STATES OF JERSEY

ROADS AND PAVEMENTS: LEGAL LIABILITY IN CASE OF NEGLIGENCE

Lodged au Greffe on 13th May 2011
by the Deputy of St. Martin

STATES GREFFE

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PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to agree that appropriate legislation should be brought forward for approval to make the States, in respect of main roads ('grandes routes'), and the Parishes, in respect of parish roads (chemins vicinaux), legally responsible for damage to individuals suffered as a result of negligence caused by a failure by the relevant highway authority to maintain the roads and pavements in a proper state of repair; and

(b) to request the Minister for Transport and Technical Services to bring forward the appropriate amendments for States approval.

DEPUTY OF ST. MARTIN

REPORT

On the evening of 23rd December 2010, a lady and her husband were walking on an unlit pavement on La Grande Route de St. Martin when she unintentionally stepped into a pothole causing her to fall fracturing her ankle and chipping a bone in her foot.

The lady subsequently informed the Transport and Technical Services (TTS) of the pothole and of her injury. She also contacted me as I am her Parish Deputy. There were two issues to be addressed that of ensuring that the pothole was repaired and for the lady to seek redress for her injury. It should be noted that the lady was asked whether she wished to claim against TTS, and if so to write and submit details which would be forwarded to its insurers.

I visited the pavement which was in good condition apart from the area where the pothole was. It was apparent that the pothole was not as a result of general wear and tear but had developed because work around it had been carried out, but had not been adequately re-instated. When I first raised the issue with TTS I was informed that Telecoms had carried out the work. However I received another message saying that it was not known who had carried it out. It should be noted that the pothole remained unprotected and with no signage for some time before being repaired.

Since the accident there has been considerable media interest in the general state of the Island's roads and pavements. The Minister for Transport and Technical Services has been quoted in the Jersey Evening Post as saying "At present utility companies can dig up roads when and where they liked and were only required to restore the road to a minimum standard. In practice the companies did generally work well with his department, but the relationship was based on goodwill rather than a legislative framework." The Minister added that he would also look at the law which could be amended to compensate people injured because of badly maintained roads.

I understand that at present utility companies have to give some notification before digging up roads, but consideration is being given to amending the law which would require companies to apply for permits before starting work. The new law would also require utility companies to repair the road to a specified standard and would increase the period after which a newly resurfaced road can be dug up from 1 year to between 3 and 5 years.

I welcome the proposals but had the legislation been in place, it is possible that the injury caused to my parishioner might not have occurred.

Whilst it is hoped that the law will be amended to cater for utility companies, I believe it is equally important that the law be amended to compensate those members of the public who have the misfortune to suffer in any way due to the poor state of the roads and footpaths.

Having been referred by TTS to their insurers in Guernsey, the response my parishioner received was disappointing; the letter included the following –

> *"We are sorry to hear that you were injured and hope you are progressing swiftly towards a full recovery. Our understanding of the Law in Jersey is that in the absence of an express statutory provision (and there is none), the States of Jersey cannot be held legally liable for injury to a third party as a result of failing to maintain a public highway in a good state of repair. There is no*

equivalent Highways Act in Jersey. Whilst we are sorry to hear of your injury, and subsequent disruption of your celebration of the festive season, we regret that we have no offer to make in the way of financial compensation on behalf of our insured."

Having been familiar with the UK Highways Law I was surprised to learn that unlike the UK and indeed many other jurisdictions, Jersey's equivalent Highway's law makes no provision for compensating any one having the misfortune to suffer pain or loss as a result of the poor state of repair of our roads and pavements. I believe that the States and Parishes have a duty of care and should ensure that its residents are not disadvantaged because its laws are inadequate or outdated.

It is a fact that Jersey does not have a Law which provides for compensation to injured parties. The legal position is confirmed in a case which came before the Royal Court as long ago as 3rd September 2003, Dobson v Public Services Committee. Mr. Michael Birt, who was then Deputy Bailiff, sat on the case. The judgement appears as an Appendix however in summary, the judgement found –

- The position in England, until 1961, was that a highway authority was not responsible to people who suffered injury as a result of the failure to carry out repairs (in legal terms "non-feasance"). The highway authority was however responsible for injury which arose as a result of repairing the highway negligently (for example creating a hole and then leaving it unguarded (mis-feasance).

