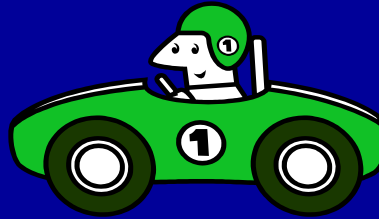


Institute of Highway Incorporated Engineers



Highway Law: Principles and Problems

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Course Outline: Session 1

■ About highways

- Definitions – highways, streets, roads etc
- How are Highways Created?
 - Dedication
 - Uninterrupted Use
 - Proof of Intent
- Boundaries of the Highway

Course Outline: Session 2

- Maintaining and Constructing Highways
 - Adoption
 - Advanced Payments Code
 - CPO powers
 - Compensation and Blight
 - Drainage

Course Outline: Session III

■ Obstruction

- What is obstruction?
- Types of procedure available - abatement, default, injunction, prosecution

■ Diversion and Stopping Up

- Powers available
- Procedures

Course Outline: Session 4(A)

- Highway Safety: rights and obligations
 - The HA's duty under s. 130
 - The HA's duty under s. 41
 - Criminal Liability
 - Traffic Regulation Orders

Course Outline: Session 4(B)

- The HA and Development Control
 - Determining planning applications – general principles
 - S. 278 Agreements
 - Use of conditions
 - Section 106 Agreements
 - Refusal and Appeals

SESSION ONE

Definitions: What is a Highway ?

- No statutory definition other than s. 328

“the whole or part of a highway other than a ferry or waterway”

- Common Law Definition:

“A highway is a way over which there exists a public right of passage, that is to say a right for all of Her Majesty’s subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance” .

Highways: Adopted and Unadopted

- Highway authority is responsible for maintaining adopted highways
- S. 36 Highways Act 1980: must keep a register of maintainable highways, open to the public
- Unadopted highways: no responsibility to maintain, but still responsible for preventing stopping-up or obstruction
- No register of unadopted highways

Notes on the definition of “highway”

- All highways are “public”
- No right to take a toll without Parliamentary authority (eg Severn Bridge, Dartford Crossing, Birmingham Northern Relief Road)
- Culs-de-sac can be highways too

Passing and Repassing: *DPP v. Jones*

- HL (Lord Irvine)

“I do not accept that, to be lawful, activities on the highway must fall within a rubric incidental or ancillary to the exercise of the right of passage”

- Right to use the highway for

“such reasonable and usual activities as are consistent with the general public’s primary right to use the highway for the purposes of passage and repassage”

Definitions: What is a Road?

- Defined by statute

- Road Traffic Act:

“any highway and any other road to which the public has access”

- Traffic offences can be committed on roads as well as highways

Definitions: What is a Street?

- New Roads and Street Works Act 1991

“the whole or part of any of the following, irrespective of whether it is a thoroughfare:

- (a) any highway, road, lane, footway, alley or passage
- (b) a square or court
- (c) any land laid out as a way whether it is for the time being formed as a way or not”

Sundry Definitions: Byways

- Byway: highway over which the public have a right of way for vehicular and all other kinds of traffic (but used mainly as a footpath or bridleway)
- Restricted Byways (s. 48 CROW Act 2000): highways which public have rights of way on foot, on horseback and for carriage driving
- All RUPPs now treated as restricted byways (s. 47 CROW Act 2000)

Sundry Definitions II



- Footpath - (s. 329 HA 1980): highway over which the public have a right of way on foot

Sundry Definitions III

- Walkway - hybrid creature under s. 35 HA 1980
 - Ways over under or through buildings
 - Can be dedicated as footpaths subject to conditions
 - Can be brought to an end without formal stopping up process

- Private road: road which is not open to members of the public and which the highway authority has no responsibility to maintain

Creating Highways: Dedication

- Most highways not “owned” by the highway authority
- Exception in the case of new roads, motorways etc, where land purchased for the purpose
- But all other highways rely on concept of “dedication”

What is Dedication?

- Essence of dedication – acquiescence of the landowner in the use of the land as a highway, i.e. by the public as of right
- Can be presumed/implied or express

Express Dedication

- Roads for new developments: will usually benefit from express dedication
- One sentence on a plan showing the routes and signed by the owner is enough
- Section 38 agreements now routinely include a dedication clause

Limiting Express Dedication

- Landowner may reserve certain rights which would otherwise restrict or obstruct
- E.g.
 - stiles or gates; ploughing
 - Hold markets
 - Existence of trees
- But cannot include locked gates

Dedication V

Presumed (Non-Express) Dedication

- Intention is crucial
- At common law: uninterrupted user is strong evidence, but not conclusive
- Most likely to assist where no owner comes forward

Proof of Dedication

- Section 31 HA 1980:

“Where a way over any land ... has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to be dedicated unless there is sufficient evidence that there was no intention during that period to dedicate it”

20 Years' Uninterrupted Use

When does it start?

- Counted backwards from the day when the use was brought into question
- Eg. When locked gate installed or statement deposited with the HA

Uninterrupted Use As Of Right

- Can be no interruptions
 - No locked gates or challenges
 - No closures, notices

- Must be as of right
 - Not secret, by force, or permission of the owner
 - Payment of tolls = use by permission
 - Tradesmen and employees use by permission and not by right

Belief of the Users

- *O'Keefe v. SoSE and Isle of Wight*
 - *Must be use in the honest belief that there is a right of passage*

BUT:

- *R (Oxfordshire) v. Sunningwell PC (1999)*
 - Village green case
 - User as of right does not require belief

Dedication X

Sunningwell

“Where Parliament has provided for the creation of rights by 20 years’ user, it is almost inevitable that user in the earlier years will have been without any very confident belief of the existence of a legal right. But that does not mean it must be ignored”

Proving Dedication: Sources

- S. 32 Highways Act:

“A court or tribunal, before determining whether a way has or has not been dedicated as a highway ... shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give such weight thereto as the court or tribunal considers justified by the circumstances”

Types of Map

- OS Maps (date from early 1800s)
 - Drawn by surveyors and good evidence of what was on the ground e.g ways and gates
 - Less helpful on status
- Enclosure Maps
 - Helpful if available
 - Usually specific as to status and width

Types of Map II

■ Tithe Maps:

- made for almost every parish
- ***Copestake v. West Sussex***: show the existence of the right of way, but not its status or the extent of the public right of way

■ Definitive Map and Statement:

- conclusive evidence of certain particulars in the map and statement: s56 W&C Act

Other Evidence

- Fences and hedges, regularity of line
- Ground levels
- Apparatus of Statutory Undertakers – did they obtain wayleaves or rely on powers under Street Works Act?
- Has the HA carried out maintenance?

Relevance of Adoption

- Adoption is relevant to the obligation to maintain
- Ways can be dedicated even though not maintainable by the public
- Therefore absence of maintenance by the HA is not evidence of non-dedication: *Beynon's Case*
- But evidence of adoption may be strong evidence of dedication

Relevance of Adoption II

***Attorney General v. Antrobus* (1905):**

“I venture to think that this expenditure of money is the important consideration, and in such case the landowner who has permitted the expenditure cannot be heard to say that a road on which he has allowed public money to be spent is his private roadway.”

Modern Implications

- Forecourt or layby for parking
- Display areas in front of shops
- Outdoor dining areas in front of restaurants

Dedication: Disproving Intent

- Barring the way
 - Must intend to prevent use
 - Does not matter that no-one tried to use it
- S. 31(2)
 - Erected a notice, visible to users
 - Maintained the notice after January 1, 1934
 - If torn down, can give notice to the Council that the way is not dedicated

Dedication: Disproving Intent

■ S. 31(5):

- Can at any time deposit a map and statement of the ways which are admitted
- Within 10 years, deposit statutory declaration that no additional way has been dedicated since deposit/last declaration
- “in the absence of proof of a contrary intention” will be sufficient to negative an intention to dedicate any additional way

Dedication: Disproving Intent

■ **Godmanchester & Dr Drain v. SSEFRA**

- **CA:** communication not essential, though may be an indicator of the presence of a genuine intention
- **HL:** intention not to dedicate must be objectively established. “Intention” means what users of the way would reasonably have understood. Must be evidence of some overt act on the part of the landowner such as to come to the attention of the public who used that way
- No requirement that there be an absence of intention throughout the whole 20 years

Impact of CROW Act 2000

- Countryside and Rights of Way Act 2000, section 2(1): the right to enter and remain on “access land”
- S. 12(3): use of a way in the exercise of the s. 2(1) right is to be disregarded in deciding whether dedication may be presumed

NE&C Act 2006

- Section 66: no new rights of way for mechanically propelled vehicles, unless
 - created by enactment or instrument,
 - created under statutory powers and intended to be used by such vehicles
- Section 67: any existing public right of way for mechanically propelled vehicles not shown on a definitive map is extinguished

NE and C Act 2006 II

Main Exceptions to s. 67:

- main lawful use in 5 years to May 2006 was by mechanically propelled vehicles
- on the list of highways maintainable at public expense
- created under statutory powers and intended to be for such vehicles
- created through use by such vehicles before 1930
- If an application has already been made under s. 53 W&C Act 1981 to modify the definitive map

NE and C Act 2006 III

Section 67(5):

Where, immediately before commencement, the exercise of such an existing public right of way is reasonably necessary to access the land or part of the land, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land.

Acceptance by the Public?

- Acceptance previously essential
 - Easily proved if land usable and useful
 - Could give rise to dispute w.r.t verges, dead-ends
- ***SoS v. Baylis 2000***: acceptance by the HA under s.72 constitutes acceptance on behalf of the public
 - Will apply equally to s. 38

Effect: Right to Sue for Trespass?

