

Highway Verges – The Green, Green Grass of ...



***Harrington
Driver
Training
Services***

This paper concerns roadside verges, a topic that may not be as popular or as receptive by some readers as opposed to other more interesting driving topics. But grass verges play an important role in providing extra space for pedestrians, equestrians and wildlife. Road verges also provide a vital refuge for many bees, butterflies, birds, bats and bugs and the procession of colour throughout the year - cowslips, bluebells, daisies, orchids, foxgloves and cow parsley keep us in touch with the changing seasons and provide us with a sense of place. Included in this paper are a number of court findings detailing the legal position of grass verges and parking on verges can be problematic if done on a bend etc. Finally, a conclusion is given.

Highway Verges-The Green, Green Grass of ...

Tom Harrington LL B F Inst. MTD (April 2020)

From the outset, it's important to acknowledge that a sizable part of this paper was gleaned from the Open Spaces Society (OSS) website which is an organization that protects and defends the open spaces people live in in England and Wales since 1865. ¹ When driving, have you ever considered why there are grass verges on both sides of the highway? Why are they there? What's their purpose, their origin, who owns them and what the law says about them? There are nearly half a million kilometers of rural verge in the UK. This is equal to half the remaining flower-rich grassland and meadows. For the 23 million people commuting to work by road every day, road verges can be their only daily contact with nature. The procession of colour through the year - cowslips, bluebells, daisies, orchids, foxgloves and cow parsley keep us in touch with the changing seasons and provide us with a sense of place: orchids on the southern chalk downs, wood crane's-bill in the Yorkshire Dales and melancholy thistle in Scotland. Road verges are also a vital refuge for many bees, butterflies, birds, bats and bugs – a good verge will supply a diverse source of nectar and pollen from the first celandines in February to the last Devil's-bit in September. ² But you may well ask - what has all of this got to do with driving and road safety? Running along many of the highways of Ireland, England, Scotland and Wales there are strips of land open to the public, running between the metalled ³ road and the fences enclosing the adjoining land. Such strips are often irregular in character and sometimes of considerable width. A reason for their origin is to be found in the judgment of Abbot, LCJ, in *Steel v Prickett (1819)* ⁴ where he used these words:

“In remote and ancient times when roads were frequently made through unenclosed lands, and when the same labour and expense was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, when the road was out of repair, might pass along by the side of the road.

¹ oss.org.uk

² *Plantlife. The Good Verge Guide.* plantlife.org.uk

³ Metalled roads are called all-weather roads because they are made of concrete, asphalt and other materials to sustain vehicular traffic all-year round. Whereas unmetalled roads can be difficult to use during wet weather.

⁴ 2 Stark 463 NP

This right on the part of the public was attended with this consequence that although the parishioners were bound to repair the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road ... hence it followed as a natural consequence that when a person enclosed his land from the road he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required ... the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair. When an owner has left such a strip alongside the road, with the intention that the public should be able to use it for passage, and the public has so used it, there is a presumption that he intended to dedicate the strip as part of the highway, and such strips must in many cases be deemed to have been so dedicated. In that event, the strip alongside the road is just as much part of the 'highway' as the metalled road itself”.

Sometimes the roadside strips belong, not to the owner of the adjoining property, but to the lord of the manor, and are part of the manorial waste. In such cases they may or may not be subject to rights of common, but in either event they may be held to have been dedicated to public passage, in which case also they are part of the highway. *See East v Berkshire County Council (1911)*⁵ and *Evelyn v Mirrielees (1900)*.⁶ These ‘roadside strips’ are now more commonly referred to as ‘roadside verges’. It is important that strips of roadside verge should be safeguarded from any illegal attempts to enclose them for the following reasons. In cases where no footway has been constructed alongside the metalled road, the verge enables pedestrians to proceed with greater safety than they would on the metalled road. Verges often provide a soft turf surface of value to equestrians who would otherwise be limited to using a metalled road which is often unsafe and sometimes of a character unsuitable for horses. With the loss of most of our traditional meadow land through agricultural change, our largest nature reserve is now represented by roadside verges, an important habitat which extends to perhaps half a million acres. They are a vital reservoir of wildlife, especially of wild flowers. If the enclosure of roadside verges is permitted, any necessary widening of the metalled highway will be more costly by reason of the consequent compensation to the owners of the adjoining lands, and perhaps some much-needed road improvement may thereby be prevented.

