Highways Act 1980 Case Summary & Comment: Deborah Barlow v Wigan Metropolitan Borough Council [2020 EWCA Civ 696]

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Background and issues

On 21.09.2014, the Claimant was walking along a path in Abram Park, Wigan, when she tripped over an exposed tree root and sustained injury.

An order was made for liability to be tried as a preliminary issue. Given how the claim was pursued at trial, the court had to deal with the case on the basis that the Claimant could only succeed in her claim by showing that the path on which she fell was a highway maintainable at public expense, so that she had a cause of action for breach of statutory duty under s41 of the Highways Act 1980 ("the Act"). This in turn meant that to succeed in contending that the Defendant was under a duty to maintain the path, the Claimant had to prove that either: i) it was a "highway constructed by a highway authority" within the meaning of s36(2)(a) of the Act; or ii) it was one of those highways which "immediately before the commencement of this Act were highways maintainable at public expense" within the meaning of s36(1) of the Act.

The decision at first instance

The judge at first instance, HHJ Platts, decided that the Claimant had suffered injury as a result of tripping over the tree root on the path, and that the root rendered the path "dangerous and defective". Those findings were not in dispute by the time the matter reached the Court of Appeal. HHJ Platts stated that the issue to determine was whether the Defendant (which accepted that it was the Highway Authority in respect of the accident location) was liable for the defect.

HHJ Platts dismissed the claim, and made the following relevant findings: i) that for s36(2)(a) of the Act to apply, the highway had to be constructed as a highway at time of construction;

ii) that required an intention so to create it on the part of the highway authority; iii) there was no evidence of what the intention of Abram UBC (the council's predecessor) was when creating the path; iv) that accordingly, since the highway only became such as a result of long usage rather than original dedication, s36(2)(a) of the Act was not satisfied; v) that finding alone spelled failure for the claim; vi) s36(2)(a) of the Act would apply to highways created before and after the commencement of the Act; and vii) it was not possible to find (as also required by s36(2)(a) of the Act) that the path had been so constructed by a highway authority because there was no evidence as to whether Abram UBC was a highway authority.

The decision on appeal to the High Court

By the time the appeal to the High Court was heard by Waksman J, the Defendant had conceded that Abram UBC had been a highway authority at all material times, but contended that when it had constructed the path, it had no intention to dedicate it as a highway and it did not do so in its capacity as a highway authority. The Defendant also argued that s36(2)(a) of the Act can only apply to highways built after the Act came into force.

Waksman J allowed the appeal on liability. He held that s36(2)(a) of the Act is not confined to highways which were constructed at the outset. He rejected the Defendant's argument based on the capacity in which Abram UBC was acting at the time. He held that as long as the relevant local authority at the time was a highway authority, then that was sufficient for its construction of the way to attract the operation of s36(2)(a) of the Act. He further rejected the Defendant's argument that the Act can only apply to highways built after the Act came into force. Waksman J thus allowed the appeal and held that the Claimant succeeded on primary liability under s36(2)(a) of the Act, making it unnecessary to decide whether she could succeed under s36(1) of the Act.

Grounds of appeal to the Court of Appeal

The grounds of appeal to the Court of Appeal were that Waksman J was:

1. Wrong to find that the path was a highway maintainable at the public expense pursuant to s36(2)(a) of the Act and therefore also wrong to find that the Defendant was under a statutory duty to maintain it under s41 of the Act;

2. Wrong not to find that the path was maintainable by nobody and therefore also wrong to find that the Defendant could not avail itself of a defence applying the principles set out in *McGeown v Northern Ireland Housing Executive*;

3. Wrong to find that the Defendant was under a statutory duty to maintain as an adopted highway a footpath which a predecessor authority did not construct as a highway but as a park which that predecessor authority then occupied under the Occupiers' Liability Act;

4. Wrong to adopt an obiter dictum statement from *Gullisken v Pembrokeshire CC* and thus make a finding that for a path to be a highway and come within s36(2)(a) of the Act, the local authority did not have to be acting in its capacity as a highway authority when constructing that path;

5. Wrong to base his findings on policy reasons, namely, to ensure that there should not be public highways in public open spaces that were maintainable by no-one;

6. Wrong to find that s36(2)(a) of the Act has retrospective effect such that it is capable of applying to a highway constructed before the coming into force of that provision that did not fall within s36(1).

The Claimant sought to uphold the decision of Waksman J on the issues in which he found in her favour and an additional ground, which was that the path was probably dedicated before 1949 such that it was a highway maintainable at public expense by the operation of the National Parks and Access to the Countryside Act 1949 (the "1949 Act") s47(1), the Highways Act 1959 ("the 1959 Act") s38(2)(b), as well as s36(1) of the 1980 Act.

Judgment of the Court of Appeal

The appeal was dismissed. Bean LJ gave the lead judgment, but Singh LJ and Macur LJ agreed.

Was the path "constructed by a highway authority" within the terms of s36(2)(a)?

The main issue here was whether the Claimant had to show that, when Abram UBC constructed the path in the 1930s, they did so in their capacity as the local highway authority. Bean LJ held that s36(2)(a) should be construed as referring only to highways constructed by a highway authority acting in their capacity as such.

He considered that the Claimant could not succeed under s36(2)(a) of the Act, because when Abram UBC constructed the path, they were not acting in their capacity as the highway authority for the area. It was thus unnecessary to decide if intention is a factor under s36(2)(a).

Section 36(1) of the Act and the deemed date of dedication

Bean LJ set out his reasoning for allowing the appeal on this basis as follows.

A highway may be created by express dedication by the landowner (of which there was no evidence in this case), deemed dedication under s31 of the Act or dedication inferred at common law.

As to deemed dedication, s31 of the Act is to the effect that where a way has been enjoyed by the public as of right and without interruption for 20 years, it is deemed dedicated as a highway without sufficient evidence of contrary intention. That 20-year period is calculated retrospectively from when the right of way is brought into question.

However, Bean LJ stated it was unnecessary to decide if s31(2) of the Act applied, as the Claimant succeeded on the basis of inferred dedication at common law. As to this, he held that: i) the evidence clearly established that the park was opened in the early 1930s; ii) the path and other paths were laid out soon afterwards; and iii) that since then (about 80 years before the Claimant's accident), the public have been allowed to walk on the paths without restriction or interruption of any kind even on one day a year. This was ample evidence in his view to support the implication or presumption of dedication at common law.

He then stated that "the importance of this is that when the common law presumption arises, it is retrospective". The effect is that the act of dedication is "deemed to have occurred at the beginning of the period of continuous user, not at the end of it". This therefore meant that, in this case, the path was deemed to have been dedicated since the early to mid-1930s, well before the commencement of the 1949 Act. That in turn meant that it was deemed to have been "repairable by the inhabitants at large" until 16 December 1949 and thereafter until 1 January 1960 (the commencement dates of the 1949 and 1959 Acts respectively), and "maintainable at public expense" since that time.

The Claimant's cause of action for breach of statutory duty under s41 of the Act was accordingly established and the appeal was dismissed.

Comment

The decision provides clarification on the issue of how highways can be created through dedication inferred at common law, and therefore highlighting a way in which such highways can be deemed to be "maintainable at public expense" within the meaning of the Act. This will be of assistance to Claimants who have suffered injury due to accidents caused by hazards on such paths.

This article is an overview of the law and is not a replacement for formal legal advice tailored to your specific query. If you seek further information, please contact practice director Dave Snook on david.snook@3pb.co.uk.

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