- Owner's action in trespass if used for purpose other than passing and repassing.
 - Eg *Duke of Rutland's Case*
 - Does *DPP v. Jones* affect this?
- HA has sufficient interest in the top two spits to maintain action in trespass
 - *Wiltshire CC v. Frazer*

The Boundaries of the Highway

- The highway is not necessarily confined to the metalled track: strips of adjacent land will also often be part of the highway
- The common law presumption: the highway is everything lying between the hedges, ditches or fences along the road

Fence to Fence: Rothschild's Case

“In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences: and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of the carriages and foot passengers”.

Limits of Rothschild's case

- ***Neeld v. Hendon***: depends on:
 - the nature of the district
 - width of the margins
 - Levels of adjoining land

- ***Hinds v. Breconshire***:
 - fence erected on a bank because it was the most convenient and inexpensive place
 - bore no relation to the highway

Boundaries on Unenclosed Land

- E.g. moorland
- General presumption, if no ditch – highway is confined to the metalled road, unless public user of adjoining land proved

Unenclosed Land II

- ***Steel v. Prickett* (1819):**

“it was part of the law that the public, where the road was out of repair, might pass along the land by the side of the road”.

- ***Elwood v. Bullock* (1844)**

“The extent of a highway, where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage”.

Unenclosed Land III

Eyre v. New Forst Highway Board (1892)

Where the way becomes “foundrous”, the public have a right “of doing that which would otherwise be trespassing beyond ... the bounds of the legitimate highway” ... and “have a right to deviate right or left in order to get along on those parts which are less foundrous... parts which are less muddy and dilapidated”

“Roadside Waste”

- Various references in the HA to roadside waste
- May simply include land over which there is a right to deviate, even if not highway
- But such land may become part of highway if used by the public and tracks are formed: eg. *East v. Berkshire* (old A4)

Ditches

- An obstacle to passage, rather than something over which can pass and repass
- Initial presumption is therefore that ditches are not part of the highway
- Rebuttable if shown it was constructed in order to drain the highway

Statutes Affecting Width

- No legislation on widths for motorways or trunk roads (tho' will be design standards which cover this)
- S. 145: HA can require owner to widen or remove gates:
 - On a carriageway, where they are less than 10'
 - On a bridleway, where they are less than 5'

Statutes Affecting Width II

- S. 30 Public Health Act 1925
 - Authorised authorities to make byelaws specifying a minimum width of a new street
 - But did not mean that the whole of the distance was dedicated
 - ***Hale v. Norfolk CC*** (2000): byelaws don't require land to be dedicated. Road here had never been made up. Mrs Hale entitled to erect posts and chains between edge of carriageway and her garden

Rights of Way Act 1990 – s. 137A HA

- Limits on farmers' rights to plant crops where width of way not recorded
 - Footpath not a field edge: at least 1m (2m for bridleways)
 - Field edge: 1.5m (3m for bridleways, other carriageways)
 - HA may make good the surface of ways over unmade road if so disturbed as to render it inconvenient
 - Does not apply to made-up carriageway

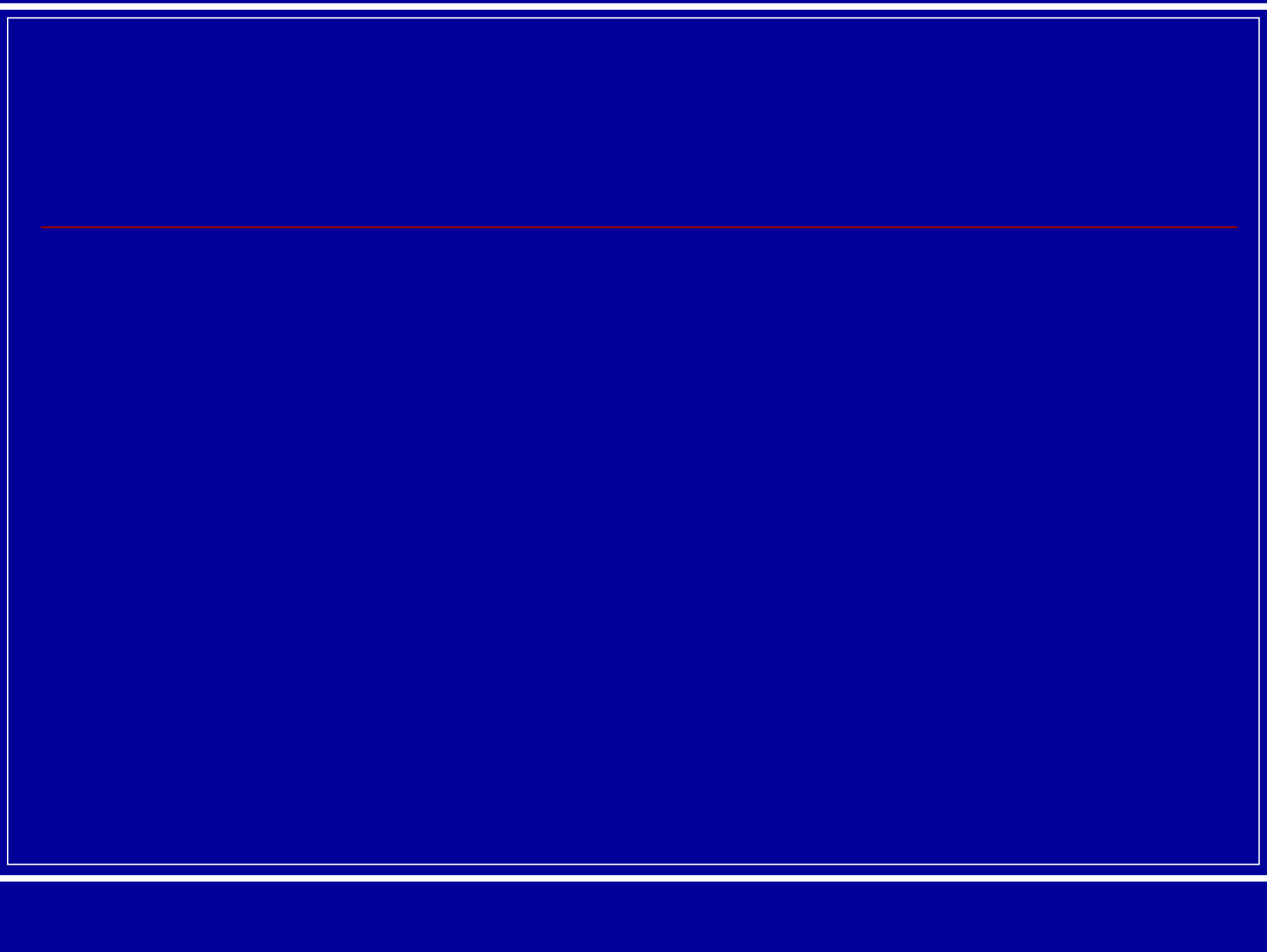
Commons and Village Greens

■ Commons Registration Act 1965

- Common land does not include land which forms part of a highway (s. 22)

■ Village Greens

- Can include existing highways
- But otherwise unlawful to drive on a village green
- So rights cannot be acquired by prescription



SESSION TWO

Maintaining & Constructing Highways

- Liability to Maintain: which highways?
- Adoption and its Effects
- Advanced Payments Code
- Highway Construction: When is Planning Permission Needed?
- CPO powers
- Compensation and Blight
- Drainage

HA Liability to Maintain Roads

■ Section 36(2)

- All highways which were maintainable at the public expense under the 1959 Act
- A highway constructed by the HA
- Highways constructed by a council under Pt II Housing Act 1985
- A trunk road or special road
- Footpath or bridleway created under a pp creation/ diversion or rail crossing diversion order

Highways Historically Maintainable

- Historically – all highways maintainable by “the inhabitants of the parish at large”
- Highways Act 1835 – no new road would become publicly repairable unless the statutory formalities complied with
- Highways Act 1959: “the inhabitants of the parish” replaced by “at public expense”

Pt II Housing Act 1985

- Authority may lay out/construct streets on land acquired for housing functions – but if those ways are then thrown open to the public, they become a highway through dedication
 - *Gulliksen v. Pembrokeshire*
 - Cf *Ley v. Devon CC*
- Would then become maintainable at p.e.

Adoption

- New adoptions:
 - Section 37 Notice
 - Section 38 Agreement
 - Section 228 Notice of Adoption after the execution of street works

Adoption by s. 37 Notice

- Person who proposes to dedicate a way as highway and desires that it shall be maintainable at public expense can give 3 months notice of proposed dedication
- If HA considers it will not be of sufficient utility to the public to justify maintaining at public expense, they can complain to magistrates
- If dedication and satisfactory construction certified by HA, kept in repair and used by public for 12 months, it becomes maintainable

Section 37 Notices

- Questions for magistrates:
 - Is the highway of sufficient utility to the public to justify making it maintainable at the public expense
 - Has it been made up in a satisfactory manner

Section 38: Adoption by Agreement

“(3) A local highway authority may agree with any person to undertake the maintenance of a way –

- (a) which that person is willing and has the necessary power to dedicate as a highway,
- or
- (b) which is to be constructed by that person, or a highway authority on his behalf, and which he proposes to dedicate as a highway ...”