- The position in England was changed by statute as long ago as 1961 (The Highway (Miscellaneous Provisions) Act 1961, now repealed by the Highways Act 1980) so as to provide that a highway authority was responsible for injury where it had failed to undertake any repair (non-feasance) but gave a defence to the highway authority if it could prove that it had taken all reasonable steps to prevent injury.

- The law in Jersey however remains as established as long ago as 1914 (the relevant statue being the Loi (1914) sur la Voirie which gave responsibility to the Parish to maintain the roads within its boundaries. That was amended in 1941 to provide that the States would take responsibility for main roads.

- The 1914 Act was considered in the Dobson case and it was found that the Act did not create any right of action against the Parish or the States for injury arising from a failure to carry out any maintenance (non-feasance).

- The Court noted that the States had amended the 1914 Law on 4 occasions in respect of other matters (in 1971, 1972, 1973 and 1995) yet on none of those occasions took the opportunity of amending the law to ensure that Islanders have a right to recover damages if they are injured because of a failure to repair.

The Court was clearly troubled by the situation. It acknowledged however that creation of a liability for injury from failure to repair could have significant resource implications for the States in respect of main roads and parishes in respect of minor

roads. In the event that they were liable for non-repair they may in future spend money upon repairs which would otherwise be spent in other areas. The Court concluded that the allocation of those financial resources was not a matter for it to decide but that reform must be dealt with by legislation.

The Court did however question whether the justification for TTS immunity was still acceptable. It therefore expressly invited the Committee (in the final paragraph of the judgement attached) to take action to review the situation. Eight years have now passed since that judgement and it is apparent that the status quo remains. The mere promise by the Minister for Transport and Technical Services to now look at the matter is not good enough.

The problem is a very real one and sympathy is not good enough. The UK resolved the issue in 1961, that was 50 years ago. The States were called upon to do something by the Royal Court 8 years ago. It is high time that the matter is addressed.

It will be argued that there could be a financial cost, however more importantly there is a human cost which is borne by those who are unfortunately injured as a result of the States and the Parishes failing to maintain their highways in good repair and not updating a relevant law.

I believe the law must be amended to ensure that the States and Parishes become legally liable for any injury caused to a third party which has arisen because of negligence as mentioned above.

With reference to the injury suffered by my parishioner, had the law been in place, TTS would have known who had carried out the work and have ensured they were reminded of their responsibilities. It is also likely that my parishioner would have been successful with her claim as her injury had occurred because the area was not reinstated and left exposed. It should be noted that any compensation would be paid the Insurance Company and by TTS.

To establish the manpower or financial implications, I contacted every Connétable and the TTS. It is apparent that all are already paying for insurance cover. I have discussed my proposals with many of the Connétables and most are supportive however some are of the view that should there be an increase in insurance payments, insurance companies may seek a rise in premiums.

I have also discussed my proposition with the Minister for Transport and Technical Servcies and his Department.

There may be concerns about increased claims however if the highways are kept in good repair, or are properly reinstated after work has been carried out and there is satisfactory signage when work is being undertaken, there should be fewer accidents with corresponding fewer insurance claims.

Financial and manpower implications

There should be none as the relevant insurance policies held by the States and the parishes should already cover this risk.

APPENDIX

DOBSON v. PUBLIC SERVICES COMMITTEE

[2003 JLR 446]

ROYAL COURT (Birt, Deputy Bailiff): September 3rd, 2003

Tort—breach of statutory duty—highways—no private law remedy for breach by Public Services Committee of statutory duty simpliciter or common law duty of care to repair highway

The plaintiff brought an action for damages against the defendants on the grounds that they had negligently breached their duty to maintain the public highway.

The plaintiff allegedly suffered injury as a result of stumbling on a protruding paving slab on a main highway. He claimed that the Committee was under a duty to maintain main roads under art. 1 of the Loi (1914) sur la Voirie, as amended, and that it was in breach of this duty.

