Roads: pedestrian accidents on the pavement

Standard Note: SN/BT/627
Last updated: 16 June 2010
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This note describes the duty of the local highway authority to maintain the highway (including, in the definition of that term, pavements) and those defences that an authority can use if a pedestrian is injured on the pavement.

Any constituent who wishes to proceed with a case against the highway authority should obtain legal advice. They will have to prove, on the balance of possibilities, that the part of the highway where this accident occurred was not reasonably safe and that the accident was caused by the dangerous condition of the highway. Information on where to seek legal advice can be found in HC Library standard note SN/HA/3207

Further information can be found in *Tripping and Slipping Cases: A Practitioner's Guide* (1st ed.) by Charles Forster (Longman, 1994) and information on other roads-related matters can be found on the Roads Topical Page of the Parliament website.

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1 Summary

Anyone wishing to proceed with a case against the highway authority should obtain legal advice. They will have to prove, on the balance of possibilities, that the part of the highway where the accident occurred was not reasonably safe and that the accident was caused by the dangerous condition of the highway. It is also necessary to ensure that the area is part of the public highway and not a private road.

A highway authority, which may be either the county council or the district council in the case of local roads, has a duty to 'maintain highways maintainable at public expense' under section 41 of the *Highways Act 1980*, as amended.[1] The relevant code of practice is *Well-maintained Highways: Code of Practice for Highway Maintenance Management*, published in July 2005 by the UK Roads Liaison Group (UKRLG). It is not a statutory document but is published with the backing of central and local government. The legal position of local authorities is set out in the Code of Practice.[2]

There is no statutory definition of a highway, only a common law one. That definition is quite clear: a "highway is a way over which all members of the public have the right to pass and repass. Their use of the way must be as of right, not on sufferance or by licence".[3] Thus the term will cover most pavements. "Maintenance" includes repair, as defined under section 329(1) of the 1980 Act. No standard of repair is prescribed by statute and reference is made to the rules of common law. This obliges the highway authority to carry out regular inspections of the highway. As the highway authority is under an express duty to maintain any highway maintainable at the public expense for which it is the highway authority under section 41(1) of the 1980 Act, it is liable to be sued by any lawful user of the highway who suffers damage as a consequence of a failure on the part of the authority to carry out that duty.

Where an obstruction in the road or on the pavement results from poor maintenance by the local authority and causes injury, the victim may be entitled to compensation from that authority. There is some case law on the difference in height between adjoining paving stones which can be considered dangerous and, therefore, relevant to a claim for compensation by a pedestrian against a highway authority. However, a council's liability is not determined by case law on height alone. Irrespective of the height or depth of a depression in the footway a court might consider a council liable to pay compensation on the grounds that the council had not complied with their statutory obligation to do all that was reasonably required to ensure that the part of the highway to which the action relates was not dangerous.

2 Defences

There are two defences available to a highway authority faced with claims under section 41 of the 1980 Act: a common law defence and a statutory defence as provided for in section 58 of the 1980 Act.

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1 i.e. generally not private or unadopted roads

2 UK Roads Liaison Group, Well-maintained Highways: Code of Practice for Highway Maintenance Management, July 2005

3 Sweet & Maxwell, *Encyclopaedia of Highway Law and Practice*, March 2002, para 2-335

2.1 Common law

The common law defences available to the highway authority are listed in the *Encyclopaedia of Highways Law & Practice* as follows:

> *Act of God or inevitable accident*. A cloudburst (as in *Nicholas v. Marsland* (1876) 2 Ex.D. 1) or other natural calamity may avail a highway authority in exceptional circumstances.
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> *Act of a third party*. Clearly if another driver forces the plaintiff's vehicle off the road, he cannot sue the highway authority for damages sustained as a consequence of the condition of the grass verge. Similarly, no action would appear to lie against the highway authority if the cause of the plaintiffs injury was a sudden subsidence of the road surface due, for example, to mining operations by the National Coal Board.
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> *Contributors negligence*. It used to be thought that this defence could not be established in reply to an action on a statute; it seemed logical that it could be used as an answer only to an action in negligence. However, it was clearly established in *Caswell v. Powell Duffryn* [1939] 3 All E.R. 722 (a decision of the House of Lords), that contributory negligence could be pleaded as a defence (or as a partial defence since the Law Reform (Contributory Negligence) Act 1945 (8 & 9 Geo. 6.c. 28)) in an action for breach of statutory duty. It was made clear that this did not apply only in the context of employers and workmen in *Sparks v. Edward Ash Ltd.* [1943] 1 All E.R. 1, and the draftsman of the present statute clearly thought the defence may be available in this context, in view of his passing reference to the defence in subs. (2). It seems therefore that if the plaintiff is not keeping a proper look-out when using the highway, (either as a pedestrian or when driving a vehicle), the highway authority will have at least a partial defence if he is injured as a consequence of the non-repair of the highway. This view is supported by *Burnside v. Emerson* [1968] II W.L.R. 1490, in which the plaintiffs were injured when their car, travelling at about 25 m.p.h. in very wet conditions, was struck by another car, which swerved on entering a pool of water on the road. There was evidence that this other car must have been travelling at approximately 50 m.p.h. at the time of collision; its driver was killed in the collision. There was also evidence that the particular part of the road was frequently flooded in wet weather and that this was due both to a drain not being placed at the lowest part of the road (there was a dip in the road at the place of collision) and to a lack of cleaning of the drain by the servants of the second defendants (the highway authority). The trial judge held that the plaintiffs had established a cause of action against the second defendants under s.1(1) of the Highways (Miscellaneous Provisions) Act on the basis of failure to maintain the highway, and he held that the second defendants were wholly to blame. On appeal, *held* (1) that the plaintiffs had established such a case of action; but (2) that, on the facts, the deceased driver was two-thirds to blame for the accident.
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> *Volenti non fit injuria*. It is not clear how far this principle is a defence open to a highway authority. Obviously it could not be argued that a plaintiff could not recover damages simply because he had taken upon himself the "risk" of walking (or driving) on the defendant's highway, for he is entitled to assume a reasonable standard of maintenance. However, if a danger is obvious (e.g. a plank placed across an excavated trench), and there is no evidence of negligence, the highway authority may be able to escape liability if they can show the plaintiff voluntarily undertook the risk was the "author of his own misfortune." Knowledge of itself may not be sufficient to establish this defence (*Smith v. Baker* [1891] A.C. 325) but knowledge may be of value in establishing contributory negligence on the part of the plaintiff.[4]

