

GLEAM



Green Lanes Environmental Action Movement

Patron: HRH The Duke of Edinburgh KG KT

www.gleam-uk.org

**A NEWSLETTER for those interested in protecting ancient ways
from the ravages of use by motorised recreational vehicles.
AUTUMN 2009**

In the Case of Historic Rights v Public Nuisance

*In modern Rights of Way law there are still loopholes which allow ways to be reclassified as BOATs. GLEAM Committee Member **Andy Dunlop** explains how an ancient law can come to the rescue.*

Q. Why is riding a motorbike on a green lane like making obscene phone calls?

A. In the same way that helping a homicidal maniac escape from Broadmoor is like lying about the death of Napoleon, or like digging up a church wall.

Puzzled? Then read on!

Despite all those routes saved by the NERC Act, a number still continue to go to Byway Open to All Traffic (BOAT) status, purely on ancient evidence. They may be exempted from the intended protection because they are on the List of Streets but not on the Definitive Map, or by the timing of the request for their addition to the Map. Even worse, where ancient evidence does not support the status of BOAT, the motorised lobby may still to an extent rely on modern user to prove their claim. Hence unsuitable routes are still being reclassified as BOATs.

When Roads Used as Public Paths (RUPPs) existed, a number of them fell to BOAT status based only on modern use. Eventually this was successfully dealt with at the Berney Marsh case in Norfolk, over an RSPB Site of Special Scientific Interest. Here this application was countered by the claim that, because being a RUPP proved the route to be a bridleway at most, any motorised user would, according to statute, be illegal. And you cannot claim a legal right by acting illegally. This success was widely reported, and a large number of RUPP to BOAT claims then failed. Mr Tim Stevens of the Trail Riders Fellowship, upset by their losses, challenged this in the High Court over a route at Norton Malreward in Somerset. It was indeed a “Mal reward”, as the TRF lost their argument. Even more routes were thus protected.

Following this, a landowning company started trying to charge people for driving over a Common that it owned to get to their homes. It was argued that the home owners could not claim a right to do this and needed permission, which would be withheld unless a large sum was handed over. The House of Lords, in the 2004 case of *Bakewell Management Ltd v Brandwood*, decided that the landowner was in the wrong, and that you could, to a limited extent, claim a right over land based on illegal use. This again opened the gates for the motorists to claim modern user rights over footpaths, bridleways and Commons.

Although the Bakewell loophole was largely closed by the NERC Act, a new argument was required – and one has now successfully been put into use. Strangely, it is probably the oldest one there is, and also one that has been previously and improperly rejected by Authority because of a single misplaced word.

Over the years of dealing with claims for BOATs, the Planning Inspectorate and County Councils often heard arguments that a BOAT classification of a route was incompatible with the historic and legally protected usage as a footpath or bridleway. The County or Inspector would confirm rights to motorised users based on an assumption of dedication, because the route already existed and some motorists had

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Contd from page 1.....

claimed to have driven over it. They would pay no heed to the objector who said the motorists damaged the route, made it impassable, prevented others from using it or frightened non-motorised users. Indeed, they even threatened objectors with costs should they dare to continue their objection. Their response was normally along the lines of:

“The issues of nuisance, suitability, health, safety, nature conservation and environmental matters cannot be considered when deciding what public rights exist over a route.”

WRONG!

Let's try that again, but this time move the word “public” from the end of the sentence to the front of “nuisance”. Driving a car on a public bridleway or breaking a Traffic Regulation Order may get the offender a fixed penalty ticket, but it can also create a right to drive over the way. Do the same and commit a “public nuisance”, though, and you get the possibility of life in prison and an unlimited fine. But more important, it cannot create a right to pass and repass.

Public nuisance is one of our oldest laws. It is unwritten, but the concept has evolved when tested by the Courts over the centuries. Ironically, it was the *Bakewell* case that brought it to attention. The accepted conceptual definition nowadays is:

"A person is guilty of a public nuisance who

- a. does an act not warranted by law, or
- b. omits to discharge a legal duty,

if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

*Archbold. (2005). *Archbold: Criminal Pleading, Evidence and Practice*.