The defendant's application to have the Order of Justice struck out on the basis that it revealed no reasonable cause of action was refused by the Master who held that it would not be appropriate to dismiss it until the facts were ascertained.

On appeal, the defendant submitted that (a) it was unnecessary to ascertain the facts, as the issue whether there was a private law cause of action was a point of law, and so should be determined early in the action, in the interests of saving time and expense; (b) it was clear from the language of the statute that the legislature had only intended to transfer the duties of the parishes to maintain the highways to the States, and not to provide a private right of action; and (c) the States did not owe any common law duty of care to members of the public and it would be inappropriate for the court to develop one.

The plaintiff submitted in reply (a) that the court should not follow the English law of tort on this occasion but should introduce a private right of action for failure to maintain the highways, especially as most jurisdictions in which this action had been denied had reversed the position by statute; or alternatively (b) even if there were no private cause of action, the court should follow the courts of Guernsey in developing a common law duty of care owed by the Committee to all road users.

Held, allowing the appeal:

(1) The Master had been wrong to refuse to strike out the Order of Justice on the basis that the court needed to ascertain the facts. The existence of a private law cause of action against the Committee for failure to repair the highway, either for breach of the statutory duty *simpliciter* or for breach of a common law duty of care, was a point of law. It was therefore appropriate in the interests of justice to reach a decision on this issue quickly rather than letting the parties incur potentially unnecessary costs by taking the matter further (paras. 4 – 5).

(2) A civil remedy was only available for breach of a statutory duty if the law in question was passed "for the protection of a limited class of the public," as the court would only impose this extra burden on public funds if it were sure that the legislature had intended it to. It was clear from the language of art. 1 of the Loi (1914) sur la Voirie, as amended, that the 1914 Law was not intended to alter the nature or extent of the duty to repair the highway by establishing a private right of action; it was simply a transfer of this duty from the parishes to the States. The duty to repair the highway was an example of the kind of duty which, although of benefit to individuals particularly affected, was not treated as passed for their benefit, but for the benefit of society in general, and so did not provide them with any individual right to sue in the event of a failure by the Committee. Furthermore, as the duty to repair the highway was absolute, the introduction of a private law action would result in the Committee's becoming liable even when all reasonable care had been taken to repair it, or when there were insufficient funds (paras. 9–11; para. 15).

(3) Moreover, although the 1941 amendment to the Law had not provided a similar remedy for enforcement of the duty to that under the 1771 Code, the existence of a remedy in the 1771 Code weighed against the existence of a private action. If the legislature had intended to create such an action, it would have done so in 1941 when the common law rule was already well established (para. 14).

(4) It was inappropriate for the court to develop the law to impose a common law duty of care on the Committee in the absence of legislative action. Although the court was proactive in developing the law of tort between private individuals, it was more cautious in interfering with the obligations of public authorities, as any such development could have significant resource implications for the States, and the allocation of finances was not a matter for the courts (para. 18).

(5) It followed that, although this unsatisfactory outcome highlighted the need for legislative reform, the plaintiff's Order of Justice disclosed no reasonable cause of action and should be struck out (paras. 19–20).

Cases cited:

(1) *C* v. *D.P.P.*, [1996] 1 A.C. 1; [1995] 2 Cr. App. R. 166, referred to.
(2) *Goodes* v. *East Sussex C.C.*, [2000] 1 W.L.R. 1356; [2000] R.T.R. 366, considered.
(3) *Knight* v. *Thackeray's Ltd.*, 1997 JLR 279, referred to.
(4) *Morton (formerly Champion)* v. *Paint* (1996), 21 *Guernsey Law Journal* 36, distinguished.
(5) *Stovin* v. *Wise*, [1996] A.C. 923; [1996] 3 All E.R. 801, applied.
(6) *Vancouver (City)* v. *McPhalen* (1911), 45 S.C.R. 195, considered.
(7) *X (Minors)* v. *Bedfordshire C.C.*, [1995] 2 A.C. 633; [1995] 3 All E.R. 353, applied.