Section 38 Agreements II

- HA has wide discretion on terms
- Normal to seek bond to guarantee completion
- Can only be entered into by the landowner
- *Overseas Investments v. Swansea*: Do not run with the land
- If dispute over adoptable standard, owner can build first and ask HA to adopt: s. 37

Section 38 Agreements III

Fountain & Colonnade Management v. Westminster [2005] EWCA Civ 1607

- S. 38 agreement covering repairs and maintenance
- Developer sought “fair proportion” of costs of repair from the HA (per agreement)
- Court apportioned costs 10:90 on basis of traffic survey

Notice of Adoption: Section 228

- After execution of street works
- Does not matter by whom the street works are executed
- Display a notice in a prominent position
- Adoption follows if no objection within a month
- If owner of street (or majority of owners) object(s), adoption shall not take place
- Matter is then referred to the magistrates

Section 228 adoptions (2)

Rusby v. Harr [2006] EWCA Civ 865

- **Magistrates consideration:**

“would at least include the policy question whether the street ought to remain private so that the public can be excluded”

- **Can only challenge s. 228 adoption by raising an objection or by judicial review**

What does the HA get on Adoption?

- Where highway is maintainable at the public expense it is “vested” in the HA: s. 263
- S. 264: drains belonging to or used in connection with the drainage of a road vest in the HA
- Taken to mean the “top two spits”, or as much space over and under the road as the HA needs to carry out its duties of maintenance
- Landowner retains the subsoil of the road

Effect on Ownership: Airspace

- *Wandsworth Board of Works v. United Telephone*: HA obtains rights to the “area of user”
- *New Towns v. Hemel Hempstead*: building spanning the road was not a “bridge” – consent not required

Effect on Ownership II

- If the highway is stopped up, ownership reverts to the successors in title of the person who dedicated
- Presumption: adjoining landowners, up to the mid-point

The Advanced Payments Code

- S. 219 HA 1980:

Where it is proposed to erect a building requiring building reg. consent, and that building will have a frontage onto a private street, no work is to be done to commence erecting the buildings until the developer has paid or secured the payment of enough money to make up the street

- 11 exemptions in s. 219(4)

Advanced Payments Code Procedure

- HA has 6 weeks following passing of the building reg. plans to serve a notice requiring payment
- S. 220 – HA is under a duty to do this
- APC does not apply
 - if a s. 38 agreement has been entered into
 - If more than $\frac{3}{4}$ of the frontage will be industrial
- Owner and builder can be prosecuted for starting work without depositing money

APC: Exemptions?

What if the developer does not wish to construct to adoptable standard?

- S. 219(4)(e): house can be exempt if HA satisfied that the whole of the street is not likely to be in so unsatisfactory a condition as to justify private street works
- Alternatively, seek bond and return most of it under s. 221, when houses are occupied

New Roads in Unknown Ownership

- Holder of a right of way does not own sub-soil, and cannot dedicate

- Answer:
 - Developer makes up the road, in the exercise of his right of way
 - HA can then give notice of adoption under s. 228

Maintaining Unadopted Highway

- HA may not be liable to maintain, but:
 - Still has duty under s. 130 to protect the rights of the public to use it
 - Offence under s. 137 to obstruct a highway
 - HA has power under s. 143 to remove unauthorised structures

Maintaining Private Streets: s. 230

- HA may require frontagers to execute repairs needed “to obviate danger to traffic”: s. 230(1)
- Right of appeal to magistrates’ court
- If notice not complied with, HA may carry out works and recover costs from frontagers
- A majority of frontagers may require HA to proceed under private street works code and then adopt: s. 230(5)
- HA entitled to carry out emergency repairs without notice under s. 230(7)

Highway Construction: Planning

- Town and Country Planning Act 1990:
 - “the carrying out on land within the boundaries of the road by the local highway authority of any works required for the maintenance or improvement of the road”
- is not “development” requiring planning permission

Highway Works under the GPDO

- T&CP General Permitted Development Order grants deemed permission for many works of maintenance or improvement
- Part 9
 - “The carrying out in land within the boundaries of an unadopted street of works required for the maintenance or improvement of the street or way”

The GPDO II

- Part 12: The erection or construction and the maintenance, improvement or other alteration by the local authority ... of
 - “(a) any small ancillary building, works or equipment on land belonging to or maintained by them required for the purposes of any function exercised by them on that land.
 - (b) Lamp standards, information kiosks, passenger shelters, public shelters and seats
”
...

The GPDO III

- Part 13: The carrying out by a Local Highways Authority

“(a) ...

(b) On land outside but adjoining the boundary of an existing highway of works required for or incidental to the maintenance or improvement of the highway”

Improvements for Developers

- New development will often necessitate improvements to roads
- Developer has no right to carry out works in the highway
- Answer: s. 278 HA 1980 (see afternoon session)

Land Acquisition for Roads: CPO

- S. 250: can create new rights in/over land
- Main powers: s. 239-246
 - S. 239(1) and (3): for the construction or improvement of a highway (other than a trunk road)
 - S. 240(4) and (5): public conveniences and lorry areas
 - S. 243 – cattle grids
 - S. 246 – mitigation works
 - S. 249 – general limit of 220 yards either side of the centre-line

Powers of Entry and Survey

- S. 289 – power to enter for purpose of surveying.
 - Includes placing and leaving apparatus
 - Boreholes
 - Requires 7 days notice to enter as of right
- S. 291 – maintenance of structures and works
 - Eg bridges, fences, barriers, drains, watercourses

CPO Procedure: Drafting the Order

Order must have

- A Schedule which:
 - Identifies parties affected (inc. tenants and mortgagees)
 - Lists area of each parcel being taken
- Order Map numbering and delineating each piece of land in separate ownership

CPO: Procedure

- Notice of the Order is served on all persons listed and advertised
- Three week period for objections
- If a statutory objector objects, there must be an Inquiry (unless objection withdrawn)
- Inspector appointed by the Secretary of State hears Inquiry and makes recommendation
- Secretary of State decides

CPO: Procedures II

- Complex and lengthy procedure – allow two years
- Sensible to reach agreement with as many landowners as possible, but even one objector can force inquiry ...
- New roads may require other orders (e.g. side roads, stopping up). Under s. 257: can run procedures concurrently

CPO: What Needs to be Shown?

- Usual to have planning permission first
- Funding available + no impediments
- Compatibility with Development Plan and government guidance
- Environmental Assessment and impact
- Reasonable efforts to negotiate (but compensation is for the Lands Tribunal)
- Acquisition is in the public interest

CPO: Secretary of State's Powers

- May confirm the order with or without amendments
- But cannot increase area of CPO without written consent of landowners

Public Open Space and Allotments

- Acquisition of Land Act
 - Public open space has special protection
 - Can generally only be taken if suitable alternative provision is made
 - Secretary of State must certify this, or else special parliamentary procedure
 - S. 250 authorises CPO of “exchange” land

CPO: Once the Order is Confirmed

- HA can give 14 days notice of entry and take possession
- Compensation then payable
- If amount not agreed, quantum is referred to the Lands Tribunal

CPO and Compensation

- Landowner is entitled to compensation
- Generally, will be the equivalent of the market value of the land taken + “disturbance”
- But can extend to the extinguishment of the entire business
- Or the cost of relocating to alternative premises

CPO and Compensation II

- Value not just based on existing uses – what else would the land have got p.p. for?
- Landowner can seek Certificate of Alternative Development to certify what permission could have been expected
- In calculating market value, ignore any value which results from the road scheme

Blight

- Not about impact on amenity etc
- Arises from “safeguarding” of land for possible future development
- May inhibit future development
- May make it impossible to sell the property
- Remedy = Blight Notice

What is Blighted Land?

- Shown in a development plan as being required for a Govt Dept, local authority or statutory undertaker
- Indicated in a development plan or plans approved by resolution of the HA as land on which a highway is proposed to be constructed, improved or altered, or to be acquired for mitigating impact of a new highway

Who Can Serve a Blight Notice?

- Must have a “qualifying interest”
 - Owner-occupier of a house
 - Owner-occupier of farm land
 - Owner of small business, rateable value under £24,000
- Have to demonstrate that they have tried to sell the land but unable to obtain a buyer who is prepared to pay the full market value

Consequences of a Blight Notice

- If the HA accept it:
 - It is deemed to have served “notice to treat” as if it had made a CPO
 - Owner can then require the HA to acquire his property
 - If price not agreed, is referred to the Lands Tribunal

Consequences of a Blight Notice II

- HA can refuse to accept on the grounds
 - That the land is not blighted
 - That they do not propose to acquire it within 15 years
 - That only part of the land needs to be taken, and this can be done without “material detriment” to the remainder
- Landowner’s remedy: refer matter to the Lands Tribunal

Compensation for Adjoining Land

- S. 246: HA has power to acquire land which is “seriously affected” by the construction or use of a new road but
 - Owner must have a “qualifying interest” (see blight, below)
 - Must do so by agreement
 - Is not obliged to do so

Adjoining Land: Depreciation

- Land Compensation Act 1973
 - Highways opened to public traffic after 1969
 - New roads or where the location, width or level of the carriageway has altered (other than by resurfacing) or where an additional carriageway is provided
 - Available only to owner occupiers of houses and small businesses

Compensation for Loss of Trade

- S. 10 Compulsory Purchase Act 1965 allows claim for land which has been “injuriously affected by the execution of the works”
- Requires landowner to show he would have had a claim at common law – e.g for public nuisance, such as interference or obstruction of the highway
- Must be direct interference with the access to an individual site which went beyond what was ordinarily incidental to the traffic objectives of the scheme as a whole

Injurious Affection: *Moto Hospitality*

- use of CPO powers in the package of orders was enough to trigger the application of s. 10 to the works as a whole
- but compensation is for injurious affection caused by the execution of the works – i.e. the effects of construction, not for the operation and use of the works
- loss here resulted, not from direct construction of any access but from rearrangement of the junction as a whole. The Highways Acts do not give landowners any guarantee or expectation that the highway system in their area will remain unchanged

Injurious Affection: No compensation

No compensation for loss of trade arising from

- diversion of traffic as result of
 - Bypasses
 - One-way systems
 - Parking restrictions
- Improvements within the existing highway without CPO

Compensation and Human Rights

- Article 8 ECHR

“Everyone has the right to respect for his private and family life”

- *Andrews v. Reading BC*

- new traffic measures on A4, including bus lane
- Led to increased traffic noise
- Andrews received £2000 damages
- Case settled before it got to the CA ...