So, how does that help?

The concept of nuisance dates back to twelfth century English Common Law. It began as a criminal writ, belonging only to the Crown. It was used in cases that involved encroachments upon the King's land or the blocking of public roads or waterways. The King sought to punish these criminal infringements, commonly known as “purprestures”, through criminal proceedings. Over time, activities prosecuted as public nuisances included everything from embezzling public funds to having a tiger pen next to a highway; from assisting a homicidal maniac to escape to placing a mutilated corpse on a doorstep; and from selling rotten meat to “subdividing houses to the point where they become ‘over-pestered’ with the poor”. As these examples demonstrate, early authority to commence public nuisance actions was derived from the sovereign's “police power”.

The term “nuisance” is traditionally used in three ways:

1. to describe an activity or condition that is harmful or annoying to others (e.g. indecent conduct, a rave, a rubbish heap or a smoking chimney);
2. to describe the harm caused by the before-mentioned activity or condition (e.g. loud noises or objectionable odours);
3. to describe a legal liability that arises from the combination of the two.

The law of nuisance was created to stop bothersome activities or conduct when they unreasonably interfered with the rights of others.

This then takes us back to our original objections to motorised use of some existing unsurfaced public rights of way which are being claimed by user evidence. This involves public ways shown on the List of Streets, where it has not yet been decided if public vehicular rights exist.

In the Derbyshire Silly Dale bridleway enquiry (<http://www.gleam-uk.org/contentious-issues/public-nuisance-destroys-boat-arguments/>), in which I was involved, we faced a claim for BOAT status on a route shown on the List of Streets but not on the Definitive Map, which was set out as a bridleway in the Inclosure Award of 1812/1814. . The motorists, represented by Mr Tim Stevens, asserted *Contd.....*

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modern user dedication, claiming up to 30 years use. We countered by complaining of public nuisance. Our evidence involved hazardous encounter in narrow places, serious rutting, prevention of use by horses, prevention of use by schoolchildren on nature walks, disturbance from noise, danger to driven stock, damage to walls and complaints to the highway authority. The Inspector found for us, and the key part of the route became a Restricted Byway. The TRF have not appealed to the Courts, and therefore appear to accept that they have been a public nuisance.

In forthcoming cases we have even more evidence of antisocial behaviour causing a public nuisance to legitimate users. This again includes surface and enclosure damage, frightening encounters preventing usage, and actual and threatened violence. We will keep you posted.

Oh, and if you are still wondering:

Riding a motorbike on a green lane has been held to be a public nuisance, along with making obscene phone calls, helping a homicidal maniac escape from Broadmoor, and also lying about the death of Napoleon (to affect share prices). Digging up a church wall? Yes, that is a nuisance too. And you thought the law was boring!

Some material for the above was sourced from the Planning Inspectorate, "Nuisance Law" and the Cambridge Law Journal. All are freely available via the Internet.

Before and After



Members of the Mid & West Berks Local Access Forum, including well-known members of GLEAM, inspecting a 'bomb crater' on a BOAT at Boxford, Berks.



The same 'bomb crater' after repair by West Berkshire Council. The off-roader damage to the whole BOAT cost £23,000 to repair (500 yards of major repair, 400 yards of lesser repair), all at Council Taxpayers' expense.

New Members for GLPG in Wales

The Green Lanes Protection Group (GLPG), founded by GLEAM in 2005, has now grown to include 21 like-minded organisations with the addition of two new members in Wales. From its early days GLPG has had the membership of the Campaign for Rural Wales, the Country Land and Business Association (CLA) and the Campaign for National Parks, and the support of the Ramblers Association, all of whom are active in Wales. Now our Welsh support has expanded, and we have welcomed as new members the Cambrian Mountains Society and the North Wales Alliance to Influence the Management of Off-Roaders (NWAIMOR). NWAIMOR includes in its own membership the Snowdonia Society. CMS and NWAIMOR are fighting their own campaigns to control off-roading in Mid and North Wales respectively, and we hope to be of assistance to them.