Legislation construed:

Code of 1771, *Règlemens pour la réparation des chemins*, at 40 (1968 ed.)
Loi (1914) sur la Voirie, art. 1, as substituted by the Loi (1941) (Amendement) sur la Voirie: The relevant terms of this article are set out at para. 10.

art. 1A, as substituted by the Loi (1941) (Amendement) sur la Voirie: The relevant terms of this article are set out at para. 10.
Text cited:

Report of the Law Reform Commission of British Columbia: CIVIL RIGHTS: PART V, The Tort Liability of Public Bodies, LRC 34 (1977)

D.J. Benest for the defendant.
The plaintiff did not appear and was not represented.

1. **BIRT, DEPUTY BAILIFF:** This is an appeal by the defendant against a decision of the Master on February 17th, 2003 refusing to strike out the Order of Justice on the grounds that it disclosed no reasonable cause of action. It raises an interesting point of law as to the liability of the Committee for the non-repair of a main road. Unfortunately, although the plaintiff was represented before the Master by Advocate R.J. Michel acting under a legal aid certificate, he has not appeared or been represented in this appeal. I understand that, although Advocate Michel would of course represent him under the legal aid certificate, the plaintiff was concerned that, in the event of a successful appeal, he would be ordered to pay the costs of the appeal and of the hearing before the Master. He sought to reduce the prospect of that occurring by not appearing in the appeal. It is unfortunate that this is so but I have had the benefit of reading the detailed skeleton argument submitted by Advocate Michel to the Master and the authorities upon which he relied.

The background

2. According to his Order of Justice, the plaintiff was walking along the pavement in Stopford Road, St. Helier on September 2nd, 2001 when he tripped over a protruding paving slab and injured himself. He asserts that the Committee was under a duty to maintain Stopford Road, as a main road, and that the accident was caused by the Committee's negligence in failing to maintain the highway and allowing the paving slab to be loose, uneven, *etc.* For the purposes of a striking-out application on the grounds that there is no reasonable cause of action, the factual allegations must be taken to be well founded. The Order of Justice does not distinguish between a breach of statutory duty and a breach of a common law duty of care but I shall assume in the plaintiff's favour for the purposes of this application that both are alleged.

3. In its pleadings, the Committee does not admit to being under a duty to repair the highway but, for the purposes of this application, the Committee accepts that the court should proceed on the basis that it is under such a duty. The basis of the Committee's application to strike out is that a breach of the Committee's statutory duty to repair the highway does not give rise to a private law cause of action on the part of someone who suffers damage as a result of the breach. It also contends that there is no common law duty of care on the part of the Committee in respect of repair of the highway.

4. The Master, having recited the parties' contentions, referred to the *dictum* of Lord Browne-Wilkinson in connection with striking-out applications in *X (Minors)* v. *Bedfordshire C.C.* (7) ([1995] 3 All E.R. at 373):

> "Actions can only be struck out under RSC Ord. 18, r.19 where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but

> is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts. But I agree with Sir Thomas Bingham, M.R. ([1994] 4 All E.R. 640 at 649, [1994] 3 W.L.R. 853 at 865) that there is nothing inappropriate in deciding on these applications whether the statutes in question confer private law rights of action for damages: the answer to that question depends upon the construction of the statutes alone.
>
> Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases (and in my view the child abuse cases fall into this category) where it is evident that, whatever the facts, no common law duty of care can exist. But in other cases the relevant facts are not known at this stage. For example, in considering the question whether or not a discretionary decision is justiciable, the answer will often depend on the exact nature of the decision taken and the factors relevant to it. Evidence as to those matters can only come from the defendants and is not presently before the court. I again agree with Sir Thomas Bingham, M.R. that if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable, then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered."

5. The Master concluded that it was not appropriate to strike out the Order of Justice without ascertaining the relevant facts by letting the matter go to trial. With respect to the Master, I do not agree. It seems to me that the question of whether there is a private cause of action (whether for breach of statutory duty *simpliciter* or for breach of a common law duty of care) for a failure by the Committee to repair the highway is a point of law. It is to be assumed against the Committee that it breached its duty to repair the highway in the manner alleged by the plaintiff and was negligent in so doing. The exact manner in which it was negligent or breached its duty is not relevant to the decision on the point of law. It is therefore in the interests of justice to determine this issue at this early stage rather than letting the parties incur what may be unnecessary cost in bringing (or defending) an action to trial.