⁵ 76 JP 35

⁶ 17 TLR 152, CA; 65 JP 131n).

The increased popularity of walking and riding and the increasing need for wide traffic-routes make it especially important that the public should not lose the advantages to be obtained from keeping such strips free from any illegal enclosure.

Ownership of the Soil.

The general principle of law relating to the ownership of the soil of such strips was stated by Gibbs CJ in *Grose v West (1816)*⁷ in the following words:

“Prima facie, the presumption is that a strip of land lying between a highway and the adjoining close belongs to the owner of the close; as the presumption also is that the highway itself to the centre line of the road does. But the presumption is to be confined to that extent; for if the narrow strip be contiguous to or communicate with open commons, or larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them”.

It is to be borne in mind that questions of who own the soil of the roadside verge, and whether it is part of the highway, are quite distinct. Regardless of who owns the soil, the public may have a right of passage over it, i.e. it may be part of the highway. Consequently, if a public right of passage over such a verge is claimed, it is no answer for the adjoining owner to say ‘*the land belongs to me*’ since even if it does, it may still be part of the highway. Where a highway authority acquires the site of the road by purchase, but has only metalled the centre, it has the same legal interest in the verges as any other freeholder has in his own land. It owns the surface and all the soil beneath. Roads taken over by highway authorities’ vest in them together with the verges. This results in the appropriate authority becoming the fee-simple estate owners in respect of the surface of the road and so much of the subsoil as is essential to the maintenance of the highway for the public use as in *Tithe Redemption Commission v Runcorn Urban District Council [1954]*⁸

⁷ 7 Taunt 39

⁸ 1 All ER 653.

Width of Highway.

The general rule of law relating to the extent of the space subject to the public right of passage was stated in *Regina v United Kingdom Electric Telegraph Co Ltd. (1862)*⁹ by Martin B, as follows:

“In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way prima facie, 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 a highway, and are not confined to the part which may be metalled ... a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law . . . “

This presumption that a highway extends over the whole space between fences may however be rebutted by proof of facts from which it may be inferred that the fences were not put up as boundaries of the highway; thus they may be part of the original boundary of a close of land through which the highway had been made. Or they may be the boundary between the enclosed land and a strip of manorial waste alongside the highway which has not been dedicated as part of it. Thus the presumption of dedication arising from the public user of greens along the side of a highway between the fences was rebutted in one instance by evidence of an entry in the court rolls of the manor that the greens were waste belonging to the manor, and of the greens being treated by the lord of the manor as his private property. *Friern Barnet UDC v Richardson (1898)*.¹⁰ The question as to the extent of the space subject to the public right of passage depends upon the evidence in each particular case as to the nature of the district, the width and level of the margins, the regularity of the lines of the fences and other relevant circumstances, *Countess of Belmore v Kent County Council [1901]*.¹¹

⁹ 26 JP 390

¹⁰ 62 JP 547 CA.

¹¹ 1 Ch 873.

Sometimes a road does not run between fences, but across open common or manorial waste; and in that case the presumption of dedication between fences does not apply, *Neeld v Hendon UDC (1899)*.¹² The cases cited above were considered in *Harvey v Truro Rural Council [1903]*¹³ by Joyce J who in his judgment said:

“In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, 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 entire of it as a highway, and are not confined to the part which may be metalled. All the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebuts that presumption ...”

It is an established maxim that ‘*once a highway, always a highway*’. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway, no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. Even if the highway authority had actually consented to any obstruction or encroachment upon the strip being part of the highway, such consent could not legalize that which was otherwise illegal... In *Attorney General v Beynon [1969]*¹⁴ the verge was of considerable width and irregular in shape. The highway authority claimed that the verge was part of the highway and that the keeping of vehicles there by the defendant was an obstruction of the highway.

Goff J said:

“It is clear that the mere fact that a road runs between fences, which of course include hedges, does not per se give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway, that is, to separate the adjoining closes from the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between

¹² 63 JP 724.

¹³ 2 Ch 638

¹⁴ 2 WLR 1447

the fences and is not confined to such part as may have been made up. It seems clear to me however as the principle has developed, that one is to decide the preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary”.

