The Motoring Organisations' Land Access & Recreation Association

Surface Standards for Unsealed Public Roads
The View of the Courts

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Caution

This paper contains references to and extracts from statutes, court decisions, and government guidance.

All of this material can over time be updated, replaced, or superseded.

Readers should take appropriate advice before commencing any course of action in this complex field of law and practice.

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1. What is Maintenance and Repair?

1.1. Burnside v. Emerson [1968] 1 WLR 1490.

Lord Diplock: "*The duty of maintenance of a highway which was by s.38(1) of the Highways Act 1959, removed from the inhabitants at large of any area, and by s.44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing up of Blackburn J., in 1859 in R v. Inhabitants of High Holborn, "non-repair" has the converse meaning.*"

1.2. Haydon v. Kent County Council [1975] 1 QB 343.

Lord Denning: "'*Repair' means making good defects in the surface of the highway itself so as to make it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. That is the combined effect of the statements of Blackburn J. in R v. Inhabitants of High Halden (1859) 1 F. & F. 678; of Diplock L.J. in Burnside v. Emerson [1968] 1 W.L.R. 1490, 1497 and Cairns L.J. in Worcestershire County Council v. Newman [1975] 1 W.L.R. 901, 911. Thus deep ruts in cart roads, potholes in carriage roads, broken bridges on footpaths or bushes rooted in the surface make all the highways 'out of repair'.*"

1.3. Both views considered and approved by the Lord Chancellor in the Court of Appeal in Department for Transport, Environment & the Regions v. Mott MacDonald & Others [2006] EWCA Civ 1089.

2. Standards of Maintenance and Repair

2.1. R v. Inhabitants of Cluworth Pasch (1704) 3 Ann. Hale, page 339. "*But where a man is bound by prescription to repair a way, he is not obliged to put it into better repair than it has been in time out of mind, but as it has been usually at the best.*"

2.2. R v. Witney (1835) 5 Dowl. P.C 728 as reported in *Glen's Law of Highways*, 1883, page 79. The court refused to discharge a parish from an indictment for the non- repair of a highway until it was ascertained whether the repairs effected would stand a winter's wear.

2.3. R v. Claxby (Inhabitants) (1855) 24 LJQB 223. In general, the level of repair must follow the character of the traffic using, or wanting to use, and road, but a lessening of the frequency of use of a road is not a reason to lower the standard of repair.

2.4. R v. High Halden (1859) 1FF 678. Blackburn J. Said that the road must be kept in such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all times of the year. This view has been regularly upheld since. Directed that the parish was not bound to make the road hard, or bring stone or other hard substances to repair the road; but they were bound in some way, by stone or other hard substances if necessary, to make the road reasonably passable for ordinary traffic at all seasons of the year.

2.5. R v. Inhabitants of Healugh (1863) The Times, 18 April 1863, page 13. "*... the way ought to be put into such a state of repair as that persons might walk along dry shod; and that if this required a bridge, then a bridge must be made.*" Treat this with care. The short report in *The Times* appears to be of adjourned proceedings.

2.6. Burgess v. Northwich Local Board (1880) QBD 264. Lindley J. Held that the duty to repair a road means the duty to keep the road... in such a state as to be safe and fit for ordinary traffic.

2.7. The Pickering Lythe East Highway Board v. Barry [1881] QBD 59. Use of 'ordinary' as the opposite of 'extraordinary'.

2.8. R v. Williamson (1881) JP 505. Extraordinary traffic goes to the character of the traffic, rather than the amount of traffic.

2.9. Raglan Highway Board v. Monmouth Steam Company (1882) JP 598. Regular winter use of highways for timber haulage not extraordinary. Note, 'ordinary traffic' chiefly donkey carts.

2.10. Ex parte Lewis (1888) 21 QBD 191 at 197. Wills J, a highway is, "*... 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.*"

2.11. Whitebread v. Sevenoaks Highway Board [1892] QBD 8. Extraordinary traffic case, held ET is in relationship to a particular road. References to character of ordinary local traffic.