Drainage

- No automatic right to drain surface water from the highway onto adjoining land
- S. 100 – right to construct drains in the highway and in “land adjoining or lying near to the highway”
- Compensation payable if damage suffered by reason of exercise of these powers

Drainage II

- Does not include power to discharge water onto adjoining land:
 - *Croft v. Rickmansworth* (1885):
 - A well is not a drain or watercourse
 - *Croysdale v. Sunbury-on-Thames* (1898)
 - no right to drain into an old pond, which could not be treated as part of the drainage system under the control of the authorities

Drainage III

- *Thomas v. Gower RDC (1922)*
 - H.A. constructed culvert under man road
 - Discharged straight onto plaintiff' land
 - Held: had not made a drain or watercourse – had simply discharged onto plaintiff's land
- *A.G. (Bromley) v. Copeland*
 - Pipe had been there since 1868
 - Assumed it must have had a legal origin

Drainage IV

- S. 250

- Can acquire rights to drain compulsorily, under CPO procedure

- S. 251

- Binds successors in title

Ditches: s. 101

- with the consent of landowner, may fill in ditches which are unnecessary for drainage and a danger to users of the highway
- If no consent, may place pipes in substitution for the ditch, and fill the ditch in

Discharging Water

- S. 299: where a drain has been laid in the exercise of rights acquired by the HA for the purpose of draining surface water from a highway, picnic area or service area, the water may be discharged into any inland waters or tidal waters
- Without prejudice to other legislation on pollution

Interfering with the Natural Flow

Bybrook Barn Garden Centre v. Kent (2000)

- Culvert constructed 70 years ago
- Adequate at the time, but volumes of water had increased because of other developments upstream
- Nursery flooded repeatedly
- Held: HA had interfered with the natural flow, and was therefore responsible for ensuring that the culvert was large enough to take all water flowing in the watercourse

Sharing Drains

- Water Industry Act 1991, s. 115
 - HA and sewerage undertakers can agree that a highway drain be used to take surface water from premises
 - Or that a public sewer vested in the undertaker be used to convey surface water from the highway
 - Neither authority can unreasonably refuse to enter into such an agreement

Statutory Undertakers' Rights

- Statutory undertakers (BT, water companies etc)
 - Have rights to excavate without consent of HA
 - Need only give notice of intended works
- New Roads and Street Works Act 1991
 - Individuals, developers and private companies must obtain a licence
 - S. 51 – offence to place apparatus in highway or break it open without licence

Quality Control

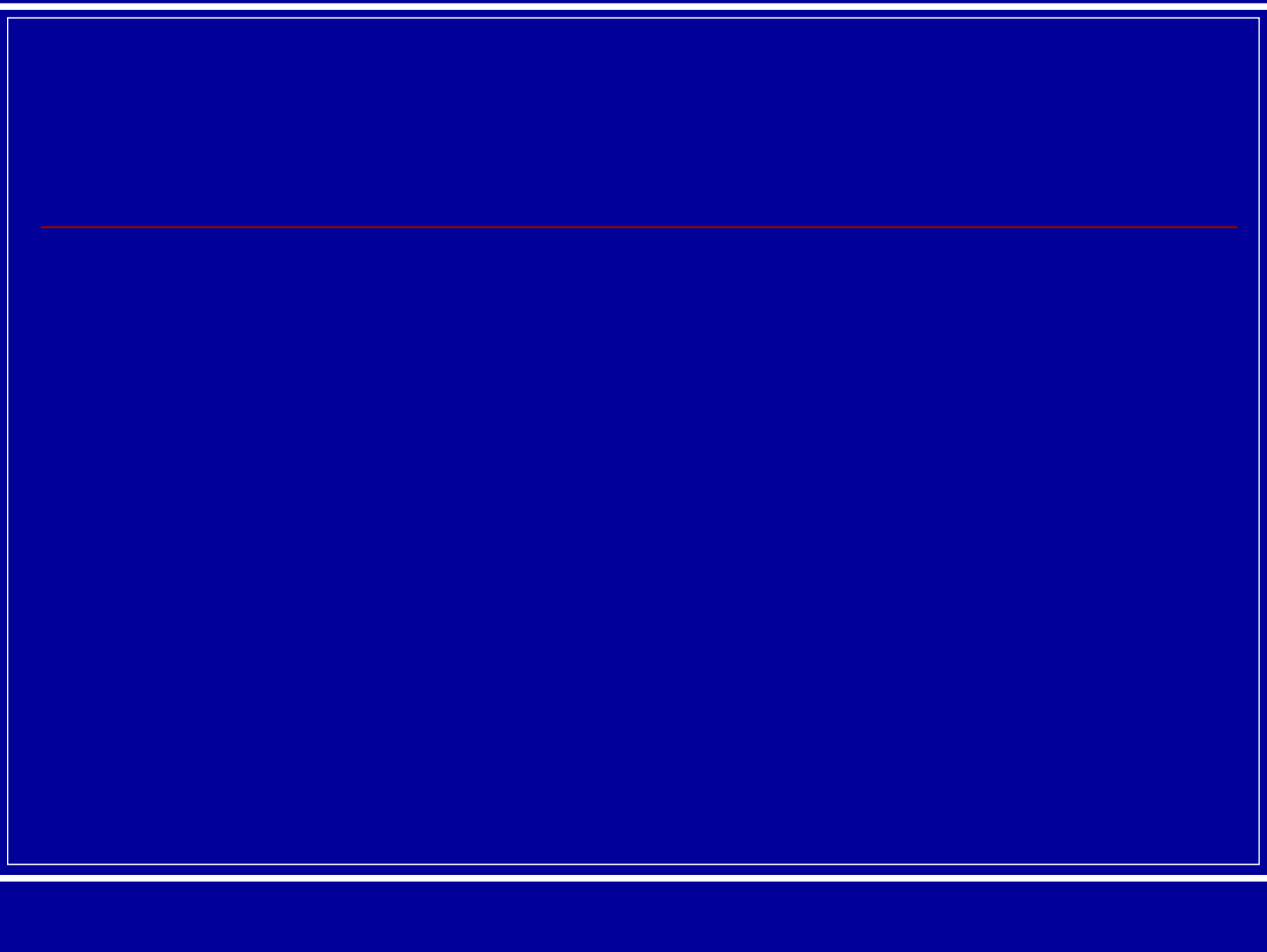
- S. 67 NRSW Act 1991
 - Undertaker must ensure that works are supervised by suitably qualified person
 - Must be a trained operative on site at all times
 - Offence to breach these requirements
 - No specific power to direct work to cease for non-compliance

The Slow Undertaker

- Section 66 NRSW Act 1991: an undertaker “shall carry on and complete the works with all such despatch as is reasonably practicable”
- Section 74: Secretary of State has power to make regulations requiring the undertaker to pay a standard charge per day if the works are not completed in a reasonable period

The Slow Undertaker II

- Street Works (Charges for Unreasonably Prolonged Occupation of the Highway) (England) Regulations 2001
- *Leicestershire v. Transco (2003, CA)*
 - Reg 5(6) notice is rebuttable presumption
- *Hertfordshire CC v. National Grid (2007)*
 - “Street works” do not include reinstatement or remedial works



SESSION THREE:

Obstruction, Stopping Up, Diversion

■ Obstruction

- What is obstruction?
- Types of procedure available - abatement, default, injunction, prosecution

■ Stopping up and Diversion

- Powers available
- Procedures

Statutory Elements of Obstruction

Three elements:

- Obstruction of free passage
- Wilful obstruction
- Lack of lawful authority or excuse

Obstruction of Free Passage

- *Nagy v. Weston*

“It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done and, of course, whether it does in fact cause an actual obstruction as opposed to a potential obstruction”

Obstruction of Free Passage II

- *Hirst and Agu*: unless it is so small as to be *de minimis* it is prima facie an obstruction - e.g.
- *Seekings v. Clarke* (newsagent's sunblind projecting 2'6" over 16' pavement)
- *Wolverton v. Willis* (greengrocer's display trays projecting 11" over a 71 footway). Wrong to hold that this was merely a technical obstruction which did not materially incommode people

Not just inanimate objects

- *Cooper v. Metropolitan Police Comm'r*
 - *Club tout approaching groups of people to persuade them to visit club*
 - *Engaged them in conversation for a minute or so*
 - *Free passage blocked, pedestrians had to step out onto the roadway*

“Wilful”

- Wilful obstruction does not require intention to obstruct, only the intentional doing of the act which in fact causes the obstruction
 - Eg *Arrowsmith v. Jenkins*:
 - public meeting on the highway
 - no intention to obstruct
 - but intended that act which caused the obstruction

“Without lawful authority or excuse”

- *Nagy v. Weston*: hot dog seller parked at kerbside
 - “excuse and reasonableness are really the same ground”
 - Whether the user is an unreasonable use of the highway is a question of fact
 - i.e. obstruction is not automatically ground for conviction

Lawful Authority or Excuse?