It was held that the presumption of law which arose had not been rebutted by the defendant’s alleged acts of ownership and the verge was held to be part of the highway and the keeping of vehicles there by the defendant to be an actionable obstruction. *In Vanderpant v Mayfair Hotel Co. [1930]*¹⁵ it was said:

“An encroachment on a highway is by common law a public nuisance. It is no defense that the obstruction is made on a part of the highway which is not habitually or ordinarily used for passage. It is no defence that the obstruction is in other ways productive of public benefit, and however reasonable may be the use of a highway by an owner of adjoining premises the public right is a higher right than his and he must yield to the public right”.

Powers and Duties of Local Authorities.

Under *S71 (1) Highways Act 1980* it is the duty of a highway authority to provide in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway adequate grass or other margins as part of the highway in any case where they consider the provision of margins necessary or desirable for the safety or accommodation of ridden horses and driven livestock; and a highway authority may light a margin provided by them under this section. *Under S130 (1) Highways Act 1980* it is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it. Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it. it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste for which they are the highway authority.

¹⁵ 1 Ch. 138 at 152

If the council of a parish represent to a local highway authority ... (b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority, it is the duty of the local highway authority, unless satisfied that the representations are incorrect to take proceedings accordingly and they may do so in their own name. ***S96 Highways Act 1980*** authorizes the highway authority to plant trees in the highway verge but not to obstruct it. ***Under S96 (6)***, no tree, shrub, grass verge, guard or fence shall be planted, laid out or erected under this section, or, if planted, laid out or erected under this section, allowed to remain, in such a situation as to hinder the reasonable use of the highway by any person entitled to use it ...***S142 (1) Highways Act 1980***. The highway authority for a highway may by a licence granted under this section permit the occupier or the owner of any premises adjoining the highway to plant and maintain, or to retain and maintain, trees, shrubs, plants or grass in such part of the highway as may be specified in the licence. A highway authority may attach to any such licence such conditions as they consider necessary to ensure the safety and convenience of passengers in the highway and to prevent traffic [‘traffic’ includes pedestrians and animals], ***s329 Highways Act 1980***] therein being delayed, to prevent any nuisance or annoyance being caused to the owners or occupiers of other premises adjoining the highway. ***Town and Country Planning Act 1990***. Where planning permission is given under Part III of the act for the change of use from highway verge to private use, the highway right is not extinguished until the Secretary of State for Transport authorizes the stopping-up of the highway by an order under s247 of the Act. The order is made to enable the ‘development’ to be carried out. Where the change of use takes place before the highway right is extinguished, the highway right can only be stopped up by an order made by a magistrates’ court. (***S116 & 117 Highways Act 1980***.)

Local Acts of Parliament

Some local authorities have their own private acts that give them powers to control or manage roadside verges and restrict the right of passage by certain categories of user. Ask the legal department of your county authority if such an act exists for your area. The legal remedies available to local authorities are described in ***Rights of Way – A Guide to Law and Practice (John Riddall and John Trevelyan, 4th edition, 2007)***. A road verge is a strip of grass or plants or sometimes trees located between a road and a footpath. Verges are known by various names, including border, boundary, perimeter, skirt, shoulder, margin, wayside etc. The land is often public property, while maintenance is usually a council or municipal responsibility.

Some authorities however, require that adjacent property owners maintain their respective verge areas as well as adjunct footpaths or sidewalks. Benefits include visual aesthetics, increased safety and comfort of footpath user's protection from spray from passing vehicles, a space for benches, bus shelters, street light and other public amenities. It is also part of sustainability for water conservation and may provide a useful wildlife habitat. Also, snow that has been removed off the street in colder climates may be stored on the verges.