2.12. R on the Prosecution of the Maidstone Rural Sanitary Authority [1892] QBD 466. A traction engine / extraordinary traffic case. Question as to whether tractions engines were still, by then, extraordinary traffic. Held, yes.

2.13. Eyre v. New Forest Highways Board (1892) August 13, 1892, JP 517. Wills J, first page, second column. "*A great many old highways in country places are highways which from the time they were first used, have never had a spadeful of gravel thrown upon them, or a shilling's worth of repairs done to them at any spot ... it is immaterial, if the public way antecedent to 1835 is made out to your satisfaction, whether repairs were ever done upon the road or not.*"

2.14. Justice of the Peace, 15 January 1898. 'Experts' opinion' as to extraordinary traffic evolving into ordinary traffic.

2.15. AG v. Scott (1904) 68 JP 502. A traction engine / extraordinary traffic case. The courts rolling back from damning heavy traffic as inevitably 'extraordinary' towards expecting the highway authorities to repair roads sufficiently as the traffic on them evolves. As the baseline of ordinary traffic moves up, so the threshold of extraordinary traffic / public nuisance moves up too. Query ... if the ordinary traffic on a given road (e.g. unsealed) diminishes in character and quantity, does that also pull back the extraordinary threshold?

2.16. AG v. Staffordshire County Council [1905] ChD 336. Headnote 'The Court will not prescribe what particular works or repairs are necessary for the maintenance of the roads." c.f. Barnes v. Bury; Seymour v. ERYC (within limits).

2.17. AG v. Sharpness New Docks and Gloucester and Birmingham Navigation Co [1915] AC 654 at 665. Highway authorities must maintain roads in fit condition for ordinary traffic, however that might develop and change. This must have relevance to, e.g., the ubiquitous mountain bike?

2.18. Burnside v. Emerson [1966] (CA) 1 WLR 1490. Lord Diplock at 1497, "*.... a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition ... Repair and maintenance thus include providing an adequate system of drainage for the road ….*"

2.19. Worcester County Council v. Newman (CA) [1975] WLR 912. Approves a pleading in Archbold (1862) describing a highway 'was and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same.' Also: Lord Justice Lawton put the matter simply: "A highway gets out of repair because the highway authority over a long period has not done its duty. It is therefore just that the law should make a mandatory order for repairs."

2.20. Haydon v. Kent County Council [1975] 1 QB 343. Lord Denning, MR: "*Thus deep ruts in cart roads, potholes in carriage roads, broken bridges on footpaths or bushes rooted in the surface make all the highways 'out of repair'.*"

2.21. Sorensen v. Cheshire County Council 9 November 1979. David J. "*It has certainly not been used for well over a hundred years but as I pointed out earlier it has never been lawfully stopped up. It is manifestly out of repair and this Court has no alternative but to order that the road be put in repair.*"

2.22. R v. East Sussex County Council, Ex parte Tandy, The Times, 21 May 1998. This case is a recent leading judgement on the extent to which a local authority can take account of its lack of resources, or its choice in allocating resources, in carrying out a statutory duty. Lord Browne-Wilkinson: "*[the council] could, if it wished, divert money from other... applications which were merely discretionary so as to apply such diverted moneys to discharge the statutory duty... 'First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty... The argument is not one of insufficient resources to discharge the duty, but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the ground that it preferred to spend its money in other ways was to downgrade a statutory duty to a statutory power…*"

2.23. Kind v. Newcastle City Council [2001] EWHC Admin 616. Scott Baker J: "*The Crown Court had to look at the whole highway. This it did. It correctly found that the highway included the whole of the width between the enclosures, but that does not mean that the council had an obligation to level everything and make all parts of it like a motorway, flattening banks so that vehicles could pass over them. The question was whether the highway as a whole was reasonably passable for ordinary traffic. In this regard the character of Prestwick Carr was of critical importance and the crown court clearly had this well in mind – primarily a single track road used for farm access.*"