The position in England

6. Although it may seem unusual, I think it is convenient to start by referring to the position in England. At common law there was a duty upon the inhabitants at large to repair the highway. That duty could be enforced by way of indictment but there was no liability upon the inhabitants to pay damages to any individual who suffered damage as a result of a failure to repair the highway. Such an individual had no cause of action. That position was maintained when the duty to repair the highway was transferred by statute to highway authorities. There was always a liability for acts (*i.e.* misfeasance). Thus if a highway authority decided to repair the highway but did so negligently (*e.g.* by creating a hole and then leaving it unguarded) a cause of action on the part of an individual who suffered damage as a result would lie. The law drew a distinction between acts (misfeasance) and omissions (non-feasance). It was only in the latter case that there was no private cause of action against a highway authority. It was not until 1961 that the position was changed by statute. The Highway (Miscellaneous Provisions) Act 1961 abrogated the rule exempting highway authorities for non-feasance but introduced a statutory defence if the authority could show that it had taken such care as in all the circumstances was reasonably required to

secure that the part of the highway to which the action related was not dangerous for traffic.

7. Mr. Benest referred me to *Report of the Law Reform Commission of British Columbia: CIVIL RIGHTS: PART V, The Tort Liability of Public Bodies*, LRC 34 (1977). It would seem from the report that this rule of English law was applied generally in the Commonwealth (*e.g.* Australia, New Zealand). The one exception appears to be in British Columbia, where the Supreme Court of Canada held in the case of *Vancouver (City)* v. *McPhalen* (6) that the statute imposing a duty to repair on the city of Vancouver did allow for a private cause of action for non-repair of the highway against the city. The Supreme Court held that there was no evidence that the duty imposed upon the city of Vancouver was one which had been transferred from the inhabitants or the municipal corporation. It was held to be an original duty with the result that the old common law exemption was not applicable. Interestingly the effect of this decision of the Supreme Court was subsequently reversed by statute in 1955.

The position in Jersey

8. It seems likely that, historically, the duty to repair the roads of the island lay with the parishes in which the roads fell. Certainly the Code of 1771, under the heading "*Reglements pour la reparation des chemins*" expressed such a duty.

9. The position remained essentially unchanged until the Loi (1914) sur la Voirie. As originally enacted, art. 1 of that Law provided that the States should draw up a list from time to time "*des Chemins Publiques qui seront considérés voies de grande communication* . . ." and contribute an annual sum towards the repair of such roads in each parish. The 1914 Law also set up roads committees in each parish to supervise the repair and upkeep of roads in that parish.

10. Article 1 was repealed and replaced by new arts. 1 and 1A in 1941. They provided as follows:

> **"Article 1**
>
> (1) Les États auront l'administration directe des grandes routes et tous les frais de construction, entretien ou autres frais seront à leur charge.
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> (2) Les chemins vicinaux resteront comme par le passé à la charge de différentes paroisses ..
>
> **Article 1A**
>
> Les États nommeront un Comité d'Administration des Grandes Routes autorisé à prendre toutes les mesures nécessaires pour l'entretien convenable des grandes routes."

It is clear from the language of the statute that this was simply a transfer of the duty to repair main roads from the parish to the States. There was no alteration in the nature or extent of such duty.

Breach of statutory duty

11. The first question for decision is whether a failure by the Committee to repair the highway in accordance with its duty under art. 1(1) of the 1914 Law gives rise to a private cause of action on the part of an individual who has suffered damage as a result. Mr. Benest argues that, for the same reason as applied in England and elsewhere in the Commonwealth, there is no such cause of action. Mr. Michel, before the Master, argued that, although in matters of tort Jersey law tended to follow English law, there was no reason to do so in this case, particularly as almost all jurisdictions had now reversed the old position by statute and had included a private cause of action for non-repair of the highway.