- *White v. Taylor* (juggler with fire sticks)

“These highway obstruction cases are by no means easy and they frequently arise out of relatively minor activities which some members of the public might consider to be beneficial”

Marches and Demonstrations

- Are not necessarily illegal, but may be obstruction of the highway
- *DPP v. Jones* (HL 1999)
 - “Provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass ... there is a right to peaceful assembly on the highway”
- Public Order Act 186 – 6 day’s notice of public procession

Encroachment and Obstruction

Types of action available to the HA:

- Abatement (self-help)
- Default Proceedings
- Civil Action for Nuisance/Injunction
- Prosecution

Abatement (Self-Help)

- Section 333 Highways Act: nothing in the Act relating to obstruction or other interference with highways:-
 - “is to be taken to affect any right of the Highway Authority or other person under any enactment not contained in this Act, or under any Rule of Law, to remove an obstruction from the highway or otherwise abate a nuisance or other interference with the highway.”

Abatement II

- *Reynolds v. Presteign* (1896)
 - Wall erected in the highway
 - Council decided to take it down rather than issue proceedings
 - Held: it was entitled to do so

Risks of Abatement

- *Reynolds v. Presteign*

“Where the question is one of doubt or difficulty, I think a judicial decision should be obtained by the local authority. If they proceed to act ... without having obtained such a decision, they run a considerable risk. The burden lies on them of justifying their action; and if they fail to justify ... they become liable to damages for trespass”

- So consider default powers as an alternative

Default Proceedings

- HA has powers to serve notices requiring steps to be taken to remove
 - Structures erected in the highway: s. 143
 - Things deposited on the highway so as to cause a nuisance: s. 149
 - Projections over the highway: s. 152
 - Hedges, trees or shrubs overhanging: s. 154
- In default, HA can carry out work itself

Civil Action for Nuisance

- Also unaffected by statute: s. 333
- Public nuisance is a common-law offence, triable by magistrates (see below)
- But also an actionable civil wrong: eg *Wandsworth v. Railtrack*

Civil Actions and Injunctions

- Civil remedy, can cover both obstructions and creating a danger to users
- *Harper v. Haden*
 - Permanent obstruction is necessarily wrongful
 - Temporary obstruction depends on circumstances. Not wrongful if negligible in point of time or reasonable
 - HA consent cannot legalise what is unlawful
 - Private individual can sue if can show special damage

When to Use the Civil Remedy

- Can be time-consuming,
- But greater sanction: unlimited fine, confiscation of property or imprisonment
- Appropriate remedy if prosecution has failed to make a difference
- Or if doubt over extent of highway boundary

Prosecution: Main Powers

- S. 137 – obstruction of the highway
- S. 138 – erecting a building or fence or planting a hedge in a carriageway
- S. 148 - unlawful deposit of materials in the highway
- S. 152 - failure to comply with a Notice to remove Projections over the highway
- Common-law offence: causing a nuisance in the highway

Other HA offences

- Miscellaneous dangers: s. 161:
 - Lighting fires without authority
 - Discharging firearms within 50' of centre line
 - Playing football to the annoyance of a user
 - Allowing “filth, dirt lime or offensive matter” to flow onto the highway from adjoining premises

Town and Police Clauses Act 1847

- Placing/leaving furniture, goods, wares or merchandise ... on any footpath ...
- Fixing or placing any flowerpot or box, or any heavy article, in any upper window, without sufficiently guarding the same against being blown down.
- Leaving open any vault or cellar, or the entrance to any street to any cellar or room underground, without a sufficient fence or handrail, ...

where these have caused “obstruction, annoyance or danger of the residents or passengers”

Sanctions for Obstruction

- Fine
- CROW Act:
 - magistrates can order offender to remove.
 - Failure to comply is a further offence
 - £5000 fine + £250 per day continuing

Stopping Up and Diverting Highways

- “Once a highway, always a highway”
 - Rules on adverse possession do not apply
 - *Loder v. Gaden*
- Hence need for statutory order e.g. side roads order, stopping up order
- S. 257 HA: can do concurrently with CPO

Stopping Up Orders: s. 116

“if it appears to a magistrates’ court ... that a highway (other than a trunk road or a special road) as respects which the highway authority have made an application under this section

(a) is unnecessary, or

(b) can be diverted so as to make it nearer or more commodious to the public

the court may by order authorise it to be stooped up ...or ..so diverted”

Unnecessary?

■ *Ramblers Association v. Kent*

- Question of fact, best left to magistrates to use local knowledge and common sense
- For what purposes would the public reasonably be expected to use that particular way?
- *“where there is evidence of use of a way, prima facie .. It will be difficult for Justices to come to the conclusion that a way is unnecessary unless the public are ... provided with a reasonably suitable alternative way”*

■ *Spice v. Leeds*

- Necessity goes beyond use of the highway for passing and repassing and may include amenity grounds, safety or access for third parties.

Nearer or more commodious

■ *Gravesham v. Wilson*

- Commodious includes width
- Dictionary definition “roomy and spacious” not wrong as a guide
- Need not be shorter but should include improvement in e.g. surfacing, levels, drainage or lighting

Section 116: Procedure

- Must notify district and parish councils
 - Cannot proceed if they object
- Must notify statutory undertakers
 - No right of veto, but may be able to retain access to services or obtain compensation for removal
- Must notify owners and occupiers of frontages
- Notices at either end of highway and in papers
- Consent where diverting onto land

The Justices' Certificate

- Order must have a plan annexed to it, signed by the Chairman
- Where coupled with diversion, cannot authorise stopping up until new length has been completed to the satisfaction of 2 Justices, who have certified this
- So arrange inspection on completion

Section 117: Requests to stop up

- A person who wishes a highway to be stopped up may request the highway authority to make an application on his behalf.
- The highway authority may make it a condition of the application that the person making the request pays the costs incurred.
- *Spice v. Leeds*
 - HA cannot be compelled to make applications. Rather, where it agrees that the highway is unnecessary but is indifferent to stopping it up, it may recover the costs of the application.

Section 256 Exchanges

- For the purpose of straightening or adjusting boundaries of the highway
- By agreement with the adjoining landowner
- Exchange with or without payment (by either party)
- Must be advertised
- Two months for objection by appeal to magistrates
- If exchange proceeds, land is transferred free of the public right of passage

Side Roads Orders

- Side Roads Orders under s. 14:
 - stopping up, diverting, otherwise altering minor roads which cross or enter the route of a trunk road or a classified road
 - construction of new highway for purposes concerned with such alteration
 - must show another reasonably convenient route is or will be made available

Stopping up Footpaths & Bridleways

■ s. 118 HA 1980

- must be expedient having regard to the extent to which the path is likely to be used and the effect on land served by the path
- in determining this, can have regard to extent to which a public path creation order would provide an alternative path or way
- must be submitted to the SS for confirmation if opposed (o'wise HA may confirm unopposed)

Diverting footpaths & bridleways

■ s. 119

- May be done in the interests of the public or the owner, lessee or occupier of the land
- Must not be substantially less convenient
- Must be expedient having regard to effect on
 - public enjoyment
 - effect on other land served by the way
 - any new way created

Diverting footpaths and bridleways II

- Cannot alter termination point if not on the same highway
- New termination point must be on same highway or one connected with it and substantially as convenient
- Requires confirmation by SS if opposed

Stopping up Private Accesses

- Main power: s. 124
 - if likely to cause danger to or interfere unreasonably with traffic
 - only if no access from the highway is reasonably required, or another reasonably convenient access is available or will be provided
- S. 125: can combine stopping up with side roads order under s. 14

Additional Powers

■ S. 247 TCPA

- SST can authorise stopping up
- Must be “necessary to do so in order to enable development”
- For planning permission which has been granted to be carried out