David Gardiner

The NERC Act and Winchester March Together

by Graham Plumbe (*Hon Adviser to GLEAM; Vice Chairman GLPG*)

The shock waves of Winchester (see the previous two issues of the GLEAM newsletter) turned to ripples and these continue as some authorities seem to find the judgment - described by leading counsel as of outstanding clarity - difficult to follow. At the time of writing, **Dorset** County Council has several urgent decisions to make, including one determination and two orders that need to be reviewed, and three imminent directions from the Secretary of State. All six turn on the fact that the application map was to the wrong scale. Other undecided cases are to follow. The only decision made recently was not to make a decision, and the Council seems wholly unable to state the principles which it will have to apply. That is in spite of clear guidance from Defra, from a recent inspector's decision in Buckinghamshire, from GLPG, from the Ordnance Survey and even from their own leading counsel, that the maps are not compliant and do not qualify for exemption.

The **Buckinghamshire** decision was at Drayton Parslow where the same point - a map to the wrong scale - arose in a claim from the Chairman of the TRF. GLPG made representations to the public hearing. The inspector and Buckinghamshire County Council (BCC) both started with the belief that the point was *de minimis* and therefore outside the judgment. BCC changed its mind at the hearing. A second point raised by GLPG was that the application did not include a list of documentary evidence as required by the regulations and was therefore not in the prescribed form. The inspector decided both points in our favour. The BOAT order is now being modified to restricted byway and four other claims are expected to be killed in the same way. The decision was relayed to Defra as it bolstered our argument that previous advice to authorities on the point should be reversed. Defra obligingly did so and it is this which now faces Dorset County Council.

The case brought by LARA against **Yorkshire Dales National Park Authority (NPA)** as to four Traffic Regulation Orders was unfortunately lost as to the application of technical procedures. It remains to be seen whether and how the NPA will restore the orders. Meanwhile, three of the four routes have been knocked out by Winchester. The NPA has confirmed this and driving on them is illegal. The off-roaders do not seem to understand this and problems lie ahead.

In **Derbyshire**, the County Council made two bridleway orders on three limbs of a route at Foolow. The inspector found that vehicular rights based on user evidence had been shown but that Winchester knocked out one of the limbs because of lack of copy documentary evidence. The other two would be BOATs. Objections by GLEAM members led to a second inquiry when it was argued that the off-road use had amounted to public nuisance which is illegal and which destroys deemed dedication. The argument succeeded on all three limbs and the original bridleway orders are confirmed. The TRF also pleaded exemption through 5 years of main use by the public in vehicles, but this failed as well.

In **Nottinghamshire** the County Council continued its argument that exemption would apply when the Council had made an application to itself before the cut-off date. For the third time the inspector supported GLPG's argument as to the application of Winchester, for which endorsement had been obtained from counsel and from Defra. He found that such an application was not valid and that restricted byway status applies. One order decision is outstanding. For other cases not yet determined, the Council has decided to throw in the towel.

In Cumbria (**Lake District National Park Authority**), the inspector found against us when deciding whether vehicular rights were dedicated on Walna Scar through motorbike hill climbing in the 1920s. If such rights were established by 1930 they escape NERCA. That can be avoided however if pre-existing vehicular rights derived from horse and cart use can be shown. GLPG thinks that the inspector has missed the point of some evidence, particularly regarding quarry traffic, and has made errors of law regarding dedication. The proposed modification to BOAT is being resisted.

One quirk in the NERC Act results in the fact that when a RUPP is reclassified under the repealed s56 (1981 Act), the inspector has no power to order a restricted byway even though vehicular rights have been extinguished. This arose in **Norfolk** where two BOATs were ordered and potential vehicular rights were proved. The inspector decided that he had no power to modify to Restricted Byway and so removed the routes from the order altogether. It is assumed that when the order is finalised, the two ways will automatically be reclassified as Restricted Byways under the CROW Act.