12. The principles applicable in establishing whether breach of a statutory duty gives rise to a private cause of action were authoritatively stated by Lord Browne-Wilkinson in *X (Minors)* v. *Bedfordshire C.C.* (7) where he said the following ([1995] 3 All E.R. at 364):

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd* [1949] 1 All E.R. 544, [1949] A.C. 398 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All E.R. 456, [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v. Lord Wimborne* [1898] 2 Q.B. 402, [1895–9] All E.R. Rep. 147.
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> Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it has been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action

vested in those adversely affected by the breach of the statutory provisions, ie bookmarkers and prisoners: see *Cutler v Wandsworth Stadium Ltd.* and *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All E.R. 733, [1992] 1 A.C. 58. The cases where a private right of action for breach of statutory duty has been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."

13. The specific position in relation to non-repair of the highway was referred to by Lord Hoffmann in *Stovin* v. *Wise* (5) [1996] 3 All E.R. at 826):

> "…This can be seen if one looks at cases in which a public authority has been under a statutory or common law *duty* to provide a service or other benefit for the public or a section of the public. In such cases there is no discretion but the courts have nevertheless not been willing to hold that a member of the public who has suffered a loss because the service was not provided to him should necessarily have a cause of action, either for breach of statutory duty or for negligence at common law. There are many instances of this principle being applied to statutory duties, but perhaps the most relevant example of the dissociation between public duty and a liability to pay compensation for breach of that duty was the ancient common law duty to repair the highway. The common law imposed this financial burden upon the inhabitants of the parish. But it saw no need to impose upon them the additional burden of paying compensation to users of the highway who suffered injury because the highway surveyor had failed to repair. The duty could be enforced only by indictment. This rule continued to apply when the duty to maintain was transferred by statute to highway authorities and was only abolished by s.1 of the Highways (Miscellaneous Provisions) Act 1961. Likewise in *Hill v Chief Constable of West Yorkshire* [1988] 2 All E.R. 238, [1989] A.C. 53 it was held that the public duty of the police to catch criminals did not give rise to a duty to a member of the public who was injured because the police had negligently failed to catch one. The decision was mainly based upon the large element of discretion which the police necessarily have in conducting their operations, but the judgment excludes liability even in cases in which the alleged breach of duty would constitute public law irrationality.
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> In terms of public finance, this is a perfectly reasonable attitude. It is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss. Apart from cases of reliance, which I shall consider later, the same loss would have been suffered if the service had not been provided in the first place. To require payment of compensation increases the burden on public funds. Before imposing such an additional burden, the courts should be satisfied that this is what Parliament intended."

14. In my judgment there is no private cause of action for breach of the statutory duty by the States (or for that matter the parishes) to repair the highway. I would summarize my reasons as follows:

> (a) I can discern no intention on the part of the legislature that this should be so. The duty to repair would seem to be a typical example of the type of duty envisaged by Lord Browne-Wilkinson in the passage referred to above,

namely one which, although in fact providing protection to those individuals particularly affected, is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. In this case, the relevant provision of the Law is intended to deal generally with the provision of main roads for the benefit of the public at large so as to enable them to get from one place to another and aid the general commerce and life of the Island community. Its purpose was not to provide to individual members of the public a right to sue for a failure of repair.

(b) The researches of counsel have failed to find a single case in Jersey where there has been held to be such a cause of action. The States must be assumed to have been aware in 1941 (when amending the 1914 Law to transfer responsibility for main roads from the parishes to the States) of the long-established rule of common law (which appears to have been followed generally throughout the Commonwealth) that there was no such cause of action. One would therefore have expected provision for such a cause of action should the States have wished to create one.

(c) The reasons summarized by Lord Hoffmann which underlay the exemption from liability in England would seem to be equally applicable in Jersey. There is nothing distinctive about Jersey in this regard. In particular, it is one thing to provide a service at public expense; it is another to require the public to pay compensation when a failure to provide the service has resulted in loss. To require payment of compensation increases the burden on public funds. Before doing so the court should be satisfied that this is what the legislature intended.

