Gorringe, lack of warning and the failure to protect

The House of Lords' decision in *Gorringe* fails to protect drivers injured through a lack of signs or poor highway maintenance, says Peter Edwards of Devereux Chambers

In the last issue of *Personal Injury Law Journal*, John Ross QC examined the duty to maintain in relation to ice on the roads. This article provides an update on recent case law affecting the scope and extent of the duty of highway authorities to maintain the fabric of the highway under s41 of the Highways Act 1980 (the 1980 Act) and in common law in circumstances other than those involving dangerous ice and snow. In particular, this article considers the implications of the recent decision of the House of Lords in *Denise Gorringe v Calderdale Metropolitan Borough Council* [2004].

Their Lordships seem to be as keen as they were in 2000 (when I wrote the article *'The duty to maintain highways – seasonal cheer from the House of Lords?'*) to seek to limit the extent of the liability of a highway authority for accidents occurring on the highway. Even leaving aside the statutory defence under s58(1) of the 1980 Act, the extent of a highway authority's statutory duty appears to be no more than to repair the 'fabric of the highway'.

Statutory liability does not, according to their Lordships, extend to decisions taken by highway authorities in respect of the layout of the highway or as to the provision or use (or non-provision or use) of road signs and markings in danger areas.

The statutory provisions

Section 41(1) of the 1980 Act provides as follows:

> The authority who are for the time being the Highway Authority for a highway maintainable at the public expense are under a duty... to maintain the highway.

Section 329 of the 1980 Act provides the unhelpful clarification that 'maintenance includes repair and "maintain" and "maintainable" are to be construed accordingly.'

Section 39(2) of the Road Traffic Act, 1988 (the 1998 Act), provides as follows:

> 'Statutory liability does not, according to their Lordships, extend to decisions taken by highway authorities in respect of the layout of the highway.'

> Each local authority must prepare and carry out a programme of measures designed to promote road safety...

The *Gorringe* decision

The *Gorringe* decision represents a further bad joke for claimants injured on the highways. It was delivered by the House of Lords on 1 April 2004 (April Fool's Day).

Facts

As with most Highways Act cases, the facts of the *Gorringe* case are relatively simple and, in common with many Highways Act cases, they are also very sad.

Ms Gorringe was driving her car on a road maintained by Calderdale Metropolitan Borough Council. She was driving within the 50 miles per hour speed limit and was approaching the crest of a hill. There were no signs or road markings warning of the dangers of the road. Some seven years previously there had been a 'slow' marking on the road but this had worn away and had not been replaced by the borough council.

As Ms Gorringe drove over the crest of the hill, the layout of the road deceived her into thinking that an approaching bus was travelling on her side of the road. It was in fact travelling on the correct side of the road and there could be no valid criticism of the driving of the bus driver. Ms Gorringe braked heavily and her car skidded into the oncoming bus. She sustained brain injuries severely affecting various bodily functions including speech and movement.

The judge at first instance held that Ms Gorringe's accident was entirely the borough council's fault in that they had not properly 'maintain[ed] the highway' given the absence of road signs or markings warning of the danger created by the crest of the hill.

The Court of Appeal disagreed and held that the borough council was not in breach of any duty owed to Ms Gorringe. The Court of Appeal concluded that Ms

Gorringe was entirely responsible for her own accident.

Ms Gorringe appealed to the House of Lords submitting that:

(1) the lack of warning road signs or markings constituted a failure to maintain the highway under s41 of the 1980 Act;

(2) the borough council's common law duty of care required it to implement safety measures, specifically road signs or markings, in order to discharge its duty pursuant to s39 of the 1988 Act.

The decision – Highways Act

Given the importance of the issue to injured claimants, the decision by the House of Lords on Ms Gorringe's submission that the lack of warning road signs or markings constituted a failure to maintain the highway under s41 of the 1988 Act is astoundingly brief.

In the leading judgment, Lord Hoffmann outlined the facts and the legislative history of the 1980 Act (arising as it did out of the common law duty of the inhabitants of a parish which was later transferred to highway authorities by the Highways Act 1959) to 'put and keep its highways 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' (per Diplock LJ in *Burnside v Emerson* [1968]).

Lord Hoffmann concluded as follows:

> The judge decided that, in the absence of a suitable warning painted on the road or carried on a sign, the highway was out of repair. The Court of Appeal unanimously disagreed and I have little to add to their reasons. The provision of information, whether by street furniture or painted signs, is quite different from keeping the highway in repair. In *Lavis v Kent County Council* [1992], Steyn LJ said in response to a similar submission that section 41 required an authority to erect a warning sign: 'In my judgment it is perfectly clear that the duty imposed is not capable of covering the erection of traffic signs and nothing more need be said about that particular provision.' This observation may be said to be short and to the point but I doubt whether, in the light of the judgment of Lord Denning MR in Haydon's case, there is a great deal more to say. At any rate, I agree with it.