New Improved Version of the GLEAM Website

The GLEAM website, which has been established and enlarged over the last three years, has undergone a major change. A greatly expanded Version 2 is now up and running. Members are urged to visit it at www.gleam-uk.org and to put it on their list of favourites. It is regularly updated, and is fast becoming a standard source of reference for Rights of Way professionals and for all those seeking guidance in this complex area of the law.

From the start GLEAM has shared its website with the Green Lanes Protection Group (GLPG), a much larger informal alliance of 21 like-minded organisations, founded by GLEAM in 2005.

While the law may be complex, the website is written in terms which are understandable by the layman. If you meet anything that you do not understand, there are many internal or external links which will take you to an enlargement and explanation of what it is that you are reading about. Any link will appear green in the text. When the cursor is pointed at it, it turns red. Clicking on it takes you to the destination of the link, where you can read more about it. To return to where you were before, click on the back button (left return arrow) at the top left-hand corner of the screen.

At the top of every page is a Search facility. By entering any topic, phrase or word in the space and clicking on 'Search', a list will appear of every page on the website on which that topic, phrase or word occurs. Clicking on an item on this list will take you to that place.

The website has eight main sections, for which there are tabs at the top of every page, thus:

Home

This page gives a brief introduction to GLEAM, with its history and achievements.

Our Aims

This page sets out GLEAM's aims and objectives.

Explanation of Terms

This page lists 17 questions relevant to Rights of Way, where anyone who meets a term that he does not fully understand can find an explanation. Clicking on any one of these questions will open up an explanation of that term. Clicking a second time will close the explanation.

Contentious Issues

This page sets out a list of (currently) 15 reports on contentious issues in which GLEAM or GLPG have been involved. Each report is dated, with the most recent at the top. Click on an item on the list to read that report. The current 15 items on the list are:

- Yorkshire Dales National Park TROs quashed
- Applications with no identified evidence/list/date/signature
- Scale of Application Maps
- Public Nuisance destroys BOAT arguments
- Pre 1930 rights – claims in the Lake District
- The Winchester Case
- Authority's application to itself
- Enforcement difficulties
- Inspectors' Practices
- Interpretation of legal points individually by inspectors
- The 5-year mpv Main Lawful User Test
- Inspector Powers
- Copies of documentary evidence
- Unfinished earlier claims
- BOAT Cul-de-Sacs

Not surprisingly, these reports are written subjectively from GLEAM/GLPG's point of view.

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Guidance

This page sets out a list of (currently) 6 guidance papers on various topics. Again, each paper is dated, with the most recent at the top. Click on an item on the list to read that paper. They are all totally objective, and may reflect Defra's or Leading Counsel's Opinion. The current 6 papers on the list are:

- The NERC Act in Practice
- User Evidence
- Basic Guide to Claim Fighting
- Enforcement
- Police Reform Act 2002
- Defra's Guidance Version 5

Newsletters

This page lists back numbers of all GLEAM Newsletters since Spring 2001 (published Spring and Autumn). Click on a particular date to download that Newsletter. It is GLEAM policy not to put new issues up on the website for two months after publication. This is to give members, who will have received hard copy of their Newsletter, an advantage over the general public, who will be able to access it two months later on the website.

Contact Us

This page sets out ways by which members of the public may contact GLEAM, by e-mail, by post or by telephone. It also invites them to become members, sets out the subscription rates and provides a Joining Form.

Links

This final page sets out the names of all our fellow-members of GLPG, plus a few other organisations, together with their web addresses.

The two most complicated pages are 'Contentious Issues' and 'Guidance'. At the top of every report or paper in these pages are what are called 'Breadcrumbs'. For example, if you are looking at Police Reform Act 2002, it will show **Home > Guidance > Police Reform Act 2002**. This will show you exactly where you are in the website. The first two of these page titles will be in green as they can act as links. Clicking on one of them will take you back to that page.

We are most grateful to GLEAM's Webmaster, Nick Marr, who has done a superb job in creating this website.

David Gardiner



**GLEAM aims to protect
public paths from wanton and
illegal damage.**

**If you would like more
information or wish to
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