expected of him on the day in question. Thus, if a car leaves the road at a particular location any defence will be significantly assisted if it can be shown when it was gritted and salted (or if it was not, why not) and the absence of such evidence will lend succour to a Claimant's case.

24. If a Claimant establishes an accident due to a road left ungritted, or if the Council cannot show that what they did was reasonably practicable in the circumstances then, in principle at least, a defence under Section 58 remains available. The Section 58 defence is differently worded and provides:

> *"It is a defence..... 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."*

The absence of the word *"practicable"* arguably makes the Section 58 defence easier to discharge and requires an authority to show that it had taken reasonable care to ensure that the highway was not dangerous – not that they had done all they could within the limits of reason. Thus, whilst similar issues arise under Section 58, they would need to be marshalled by reference to the matters set out in Section 58(2) particularly:

(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 the 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 parts of the highway to which the action relates was likely to cause danger to uses 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.

It should be noted that it is irrelevant that the highway authority has arranged for a competent person to carry out such maintenance - in this context, the task of gritting/salting - unless the authority can also prove that it had given proper instruction and that those instructions had been carried out - see the proviso to Section 58(2).

25. Thus the following matters will have to be proved in evidence by the authority:

(i) The nature of the road or pavement and where it came in the hierarchy of importance to be adopted in icy conditions;

(ii) The usage likely to be made of that highway or pavement and the nature of the traffic, whether vehicular or pedestrian;

(iii) The standard of gritting, salting or clearance which was then appropriate or which would have been expected by a reasonable person;

(iv) The extent of forewarning, by reference to weather reports and the duration of the cold weather;

(v) The extent to which notices were used to warn drivers and pedestrians - in reality this is only likely to arise where there is some special factor justifying such a warning - the authorities make it plain that pedestrians and motorists can be expected to realise the nature of the weather in which they are driving.

26. If, on one day, there were 123 collisions in Nottinghamshire, given that the cold weather lasted on and off over a period of about 21 days, the potential number of accidents is high – as a matter of maths, possibly in the thousands in Nottinghamshire alone. Not all will lead to claims but there has been enough in the recent cold snap, possibly the worst for a generation, and there is certainly enough in the new wording of section 41(1A), to suppose that local authority legal departments, lawyers and the courts will be kept occupied for some while yet.

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