Although short, the judgment of Lord Hoffmann represents the end of the road (pardon the pun) for claimants wishing to rely on s41 in circumstances in which highway authorities have done nothing to warn road users of dangerous parts of the road or, indeed, as in the *Gorringe* case itself, have allowed a previously installed road marking, which could have prevented the accident, to be removed or worn away and not be replaced.

> 'Claimants injured because of the lack of appropriate road signage or markings will require Parliamentary intervention to create a section 41 duty.'

As was the case in respect of ice and snow, claimants injured because of the lack of appropriate road signage or markings will require Parliamentary intervention to create a section 41 duty. (Parliament inserted s41(1A) of the 1980 Act, with effect from 31st October 2003, which extended the duty to maintain highways to cover a 'duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice'.) There is currently no proposal to introduce such an amendment. It seems unlikely that it will be at the top of the Parliamentary agenda in the near future.

The decision – common law duty

As stated above, the position at common law had always been that a highway authority owed no duty other than to keep the roads in good repair.

Further, a breach of that duty did not give rise to a claim for damages actionable in private law. It was a public law duty enforceable only by prosecution on indictment.

A claim for damages in respect of the duty to repair the highway was introduced for the first time by s1(1) of the Highways (Miscellaneous Provisions) Act 1961. The relevant provisions are now contained in the 1980 Act.

That is not to say that no common law claim for damages could be pursued against a highway authority prior to 1961. If the highway authority had in fact undertaken an act which made the highway more dangerous (for example, dug it up) and an individual had suffered injury as a result, then ordinary liability in tort would attach. But if the highway authority did nothing to alleviate a dangerous situation then no liability in common law tort would attach.

In the *Gorringe* case it was (rightly) accepted by leading counsel for Ms Gorringe that unless the common law position was affected by s39 of the 1988 Act (which provides that a 'local authority must prepare and carry out a programme of measures designed to promote road safety...'), no common law duty arose on a highway authority to erect and maintain road signs or markings warning of dangers of the road. Leading counsel contended that s39 did affect the common law position so as to create a duty which sounded in damages to an individual.

The House of Lords firmly rejected the proposition that s39 affected the ordinary common law position as had been contended. It held as follows:

> The imposition of a liability through the law of negligence on the local authority who had simply done nothing was inconsistent with the well-established rules which have always limited its liability at common law. The public interest in promoting road safety by taking steps to reduce the likelihood that even careless drivers would have accidents [ie the section 39 obligation] did not require a private law duty to a careless driver or any other road user... The sole ground upon which it was alleged to have a common law duty to act was under section 39 of the 1988 Act. That Act could not have created such a duty. If a statutory duty did not expressly give rise to a private right to sue for breach, the duty could not create a duty of care that would not have been owed at common law if the statute were not there. The mere fact that a local authority had once painted a road sign on that stretch of road did not mean that they were under a common law duty to do so or that they were under such a duty to repaint the sign when it was obliterated...

Analysis of decision

The only small crumb of comfort to be drawn from the judgment in the *Gorringe* case was the suggestion that if a highway authority had conducted itself so as to create a reasonable expectation about the state of the highway, it would be under a duty to ensure that it did not thereby create a trap for the careful driver.

> 'If a highway authority had conducted itself so as to create a reasonable expectation about the state of the highway, it would be under a duty to ensure it did not create a trap for the careful driver.'

One can see how this would apply, for example if a highway authority always cleared ice from a particular road but then did not do so on a particular day.

However, it is hard to see how this would ever apply to road signs, particularly as the House of Lords expressly excluded liability even in circumstances in which there had been an appropriate road sign in place but it had been obliterated and not replaced.

The real rationale behind their Lordships' decision is perhaps best drawn from the following passage of the judgment of Lord Hoffmann. The sentiment is entirely consistent with judicial pronouncements on this topic from 1978 (when Lord Denning suggested that an injured claimant should be grateful that they have been 'mended at the expense of the state under the National Health Service'), through to 2000 (when the House of Lords pronounced that 'everyone should know that if they walk on a road or footpath made slippery or dangerous with ice or snow, they do so at their own risk'). Lord Hoffmann stated as follows:

> Drivers have to take care for themselves and drive at an appropriate speed, irrespective of whether or not there is a warning sign. The policy of the law should be to leave the liability for the accident on the road user who negligently caused it rather than look to the highway authority to protect him against his own wrong.

In my opinion such a sentiment is highly questionable. A highway authority may well have information available to it on the basis of which the obvious conclusion is that a particular stretch of road is highly dangerous (for example it may have records of numerous previous accidents).

The driver on the other hand may well have no knowledge of the particular dangers posed by that stretch of road. The highway authority will almost invariably have better resources (or insurance) to cover the costs of support for a seriously injured or disabled driver.

Is it right that the highway authority can escape liability for serious injuries caused to the driver on that stretch of road? I would suggest not. But, as stated above, Parliamentary intervention will be required if the position is to be changed.

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Case references

Burnside v Emerson
[1968] 1 WLR 1490

Gorringe (Denise) v Calderdale Metropolitan Borough Council
[2004] 2 All ER 326

Lavis v Kent County Council
[1992] 90 LGR 416