2.24. Ali v. Bradford MBC [2010] EWCA Civ 1282. A 'slipping' case, but at para 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.*"

3. Ordinary and Extraordinary Traffic

3.1. Wallington v. Hoskins [1880] 6 QBD 206. Mr Wallington owned a stone quarry and shipped his stone in wagons along roads where the ordinary traffic was agricultural traffic. The stone carts damaged the roads, but stone traffic was a 'recognised business in the neighbourhood, and Mr Wallington's wagons were no heavier than was usual for that traffic. Held on appeal that because the nature of the traffic was not extraordinary, there could be no recovery of the additional expense of road repair resulting from the stone wagon traffic.

3.2. Pickering Lythe East Highway Board v. Barry [1881] 8 QBD 59. Mr Barry built a house at Lindhead and used the highway to haul cartloads of building materials, each weighing about a ton and a half. The ordinary traffic on the highways was 'light agricultural traffic' and an occasional wagon weighing a ton and a half, but not frequent enough to cause harm. Mr Barry's carts required two horses and an additional one at certain places. The carters used 'trails' on the downhill sections to brake the carts, and these caused some of the damage. The Highway Board argued that the character of Mr Barry's traffic was similar to the ordinary traffic, but its weight and frequency made it extraordinary. The Justices dismissed the complaint. On appeal held, Grove J, that the Court would be reluctant to interfere with the Justices' decision, and that the building of an ordinary dwelling house is not much different from carting materials to build or renew farm buildings locally. The only difference between Mr Barry's traffic and the usual traffic was that there was more of it, and that does not make it exceptional.

3.3. R v. Williamson (1881) 45 JP 505. Mr Williamson owned an ironstone mine and sent his ore to the railway in carts of 'ordinary size and weight', making about 70 journeys a day. The other local traffic was small agricultural carts. Held, reversing the Justices' decision, the number of daily trips does not of itself make the ore traffic extraordinary. Lindley J, "There may be cases where the use of the highway is so frequent and incessant as to amount to extraordinary traffic. I can scarcely imagine such a case. Nevertheless the mere fact that one person uses a highway more than others is no reason for calling it extraordinary traffic upon the part of that person."

3.4. Raglan Highway Board v. Monmouth Steam Railway Company (1881) JP 23 September 1882. Appeal from the decision of Justices by way of case stated. The traffic on the roads 'consisted chiefly of donkey carts and foot passengers.' The traffic alleged to have caused damage was timber haulage during winter. The Justices held that the weight of the timber carts was not excessive and "*that this was not extraordinary traffic, this being the ordinary trade of the district.*" Held that this type of traffic happened every year in this area and had always done so. It could not be called extraordinary. [There is another case between these parties cited elsewhere as (1884) 46 JP 598]

3.5. Maidstone Rural Sanitary Authority v. Jesse Ellis & Co [1882] QB 466. Traction engines and 'trucks' weighing 8 and 5 tones respectively were used to haul manure to a farm. Such engines were in use in the neighbourhood, but not on this road. Held by the Justices, that this was extraordinary traffic on that particular road. Held by Field J that the Justices were right and that 'ordinary' must be interpreted with reference to the road in question. Other roads in the area were used by traction engines, but this road only "*very rarely and then in dry weather*". The laden engine and trucks made two journeys a day over several days, "*... practically squeezing the road into the ditch and seriously damaging it ... it is impossible to hold that the use of such engines was an ordinary incident of the traffic upon [the road]. The Justices were right.*"

3.6. Whitebread v. Sevenoaks Highway Board [1892] 1 QB 8. Mr Whitebread carted stone along public highways for a period of seven years, resulting in damage and additional repair expenses. The Justices found that this was extraordinary traffic and charged Mr Whitebread with the additional cost of repairs. The Justices found that stone traffic was a recognised business in the neighbourhood, but was not the ordinary or recognised traffic of the road in question. On appeal by way of case stated, the Justices' decision was upheld.