Motorways

When asked about their attitude to planting wild flowers in grassed areas along motorways, seven (Bedfordshire, Derbyshire, Leicestershire, Nottinghamshire, Wiltshire, Herefordshire, Worcestershire, South Yorkshire) of the 29 authorities visited were sympathetic to the idea. And a further eight were sympathetic with reservations about the practicality of any proposals. There were fears expressed by three quarters of the councils about drivers being distracted by the sight of wild plants, or travelers stopping on hard shoulders to view or pick them. On the other hand, a number of authorities thought that colourful plants would break the monotony of motorway driving and actually make driving safer. Also, that the people who picked plants mostly climbed over boundary fences or bridges to do so. It was suggested that planting sites should be selected where it was difficult for people outside of the motorway to gain access in this way.¹⁶ Overgrown hedges and road-side verges pose problems during the Spring and Summer months of the year. This is especially the case in small rural roads. In Ireland, Section 7 of the Roads Act 1993 places responsibility for the maintenance of road-side hedges on the owner/occupier of the adjoining lands. The responsibility for the maintenance of road-side verges rests with the local authority. But the season when this is permitted (including hedges) under the Wildlife Act is between the start of September and the end of February the following year. The only exception is if there are road safety implications. Generally, given the number of roads and funding issues, cutting verges has a low priority compared with other maintenance elements. And where work is carried out, priority is given to sightlines at junctions or obstructions such as road signs.¹⁷

¹⁶ J. M. Way, TD M.Sc., Ph D., (1976). *Grassed & Planted Areas by Motorways*. The Institute of Terrestrial Ecology. Huntingdon. PE 17 2 LS, Cambridgeshire.

¹⁷ *RSA Expert: Reporting overgrown hedges and verges to local councils save lives*. Independent, Sunday March 2020. independent.ie

Police Responsibility

In some areas of towns or cities, parking on grass verges or footpaths is a persistent problem, as it can reduce the verge to an unsightly state and cause damage to pavements. It can also obstruct the highway, preventing pedestrians and wheelchair users from accessing road and footways if there is no other pathway. Verge parking can also cause hazard motorists especially if the vehicle is parked on a bend, narrow road or junction and could prevent emergency vehicles from attending an incident. In other areas of the town or city, pavement parking can be an alternative to prohibiting or reducing on-street parking space. It can reduce road obstructions by allowing vehicles part mount pavements or verges and keep the road clear for traffic to flow. It is an offence to park a motor vehicle on a grass verge or pavement if it is causing an obstruction or there is a Traffic Regulation order (TRO) in place prohibiting it. If there is an obstruction on the road or pavement, it is the responsibility of the police to investigate and enforce compliance.

Conclusion

There are nearly half a million kilometers of rural verge in the UK. This is equal to half the remaining flower-rich grassland and meadows. For the 23 million people commuting to work by road every day, road verges can be their only daily contact with nature. The procession of colour through the year - cowslips, bluebells, daisies, orchids, foxgloves and cow parsley keep us in touch with the changing seasons and provide us with a sense of place: orchids on the southern chalk downs, wood crane's-bill in the Yorkshire Dales and melancholy thistle in Scotland. Road verges are also a vital refuge for many bees, butterflies, birds, bats and bugs – a good verge will supply a diverse source of nectar and pollen from the first celandines in February to the last Devil's-bit in September.¹⁸ But you may well ask - what has all of this got to do with driving and road safety? Running along many of the highways of Ireland, England, Scotland and Wales there are strips of land open to the public, running between the metalled¹⁹ road and the fences enclosing the adjoining land. Such strips are often irregular in character and sometimes of considerable width. These 'roadside strips' are now more commonly referred to as 'roadside verges'.

¹⁸ *Plantlife. The Good Verge Guide.* plantlife.org.uk

¹⁹ Metalled roads are called all-weather roads because they are made of concrete, asphalt and other materials to sustain vehicular traffic all-year round. Whereas unmetalled roads can be difficult to use during wet weather.

It is important that strips of roadside verge should be safeguarded from any illegal attempts to enclose them for the following reasons. In cases where no footway has been constructed alongside the metalled road, the verge enables pedestrians to proceed with greater safety than they would on the metalled road. Verges often provide a soft turf surface of value to equestrians who would otherwise be limited to using a metalled road which is often unsafe and sometimes of a character unsuitable for horses. Also, as previously mentioned, for the 23 million people commuting to work by road every day, road verges can be their only daily contact with nature. Finally, apart from being many drivers only contact with nature, and also very importantly, soft roadside verges offer a 'safety haven' and a welcome 'escape route' for drivers trying to avoid an incident or crash. So, treat your roadside verges with respect.