■ S. 257 TCPA

- Similar power to district councils w.r.t footpaths and bridleways

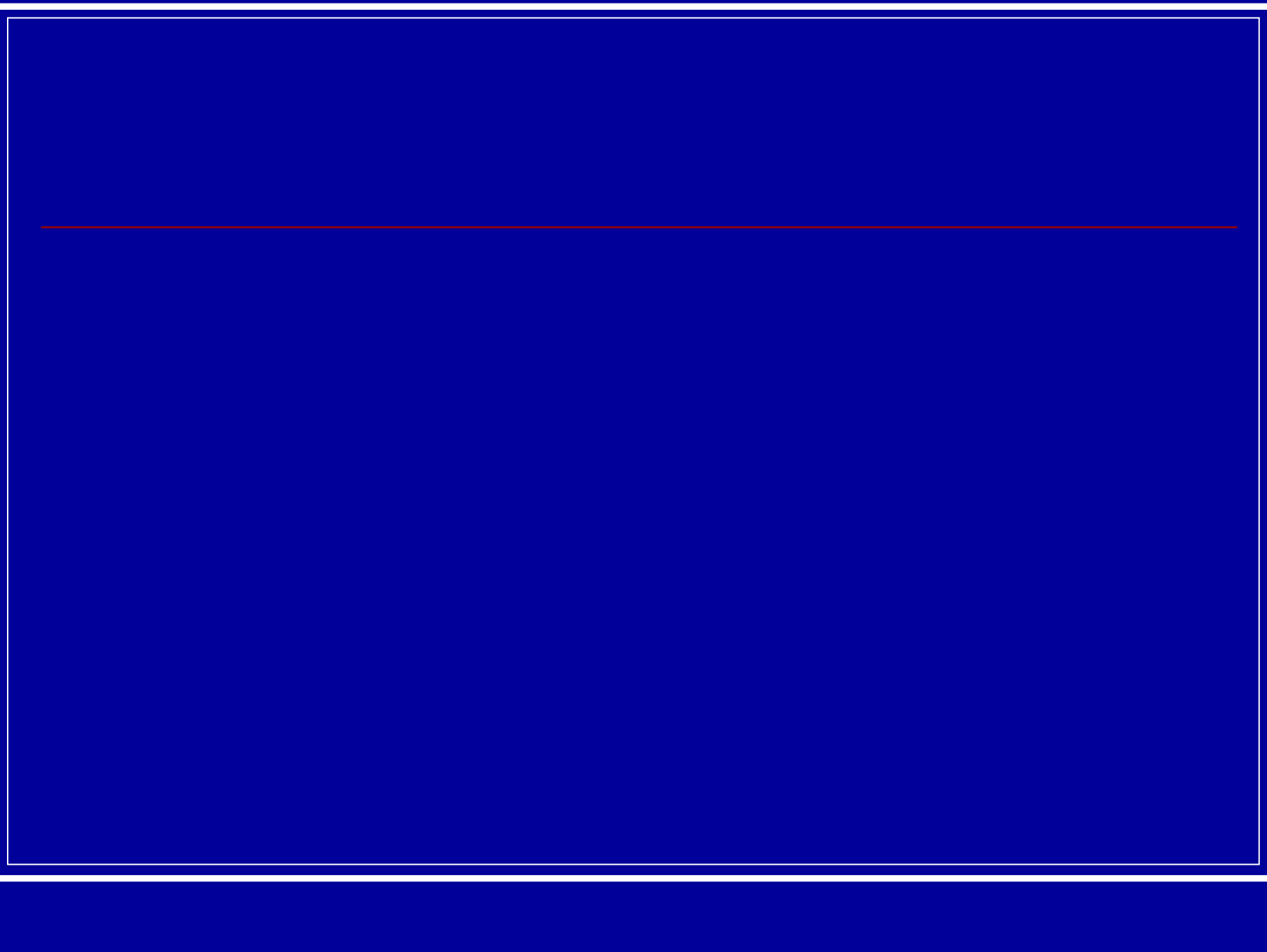
S. 247

■ *Ashby v. SST*

- Can't use this power if the development is already complete

■ *Vasiliou*

- Can't simply rubber stamp decision to grant planning permission
- Should take into account effect on trade



SESSION FOUR (A): Highway Safety

The Authority's Rights

- Additional Powers of Control
- Traffic Regulation Orders

... and Obligations

- The HA's duty under s. 130
- The HA's duty under s. 41
- Particular problems – pavements, snow, mud etc
- Criminal Liability

Unlawful Deposits: section 148

- Any dung, compost or material for dressing land on a made-up carriageway
- Any thing whatsoever to the interruption of any user of the highway
- Pitching a booth, stall or stand
- Fine not exceeding £1000

Section 148 and Section 149

- Section 149 – Notice requiring things deposited to be removed
- Remedies: self-help or prosecution
- Emergency procedure under s. 149(2) if the thing deposited constitutes a danger
 - Eg *Scott v. Westminster*: hot chestnut seller's brazier in Oxford Street

Mud on the Tracks?

- S. 148/9: but directed at the person who deposited it
- S. 151: notice to execute works to prevent soil or refuse from falling or being washed or carried onto the street/into sewer or gully in such quantities as to obstruct/choke
- Bye-laws?
- Planning conditions on new development

Water from Adjoining Land: s. 163

- Section 163: HA can require occupier of premises adjoining the highway to construct and maintain channels, gutters and downpipes necessary to prevent
 - Water from the roof or any other part of the premises falling on persons on the highway
 - Surface water from flowing onto or over the footway, so far as is reasonably practicable

Land Drainage Act 1991

Section 25

“... where any ordinary watercourse is in such a condition that the proper flow of water is impeded, then, ... the drainage board or local authority concerned may, by notice served on a person falling within subsection (3) below, require that person to remedy that condition.”

Land Drainage Act

- Power given to local authorities to carry out drainage improvement schemes, and to enter onto adjoining land to construct new works
- Subject to compensation, but without need for CPO
- *H Ward Estates v. Monmouthshire*: these powers do not breach ECHR property rights (A1P1)

Skips and Scaffolds

- Skips - s. 139 – require permission of the HA
 - Permission may have specific conditions
 - Statutory conditions
- Scaffold – s. 169 – requires licence
 - Can impose terms

Extraordinary Traffic: s. 59

- HA can recover additional (extraordinary) expense incurred through use of the highway by excessive weight or other extraordinary traffic
- “proper officer” certifies extraordinary expense
- If not agreed, referred to county court to determine quantum

RTRA 1984: Constraints

■ Section 122

“It shall be the duty of every local authority ... so to exercise the functions conferred on them by this Act (so far as practicable ...) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway”

Traffic Orders: Procedure

- Do not need confirmation by anyone else
- Advertise proposed order in draft in local press; post notices on streets affected
- Consult police and “organisations representing persons likely to be affected”
- Three week period for objections
- Must consider the objections
- Can then make the order

RTRA 1984: Consultation

- Must approach with an open mind:
 - *Partingdale Lane Residents v. Barnet*
 - Council had already made up its mind
 - Had therefore predetermined the matter
- Scope of consultation must be fair
 - *Montpeliers & Trevors Association v. W'minster*
 - consultation excluded the option favoured by most residents
 - breached legitimate expectation and unfair

Traffic Orders: Miscellaneous

- Consequences for businesses
 - No compensation for loss of trade
 - No cause of action for loss suffered

- Note supporting powers
 - S. 92 RTRA 1984 – to place bollards or other obstructions to prevent the passage of vehicles contrary to an order

Temporary Orders: s. 14 Purposes

- Because works are being or are proposed to be executed on or near the road
- Because of the likelihood of danger to the public, or of serious damage to the road;
- For the purpose of enabling litter clearing and drain/gully cleansing
- RTR (Special Events) Act 1984 – to facilitate holding of sporting or social events or entertainment

Temporary Closures: Procedure

- 7 days' prior notice must be given
- Further notice within 14 days of making order
- but no consultation needed
- Can last up to 18 months (6 for f'paths & b'ways)

Temporary Orders: HA powers II

- S. 21 Town and Police Clauses Act 1847
 - Orders for the route to be observed by traffic and for preventing obstruction “in all times of public processions, rejoicings or illuminations”
 - No procedural requirements, but short duration

Temporary Orders: HA Powers III

- section 287 Highways Act 1980

“For the purpose of securing public order or public safety or preventing congestion of traffic, a competent authority may, in any case of emergency or any occasion on which it is likely by reason of some special attraction that any street will be thronged or obstructed, cause barriers to be erected in any street and kept in position for so long as may be necessary for that purpose”.

Police Powers

- Section 67 RTR Act 1984: police can place signs on a road indicating
“prohibitions or restrictions on vehicular traffic” as may be necessary or expedient to mitigate congestion or obstruction of traffic, or danger to or from traffic, in consequence of extraordinary circumstances”
- Can be maintained for up to 7 days
- It is an offence to ignore such signs

Emergency Works: s. 52 NRSW Act

- Exception to general rule
- Must be required to prevent or put an end to circumstances which are likely to cause danger to persons or property
- For the person who carries them out to prove they were “emergency works”
- S. 57(2): must give notice within 2 hrs of commencement

Traffic Control: Traffic Orders

- Road Traffic Regulation Act 1984:
 - Purposes
 - Powers
 - Procedures

RTRA 1984: Purposes (s. 1)

- avoid danger to persons or other traffic using the road
- prevent damage to the road or buildings near the road
- facilitate the passage on the road of any class of traffic to the exclusion of other classes
- prevent the use of a road by vehicular traffic which is unsuitable for the existing character of the road
- preserve the character of a road in a case where it is specially suitable for use by horse riders or pedestrians
- preserve or improve the amenities of the area through which the road runs

RTRA 1984: Powers

- A traffic order can:-
 - Close a road to through traffic
 - Impose a one-way system
 - Impose speed limits
 - Impose weight limits
 - Impose parking or waiting and unloading restrictions
 - Prohibit overtaking
 - Restrict different parts of the carriageway to different users e.g. bus lanes

The HA's Own Duties

- 1980 Act confers a number of specific powers which may be necessary in the performance of two overarching duties
 - S. 130 Highways Act: duty to assert and protect the right to use
 - S. 41: duty to maintain the highway

Section 130

■ Subsection (1)

- “to assert and protect the rights of the public to the use and enjoyment of any highway for which they are Highway Authority, including any roadside waste which forms part of it.”

■ Subsection (3)

- “to prevent the stopping up or obstruction of highways”

■ Subsection (4)

- “to prevent unlawful encroachment on roadside waste”

Making the HA act under s. 130

- Judicial review?