3.7. Burnside v. Emerson [1968] 1 WLR 1490, Lord Diplock: "*The duty of maintenance of a highway which was by s.38(1) of the Highways Act 1959, removed from the inhabitants at large of any area, and by s.44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing up of Blackburn J., in 1859 in R v. Inhabitants of High Holborn, "non-repair" has the converse meaning.*"

3.8. Colin Seymour v. East Riding of Yorkshire Council (2000) case number A200004 In the Crown Court, before HH Judge Morrell. (At page 5, line 3) "*The needs of ordinary traffic are not only to be judged by the level of public clamour. They should be judged objectively according to the physical circumstances and a rational assessment of human conduct.*" (At page 6, line 3) "*The duty of this court in this case is to do the best it can to decide what ordinary traffic would use this stretch of the public highway at all seasons of the year if it were in a passable state judged by the standards of the year 2000.*"

4. Fords

4.1. Where a highway crosses a watercourse by a ford or stepping stones, it does not cease to be a highway. In Attorney-General Ex Relatio Yorkshire Derwent Trust Ltd and Another v. Brotherton and Others [1991] 3 WLR 1126 (House of Lords).

Lord Oliver: Pratt's Law of Highways, 13th ed. (1893), contains, at pp. 5-7, the following passage: "*Highways by water. - It is immaterial whether the land over which the right of passage exists is or is not covered with water. The right of navigation is simply a right of way; and a navigable river, a ferry, an inland lake, or a canal maintained under statutory authority for purposes of navigation, which is free and open to the public, is governed by the general principles applicable to all highways. There are some important differences between highways by land and highways by water . . . A highway which crosses a river by means of a ford, or a public footpath which crosses a stream by means of stepping-stones, does not thereby cease to be a highway . . .*

"For my part, I am in agreement with Vinelott J. I can think of no other purpose for the addition of this subsection than ex abundanti cautela to counteract any argument, however ill-founded, that a way which runs, for instance, through a ford, is not a way "upon or over land" or that the periods of 20 and 40 years are to be considered as interrupted because the site of the way is covered, either permanently or temporarily by water.

"Lord Jauncey: The extended definition of land does not provide a substitute for the above words found in the Act of 1832. I agree with Vinelott J. that the extended definition is apt to cover situations such as a ford or a causeway subject to flooding or perhaps to stepping-stones in a stream: Attorney-General ex rel. Yorkshire Derwent Trust Ltd. v. Brotherton [1990] Ch. 136, 145. But I do not consider that it was ever intended to apply to navigable rivers. The draftsman may have included subsection (8) ob majorem cautelam to forestall any argument that a way which passed through a ford or over stepping-stones was no longer a way upon or over land."

4.2. Tidal fords. In R v. The Inhabitants of Landulph 1 M & Rob 393, a road crossed "*a small inlet of*" the River Tamar close to the mouth. The water was described as washing over it at every high tide (which would suggest this was part of the road normally out of the water), leaving a deposit of mud. Held "*... it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual.*"

5. Court Orders for Roads to be Repaired

5.1. Barnes v. Bury MBC (1990) A90 24375. Litigant in person case regarding access to properties along an unmade road. "We do not consider that the situation and nature of Hawkshaw lane require it to be maintained to the same standard as an urban street. That would be inappropriate and incongruous. We consider and order that it be, i) adequately drained, and, ii) surfaced – not necessarily with a tarmacadam surface but with something that is reasonably suitable for a country lane serving the number of properties it now does. It is not possible for this Court to be more precise than that." Note: Drainage is considered prerequisite to successful repair.