(d) Lord Browne-Wilkinson explained that one of the indicators as to whether there was a private cause of action for breach of statutory duty was whether any other remedy was provided by the statute. In the 1771 Code there was provision for the Constable and Centeniers to bring the inspectors of a *vingtaine* before the Royal Court if the inspectors had failed to carry out their duty. There was therefore a mechanism for enforcing performance of the duty to repair by the parishes. It is true that the 1941 amendment to the 1914 Law provides nothing similar in respect of the obligation of the States to maintain main roads but, as described earlier, it is clear that the amendment merely transferred the existing duty from the parishes to the States; it did not alter the nature or extent of that duty.

(e) The duty to repair is expressed in unqualified terms. It is an absolute duty to maintain. The position was summarized by Lord Hoffmann in *Goodes* v. *East Sussex C.C.* (2) ([2000] 1 W.L.R. at 1361):

> "The duty is not absolute in the sense that the road has to be perfect. As Diplock L.J. explained in the later case of *Burnside v. Emerson* [1968] 1 W.L.R. 1490, 1497, the duty is to put the road:
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> > '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.'
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> But the highway authority has an absolute duty to maintain the highway in a state which satisfies this objective standard. It must levy

> whatever rate is necessary for the purpose. If the condition of the highway falls short of the statutory standard, the highway authority is in breach of duty. It is no answer that it took all reasonable care or that its resources were insufficient."

It follows that to impose a liability for breach of statutory duty *simpliciter* would impose liability even where the Committee had taken all reasonable care to repair the highway or even where it had not been able to do so because of financial constraints. These factors point against the existence of a private cause of action.

(f) In essence I see no reason to reach a different conclusion in relation to Jersey from that reached in England and most Commonwealth jurisdictions, namely that there is no liability for breach of statutory duty arising from the non-performance of the duty to repair the highway. I appreciate that times have moved on and that it may be argued that an exemption from liability of this nature is unsatisfactory in the present day. I will consider that aspect when turning to consider whether the court should find a common law duty of care.

Common law duty of care

15. Having decided that there is no private cause of action for breach of statutory duty *simpliciter*, the normal consequence would be that the court should also decline to find a parallel common law duty of care on the part of the Committee. As Lord Hoffmann said in *Stovin* (5) ([1996] 3 All E.R. at 827):

> "The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the act is not to create a statutory liable to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care."

16. Mr. Michel argued before the Master that the court should follow the approach of the Guernsey Court of Appeal in *Morton* v. *Paint* (5) in developing the common law, notwithstanding that such development had only been achieved in England by means of statutory reform (in that case the Occupier's Liability Act 1957). *Morton* has been followed in Jersey in the case of *Knight* v. *Thackeray's Ltd.* (3).

17. In my judgment the circumstances in *Morton* were very different to those in the present case. I do not think that it is open to the court to develop the law to find a common law duty of care owed by the Committee (and the parishes) to individual road users. My reasons are as follows:

(a) *Morton* was concerned with rights between private individuals. It was not concerned with the liability of a public authority for failure to fulfil a statutory duty. The courts have always been active in developing the law of tort in relation to duties owed by one individual to another; they have been slower to become involved in the obligations of public authorities.

(b) The court in *Morton* was much comforted by the fact that, in certain parts of Australia, the courts had developed the common law so as to abolish the distinction between the duties owed by occupiers to licensees and invitees (the point at issue in that case) notwithstanding that in England this had only been achieved by statute. Furthermore, it drew comfort from the fact that the courts in England had developed the common law in relation to the duty owed by occupiers to trespassers. If the courts could develop the law in relation to the duty owed to trespassers, why not the duty owed to licensees or invitees? The position is very different here. So far as the court is aware, England and all the Commonwealth jurisdictions have achieved reform of the exemption of highway authorities from liability for non-repair by statute rather than by judicial decision.

(c) The exemption from liability for non-repair was abolished in England as long ago as 1961. Since then the States have amended the 1914 Law on four occasions, namely 1971, 1972, 1973 and 1995. Yet they have made no amendment in this respect. As Lord Lowry said in *C* v. *D.D.P.* (1) (in a passage relied upon by the Guernsey Court of Appeal in *Morton*) ([1996] 1 A.C. at 28): "Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated whilst leaving the difficulty untouched."