- *ex. P. Guyer* (1980): power is discretionary

- S. 130(6)

- If parish council makes representations that a highway has been stopped up or obstructed or encroached upon, HA is under a duty to take proceedings unless satisfied that the representations are incorrect

Making the HA act under s. 130 II

■ S. 130A – Footpaths & Bridleways

- Any person can serve notice on a HA requesting them to remove obstruction
- Apply to local magistrates if not satisfied with action taken
- Court need not make order unless satisfied that the way is a highway, or that the obstruction significantly interferes with the exercise of public rights

Section 41: the Duty to Maintain

“The ... highway authority for a highway maintainable at the public expense are under a duty ... below, to maintain the highway”

Enforcing the Duty: s. 56

- Complainant may serve notice requiring HA to admit that a way is a highway, and that it is maintainable
- HA has one month to respond
- Complainant may apply to Crown Court if HA does not admit
- If HA does admit, complainant has 6 months to apply to magistrates for an order requiring the HA to put the highway in proper repair

Liability in Damages?

- Historically, no liability for failure to maintain
- S 1(1) Highways (Misc. Prov.) Act 1961
“the rule of civil law exempting the inhabitants at large ... from liability for non-repair of highways is hereby abrogated”

Overlapping Causes of Action

- Possible causes of action:

- Breach of statutory duty
- Negligence
- Nuisance

- *Hale v. Hants & Dorset Motor Services*

- Did not much matter under which head the action was brought

- *Shine v. Tower Hamlets*

- Negligence, not failure to maintain

Requirements for a Claim

- *Burnside v. Emerson* (CA, 1968)
 - The Plaintiff must show that the road is in such a condition as to be dangerous for traffic; and that the dangerous condition was due to a failure to maintain (including a failure to repair)
 - If there is a failure to maintain, the Highway Authority is liable for any damage resulting and can only escape liability if it proves it took such care as in all the circumstances was reasonably required.

The standard of maintenance

Rider v. Rider (CA, 1972): the duty

“is reasonably to maintain and repair the highway so that it is free from danger to all users who use that highway in the way normally to be expected to them.”

“The Highway Authority must provide not merely for model drivers, but for the normal run of drivers to be found on their highways, and that includes those who make the mistake which experience and common sense teaches are likely to occur..”

Increasing standards?

- *Chichester Corporation*(1906)

“it is their duty to alter the standard of a road from time to time, as the traffic upon it becomes larger or alters its character. Such cases present great practical difficulties and I always direct juries on the basis that a road authority’s duty must vary from time to time as the traffic becomes greater and more burdensome”

Standards – J. Button or J. Average?

- *Rider v. Rider* (1972)

“The Highway Authority must provide not merely for model drivers, but for the normal run of drivers to be found on their highways, and that includes those who make the mistakes which experience and common sense teaches are likely to occur”.

Relevance of Design Guidance

- Not binding, but good evidence of “best practice” – e.g.
- *Lavis*
 - HA had observed Traffic Signs Manual in marking road junctions
- *Prynne*
 - Council lost, in part because it did not space warning signs in accordance with guidance

Examples of Liability

- *Rider v. Rider*
 - edges of the carriageway had crumbled
- *Bright v. Ministry of Transport*
 - Changes to white lining had left ridges in surface
- *Rogers v. National Assembly for Wales*
 - Skid resistance of the surface too low

The Statutory Defence

- Section 58(1)

“ ... 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”

The Statutory Defence II

s. 58(2) Relevant considerations include

- Character of the highway and traffic reasonably expected to use it
- Standard of maintenance appropriate for a highway of that character
- State of repair a reasonable person would expect
- Whether the HA knew (or could be expected to know) of the state
- If repair could not have been expected before accident, what warning signs were displayed

The Statutory Defence III

“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”

- s. 58(2)

Examples of the Defence at Work

- *Pridham v. Hemel Hempstead*
 - HA had a system of 3 monthly inspections
 - HC held – inspections could have been more frequent at no greater expense
 - CA held – test was not whether there could have been a better system of inspection, but whether the system in operation was reasonable. Fact that more could have been done did not make it unreasonable

Examples of the Defence - Strikes

■ *Bartlett v. Dept of Transport*

- Manual workers strike, 1979
- No salting or gritting on the A34
- But large warning signs, information to the RAC and AA, radio broadcasts of alternative routes

Frequency of Inspection

- *Jacobs v. Hampshire*

- 6-monthly inspection not enough given design of carriageway

- *MacDonald v. Leicester*

- Policy prioritising roads and footpaths for gritting
- No breach of s. 41(1A)

Exception for Byways

- S. 54(7) W&C Act 1981: nothing in the Act shall

“oblige a Highway Authority to provide on a way shown in a Definitive Map and statement as a byway open to all traffic, a metalled carriageway or a carriageway which is by any other means provide with a surface suitable for the passage of vehicles”.
- Therefore no liability for accidents on byways caused by unmade condition of the highway

Particular Problems

- Pavements
- Lighting and Signs
- Snow
- Mud
- Water and Floods
- Trees and Hedges

Pavements

- *Little v. Liverpool*

“Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green.”

- *Mills v. Barnsley*

- No mechanical test based on dimensions

Duty to Provide Pavements?

- Section 66:

“it is the duty of a highway authority to provide a proper and sufficient footway as part of the highway in any case where it considers the provision of a footway as necessary or desirable for the safety or accommodation of pedestrians ..”

- *Thorpe v. Norfolk*(1997)

- financial resources relevant

Lighting

- No general duty to light the highway:
 - *Shepherd v. Glossop Corporation* (1921)
- But there is a duty to warn of obstructions created in the highway which includes a duty to light:
 - *Fisher v. Ruislip-Northwood UDC* (1945)
 - car hit air raid shelter erected on the highway during black-out

Lighting

■ *Foster v. Gillingham*

- Barrier in front of bomb crater
- Warning lamps blew out – employee failed to check

■ *Morrison v. Sheffield*

- Iron guards around tress planted on roadside

■ *Polkinghorn v. Lambeth*

- Street refuge, normally lit but lights not working

Signs: The Statutory Provisions

- S. 65 Road Traffic Regulation Act 1984
 - Power (but not a duty) to erect traffic signs
- S. 39 Road Traffic Act 1988
 - General duty to prepare and carry out a programme of measures designed to promote road safety
 - Carry out studies and take appropriate measures to prevent accidents

Signs: The Case-Law

- *Gorringe v. Calderdale* (HL, 2004)
 - Held: the provision of road signs and markings was quite different from keeping the road in repair.
 - Accident not caused by any defect in the road
 - No common-law duty to erect warning signs
 - Drivers have to take care of themselves and drive at an appropriate speed

Signs: Man-made Hazards

- *Gorringer* will not apply to hazards created in the highway such as resurfacing or excavation
- Must give warning of temporary hazards ahead

(The shifting sands of) Snow and Ice

- *Burnside v. Emerson* (1968)

“where there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain”

- *Haydon v. Kent* (CA, 1978)

- Duty to maintain could include clearing snow and ice or provide protection by gritting

Snow and Ice II

- *Goodes v. East Sussex* (HL, 2001)
 - Duty to maintain does not include a duty to clear snow or ice, still less to prevent them forming
- s. 41(1A)

“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”

Mud

- *Misell v. Essex County Council* (1994)
 - mud regularly brought onto lane from a nearby quarry
 - motorcycle accident
 - Held: this was a persistent, not a temporary hazard; HA were aware. Under a duty to keep the highway swept and to erect warning signs.

- Is this still good law after *Goodes*?

Water

- *Burgess v. Northwich Local Board*(1888)

“An occasional flooding, even if it temporarily renders the highway impassable, is not sufficient to sustain an indictment for non-repair”

Water II

- *Burnside v. Emerson* (1967); *Tarrant v. Rowlands*(1978): if water collects regularly on the highway. HA must take steps to deal with it as part of its duty to maintain the highway in a safe condition. Failure to do so is a breach of duty, and motorists who suffer accidents as a result may be able to recover damages

Mowing Verges and Cleaning Streets

- Must not allow grass on verges to grow so tall as to obscure visibility
- No responsibility to ensure the highway is “clean and tidy” (responsibility of the district council)

Trees and Hedges I

- *Worcester CC v. Newman*
 - Obstruction of footpaths by hedges which were overhanging did not make the highway out of repair.
 - Bushes growing in the footpath did relate to repair
- But liability may arise in other ways

Trees and Hedges II

- Trees planted in the highway – HA can be liable for accidents arising from (and for nuisance – eg. tree roots: *Hurst v. Hampshire*)
- Trees on private land – landowner liable for accidents caused by falling branches (e.g. injury to persons or vehicle) if the dangerous condition was foreseeable

Trees and Hedges III

- S. 150:
 - HA can remove trees which have fallen across the highway and recover costs from landowner
 - *Williams v. Devon* – needn't allow owner time to do it himself first
- S. 154: power to require owners to
 - Deal with overhanging branches
 - Fell dead trees/insecurely rooted hedges if likely to cause danger by falling

Criminal Liability

Manslaughter

- Must be a duty of care
- Breach of duty must cause death
- Breach must amount to gross negligence