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[4] ibid., para 2-111

2.2 Statutory

Section 58(1) of the 1980 Act provides the highway authority with a complete defence if it can *prove* that it had taken such care as was reasonably required to ensure that the part of the highway to which the action relates was not dangerous to traffic ("traffic" being defined in section 329(1) of the 1980 Act to include pedestrians and animals). In assessing whether such care had been taken in any particular case, the court must have regard to the matters specified in section 58(2), not all of which will be relevant in every case:

> **58 Special defence in action against a highway authority for damages for non-repair of highway**
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> (1)In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) 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.
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> (2)For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters:—
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> (a)the character of the highway, and the traffic which was reasonably to be expected to use it;
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> (b)the standard of maintenance appropriate for a highway of that character and used by such traffic;
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> (c)the state of repair in which a reasonable person would have expected to find the highway;
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> (d)whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
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> (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;
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> but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions.
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> (3)This section binds the Crown [...]

Generally speaking, a highway authority is expected to take reasonable care of the highway and should have procedures laid down for inspection and repair. A judge must be satisfied that a council did all that was reasonably required to avoid there being any danger to pedestrians and motorists if the council is to succeed in using the special defence provided by section 58.

3 Public utilities

The position may be further complicated if a public utility is involved.[5] Public utilities have a legal right to dig up the road but they also have responsibility for reinstating the road to a proper standard.[6] It is not always obvious whom one should claim against in cases involving a utility. Where a utility is negligent in its work and reinstatement, it will be liable. However, the highway authority still has a general responsibility to maintain the road and if the unevenness were a result of general lack of maintenance, then the liability would probably shift to the local authority. *Tripping and slipping cases: a practitioner's guide* has the following to say about liability involving contractors such as utility companies:

> Where a contractor is engaged to perform works on a highway which are authorised by statute but which would, unless so authorised, be a nuisance, the highway authority is under a duty to ensure that due care is taken by the contractor. (See *Salsbury v Woodland* [1970] 1 QB 324 at 338 ...) Writers on the subject always state this principle as distinct from and additional to the requirement under HA 1980, s41(1), but it is difficult to see why. It follows that the default of another statutory undertaker, for example in failing to reinstate a pavement after performing statutory works, is no defence to an action against the highway authority. (See *McNair v Dunfermline* Corporation [1954] 104 LJ 66 ...)[7]

4 Private premises

If an accident was outside private premises and was the result of something the occupier had done, the occupier is liable. For example, a butcher was found liable when a plaintiff slipped on a piece of fat outside his shop;[8] and a bus owner was found liable when a plaintiff slipped on ice as a result of water escaping from the defendant's nearby garage where buses were being washed.[9] It could be argued in both these cases that the highway authority was also liable if it could be shown that the problem was continually happening; in that circumstance the highway authority should have known about the problem and done something about it.[10]

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5 further information on street works and public utilities is available in HC Library standard note SN/BT/739

6 DfT et al, *Specification for the Reinstatement of Openings in Highways* (2nd ed.), June 2002

7 Charles Forster, *Tripping and Slipping Cases: A Practitioner's Guide* (1st ed.), 1994, pp5-6

8 *Dollman and another v A & S Hillman Ltd* [1941] 1 All ER 355

9 *Lambie v Western Scottish Motor Traction Co* [1944] SC 415

10 op cit., *Tripping and Slipping Cases: A Practitioner's Guide* (1st ed.), pp15-16