(d) The issue is clearly one which may have significant resource implications for the States (in respect of main roads) and the parishes (in respect of minor roads). In the event of liability for non-repair, they may in future spend money on repairs which they have hitherto spent in other areas. The allocation of financial resources is not a matter suitable for judicial decision. Reform of such matters should be dealt with by the legislature, which can consider all the implications and consult widely. Some of the issues which may arise in considering whether to remove the exemption for non-repair were summarized by the Law Reform Commission of British Colombia (*Report of the Law Reform Commission of British Columbia: CIVIL RIGHTS: PART V, The Tort Liability of Public Bodies*, LRC 34, at 21–22 (1977)):

> "The Commission has concluded, however, that the policy of the rule itself requires re-examination. That policy seems originally to have been dictated by the fact that highway authorities were notoriously underfunded. With insufficient revenue even to keep the highways in good repair, how, it was asked, could the authorities attempt to meet the tremendous barrage of actions which might otherwise be opened to the large multitude of travellers who use their highways?
>
> Is this justification for the immunity still acceptable? While municipal governments are certainly wealthier than their nineteenth century predecessors, their resources are not limitless. An argument can still be made that while the effect of abrogating the immunity would be in the first instance to impose liability upon the municipalities, the final result would be a heavier burden of taxation for the citizens.
> ….
>
> We have no doubt that enactment of our recommendations will increase the economic burden on the municipalities and may (we put it no higher) result in higher municipal taxes. We cannot persuade

> ourselves, however, that this result is anything other than sensible and fair.
>
> ….
>
> At present the community no doubt benefits from the lower taxes payable by reason of the immunity and the fact that the full burden falls upon the injured plaintiff. In our opinion, this is simply unfair. To shift the risk of loss from the injured party to the community seems to us, then, both eminently fair and as a matter of distributive justice, likely to be productive of social benefit in the form of improved highway maintenance."

These passages all go to show that this is a topic more suitable for reform by legislative action than by judicial decision. No doubt, that is why the statutory route has been followed in other jurisdictions.

(e) The solution adopted in England and a number of other Commonwealth jurisdictions does not simply impose a common law duty of care to maintain the highway. It imposes an absolute obligation but then provides for a statutory defence. If the court were to develop the law as suggested by Mr. Michel, it could only impose the former solution. That would appear in many respects to be a less satisfactory solution from a plaintiff's point of view than the statutory solution adopted in England and elsewhere. As Lord Clyde said in *Goodes* (2) ([2000] 1 W.L.R. at 1368):

> "My Lords, I have no difficulty in holding that section 41 of the Highways Act 1980 imposes an absolute duty on the highway authority. There is no hardship in so holding since the section has to be taken along with section 58 which provides a defence that reasonable care has been taken by the authority. The scheme of the provisions is in its broad effect that the authority should be liable for damage caused by a failure to take reasonable care to maintain a highway, *but the injured party is not required to prove the failure to take reasonable care.* It is for the authority to prove that it has exercised all reasonable care. Such a reversal of the onus which would have been imposed on the plaintiff in an action for damages at common law is justifiable by the consideration that the plaintiff is not likely to know or be able readily to ascertain in what respects the authority has failed in its duty. All that the plaintiff will know is that there is a defect in the road which has caused him injury and it is reasonable to impose on the authority the burden of explaining that they had exercised all reasonable care and should not be found liable." [Emphasis supplied].

That is a further argument for leaving reform to the legislature rather than trying to proceed by development of the common law.

18. For these reasons, I find that there is no common law duty of care and the court should not develop the law to impose one. It follows that the plaintiff's Order of Justice discloses no reasonable cause of action and should be struck out.

19. I should add that, as experience has shown in other jurisdictions, this may not be regarded as a satisfactory outcome in current times. Individuals who suffer damage through a failure by the highway authority to repair the highway should be entitled to recompense subject to appropriate safeguards for the public or parochial purse. I would therefore invite the relevant Committee to consider introducing appropriate legislation. It might well find it helpful to refer the matter to the Jersey Law Commission in the first instance. The Commission will no doubt be able to review the solutions adopted by various jurisdictions throughout the Commonwealth with a view to recommending that which is most suitable for Jersey.

Appeal allowed.