Health and Safety Legislation

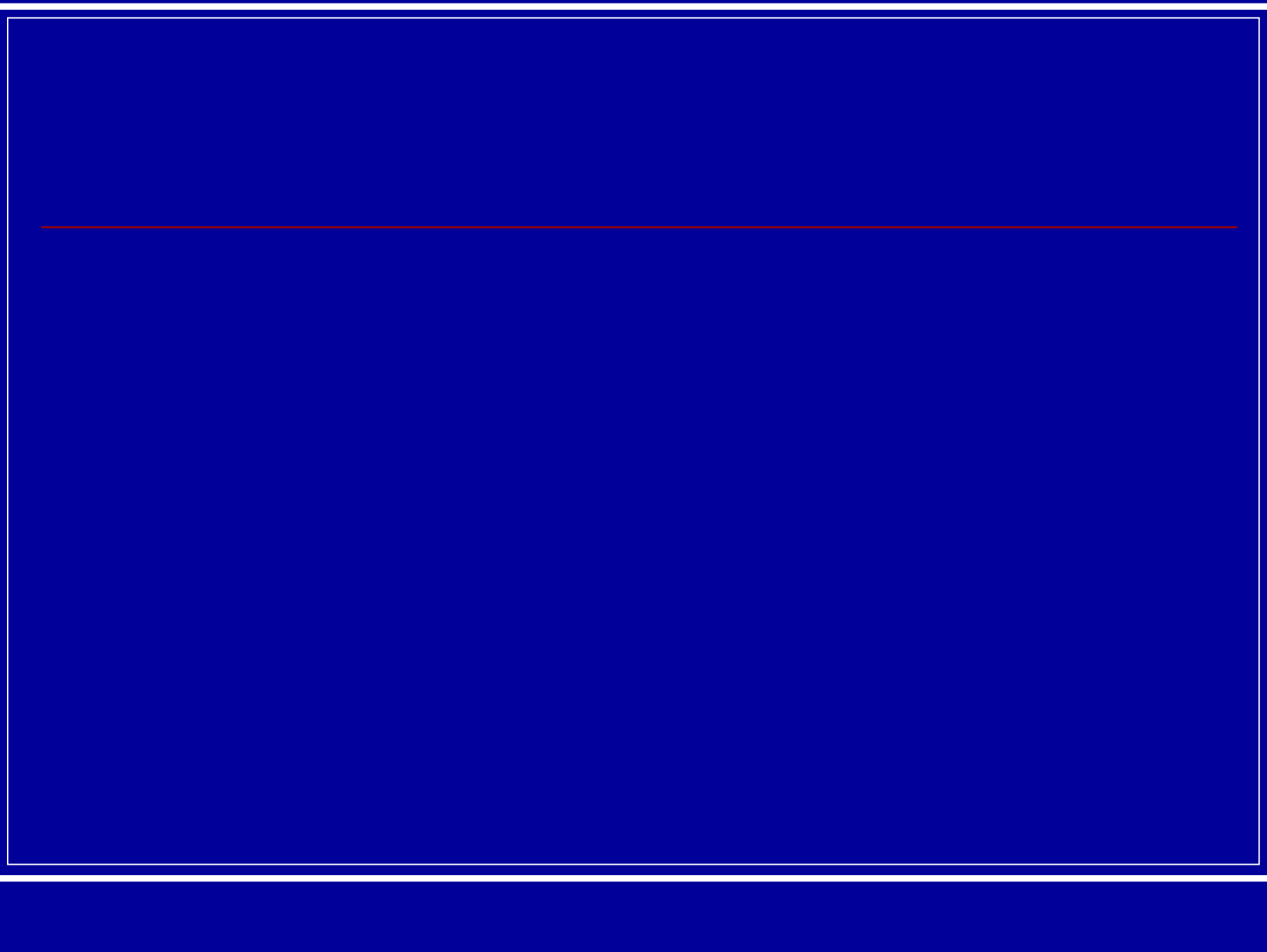
- Section 3, Health & Safety at Work Act 1974:

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”.

Health & Safety II

- Section 7: it is the duty of every employee while at work

“to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work.”



SESSION 4 (B): Highways and Development Control

- Structure of Local Government
- The Policy Framework
- Preparing Applications
- Determining Applications
- S. 278 agreements
- Conditions and s. 106 agreements

The HA and Development Control

- Structure of Local Government:
 - County Councils and District/Borough Councils
 - Unitary authorities
- Division of responsibility for planning
 - County Councils: minerals and waste
 - Most other matters: district/borough

Policy Framework

- The Development Plan
 - Old style – Local Plan + Structure Plan; or UDP
 - New Style: RPGS + Local Development Framework
 - In either case, applications to be determined in accordance with the development plan “unless material considerations indicate otherwise”
- Government Guidance – PPS and Circulars

Preparing Applications

- Know the site & spot the problem early
- Identify the development plan policies
- Not just highway safety
 - Impact on residential amenity – noise, dust etc
 - Sustainability – Green Travel Plans
- Be aware of wider implications
 - E.g. landscape

Preparing Applications II: Design and Access Statements

- Art 4C GDPO and s. 327A TCPA
- The statement must explain
 - the policy adopted as to access and how development plan policies have been taken into account
 - what consultation has been undertaken and how it has been taken into account
 - how issues have been addressed
 - how prospective users will gain access to the development
 - why the main points of access have been chosen
 - how features which ensure access will be maintained

Preparing Applications III

- Transport Assessment
- Do you need a Green Travel Plan?
- What works are required and how will you secure them?
 - S. 278 agreement
 - S. 106 agreement

Preparing Applications IV: What can You Expect from the LPA?

- Right of appeal for non-determination after 8 weeks
- Impact of “planning delivery grant”
- Increased need for pre-application discussions
- Need to front-load applications with information
- Monitoring progress
- Obtaining a copy of the committee report
- Head off problems before they get to committee

Determining Applications

- Start from the development plan: is there a conflict?
- Concept of “material harm” – does the proposal make it any worse?
- Is there an existing use, and what impact does that have?
- What could the existing use change to without pp, and is this reasonably likely?
- If the existing use is dormant, what is the likelihood that it will ever resume (“fallback”)?

Conditions

- S. 70 TCPA 1990: I.p.a. may grant permission “subject to such conditions as they think fit”
- NB: conditions are imposed by the granting authority: - HA may only have the power of request

Use of Conditions

- Should not refuse p.p. if concerns can be addressed by condition
- Circular 11/95: Conditions must be
 - Necessary
 - Relevant to planning
 - Enforceable
 - Precise
 - Reasonable

“Grampian” Conditions

- Positive and Negative Conditions
- When to use negative conditions
 - Positive conditions inappropriate if land outside applicant’s control; or payment of money required
- Link to commencement or occupation
- SoS Policy: reasonable prospect of action being performed in lifetime of permission

Section 106 Obligations

- Can be unilateral: agreement or obligation
- Run with the land
- No release or modification for 5 years
 - and only if “no longer serves a useful purpose”
- Common uses:
 - Green Travel Plans
 - Financial contributions towards road schemes
 - Agreements to transfer land

Obligations and Circular 5/2005

- Can reasonably expect developers to pay for all or part of infrastructure that would not be necessary but for the development
- Should not be used solely to resolve existing deficiencies or wider planning objectives that are not necessary to allow consent
- Can make concessions where proposal meets aims of development plan but would not be viable with full contribution

Circular 5/2005: Pooling

- Cumulative impact of developments may require larger infrastructure
- Needs a specific proposal, not a general pot
- If so, can seek contributions
- Should be set out in advance, including fair and reasonable scale of contribution
- Earlier developers should not obtain credit for existing spare capacity
- Payment returnable if not used within agreed time

Routing: Conditions or Agreements?

- ***Davenport v. Hammersmith & Fulham LBC***
 - cannot lawfully require the applicant to obtain a result that does not lie entirely within his own power
- **Circular 11/95, para 71**
 - planning conditions are not an appropriate means of controlling the right of passage over public highways

The Right Condition at the Right Time

- Full permissions and outline permissions
- *Redrow Homes v. FSS*
 - 50 year old outline permission
 - 3 points of access, use of only one constrained by condition
 - Could not use general condition to obtain detailed approval to restrict use of other two

Securing Improvements: s. 278 Agreements

- “A highway authority may, if they are satisfied that it will be of benefit to the public, enter into an agreement with any person
 - (a) ...
 - (b) for the execution by the Authority of such works ... on terms that the person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement”

Section 278 Agreements II

- Costs may include
 - Legal costs (making the agreement)
 - Administrative expenses
 - Costs of land acquisition
- Work to be executed “by the Authority” – but can appoint developer as agent
- Usual to require a performance bond if this is done

Section 278 Agreements III

- Sanctions for non-performance:
 - Amounts due under a s. 278 are recoverable from any person having an estate or interest in the land benefitting from the new access or facility
 - Registrable as a local land charge
 - Can direct that the access/facility shall not be used until the money is paid
 - Can stop up the access if direction ignored

S. 278: Limits

- Power is discretionary, but not unlimited
- Not a means for avoiding consequences of planning inquiries: *R v. Warwickshire ex p. Powergen*
- *R v. Cardiff ex p. Sears*
- Need to restrict development until works carried out – conditions or s. 106

Refusal of Permission: The Appeal

- Appeal to Secretary of State
 - Appoints independent Inspector

- Possible procedures
 - Written representations
 - Informal hearing
 - Public Inquiry

Preparing for the Inquiry

- The statement of case
 - Six weeks from start date (formal registration)
- Statements of Common Ground, Proofs of Evidence and summaries
 - Four weeks before the Inquiry
 - Rigidly enforced by PINS
- Supplementary evidence
 - Proofs or oral questions

Structuring Your Proof

- Introduction: qualifications and experience
- Description of the site, as it affects highway issues
- Summary of the proposals and their impact
- Relevant Planning policies and highway standards
- Reasons for refusal, including any mitigation measures and their likely efficacy
- Other highway issues, eg. points raised by third parties
- Conclusion

Costs

- General principle: each party bears its own
- Costs will only be awarded if
 - Application made at the Inquiry
 - Other party has behaved “unreasonably” e.g.
 - introduced new argument at last moment
 - not called evidence to defend an argument
 - Costs are incurred as a result
- Early action can avoid claim