5.2. Colin Seymour v. North Lincolnshire Council (1997) 'Twigmoor Side Road.' HH Judge Robert Smith QC. "Repair the surface of the road ... to a standard suitable to accommodate the normal and expected traffic which needs, or may need, to use the way i.e. as a 'green lane'."

5.3. Kind v. Cumbria County Council (1998). Carlisle Crown Court, 'Hartside Pass'. Stone road with at least three feet of muck and reed on the surface due to blocked drainage. This road is the first turnpike road over Hartside (bypassed in 1823) and it probably stopped being maintained much, if at all, at that time. By the late 1970s the section below the 'brow' behind Hartside Cafe was so deep in wet muck and reed that it was impossible to walk along without sinking over the knees at least. Further along towards Twotop Hill the surface was still hard under many inches of detritus, and there were surviving drainage ditches to both sides, albeit almost filled-in. The road was not at that time on CCC's list of streets and the council denied responsibility. ADK took the council to a hearing at Carlisle Crown Court and an order was made to put the road back into repair. With the drainage system working again the road has remained in good condition since, and it is interesting to note that on inspection after 14 years nature had once again laid-down a couple of inches of soil and grass on to the stone surface, even with continuing motor and cycle traffic.

5.4. Colin Seymour v. East Riding of Yorkshire Council (2000) case number A200004 In the Crown Court, before HH Judge Morrell. This is about surfacing an urban street, but is worth reading for the outlook on ordinary traffic and appropriate surface expectations and standards.

5.5. Kind v. North Yorkshire County Council (2000), Harrogate Magistrates' Court. 'Pockstones Moor': a stone road with two huge 'bomb holes' caused by blocked drainage. The photographs below are 'before' of one bomb hole, plus a contemporaneous photo of another part of the road in good original condition. This eroded section, and its near twin, were bad as far back as the mid-1970s, and motorcyclists were blamed, which was utter tosh. As with the early turnpike over Hartside (1998, above) The Forest Road (as this was called in the Forest of Knaresborough Inclosure Award) ran here across a slope, in an area with impervious bedrock and quite high rainfall. There were anciently ditches parallel to the road, and culverts underneath to discharge the surface water down the slope below. These had become totally choked through neglect, but unlike at Hartside this road was not robust enough to stand the water, and was 'blown out'. North Yorkshire County Council doggedly opposed the complaint. They said that the road is not publicly maintainable, and that because it was long out of repair, the 'ordinary traffic of the neighbourhood' did not (could not) use it, and therefore motors and cycles were not the ordinary traffic of the neigh-

bourhood. None of this impressed the Magistrates much, and an order for repair was made.

5.6. Edwards v. Stockport MBC (2007). The 'Roman Bridge' case. District Judge Baker. "*The council argue now the [TRO] is in force preventing the use of the bridleway by horse riders, it is not out of repair for the current class of traffic legally entitled to use it. They base their argument on the premise set out in the Alan Kind case that* 'A court is entitled to look at the present day character of a road and the nature of the traffic that used it when determining its current state of repair.'*There is no doubt that horse riders are not using it – but why not? By the very fact that the council itself has prevented this use by the initial imposition of bollards and then the [TRO]. I have no reason not to accept Mr Edwards' evidence that if the bollards had been removed after the public enquiry, as he expected, that horses would be using it now … In my mind it would therefore be wrong of me to consider an imposed or restricted character of this bridleway. My belief is also reinforced on the grounds of equity .... I therefore find that when considering the character of this highway for the purposes of the ordinary traffic of the neighbourhood, I should consider equestrian traffic within that.*"

5.7. Himsworth v. Derbyshire County Council (2008) (District Judge M J Friel). Birley Road: private carriage road, public bridleway. Highway authority cites c.f. Galloway v. Richmond (no citation). "*In the same way that I could not let the higher standard [bridleway] at Wigley affect me, I cannot let the lower standards of other bridleways cloud my judgment whether this one is out of repair.*"