Complainant Response to Form 3 HA.80 Sec 130A Notice

Shanklin – Wroxall Old Railway Track Bridleway

"The council do not consider that the alleged obstruction is an obstruction of the bridleway. The council do not consider that alleged works interfere with the lawful users of the highways rights over the same."

A public highway obstruction complaint is one of interference with a human right, not a physical object, although a physical object may be the cause and removal of said object the only remedy. Thus, the issue goes specifically to the extent of horse rider rights attached to the term 'pass and repass' on a bridleway.

In the court of Appeal, the Law Lords have (DPP v Jones 1999) made frequent reference to the fact that 'highway' is a descriptive term for an area of land over which rights to pass and repass are physically exercised. The addition of the word 'public' acknowledges a right of the public to pass & repass along a defined line indefinitely, as opposed to a right to step upon a particular material that is laid, like a carpet, over a highway.

Surface material composition and the extent of public rights are irrelevant to the actual existence of a public highway. Thus, a 'public highway' is part abstract and part physical, with the permanent physical element, to which the maxim 'once a highway, always a highway' applies, lying beneath any man-made surface. Any man-made surface adopts the lawful highway status and allows the indefinite rights of passage to be exercised. The right to pass & repass therefore continues to subsist, in its' entirety and unchanged, with or without an added man-made surface. As a result of this, surfacing is a matter directly related to that which improves all lawful user convenience or causes deterioration of none.

All three working paces (walk/trot/canter) on horseback are 'normal' ways to ride a horse from A to B on an unsurfaced bridleway, but only two slow paces at most could be deemed possible on an unyielding artificial surface. Without statutory authority under highway law, justified by necessity, such an impediment constitutes public nuisance and a breach of human rights because it imposes a permanent speed limit that is outside the HA's power to impose.

"The alleged obstruction is a sub base layer only being part of an improvement and upgrade surfacing scheme for which planning consent was granted on May 9th 2014 (Ref no P/00359/14 – TCP/31823) that has been designed to facilitate the lawful highway use of the bridleway for all users."

The alleged obstruction is a base layer of concrete set on a sub base of reclaimed hardcore that has zero flexibility under the weight of a horse in any ground conditions. This will not change over time, neither is there such a thing as a compatible surface dressing that will negate these properties. The alleged obstruction was designed specifically for the purposes of a cycle track and is being financed by a cycling/tourism transport initiative that excludes funding for bridleway maintenance.

"In relation to any further works that are proposed on the highway, notwithstanding that no obstruction is considered present, the authority will further investigate the suitability for use by equestrians of a final surface dressing to be approved pursuant to condition 3 of that decision."

The planning consent to regularise unauthorised engineering works on a bridleway under Ref no P/00359/14 – TCP/31823 is ineffective as lawful authority to create an impediment of an existing public bridleway due to the HA's existing duty to assert and protect the rights of all lawful users. Thus, a planning consent is an irrelevant defence to the complaint against Isle of Wight Council Highway Authority for a breach of statutory duty in relation to a public highway.

Since the base layer of concrete is virtually impermeable, a final surface dressing capable of providing adequate flexibility for the unimpeded passage of horses would have no means of drainage. As a result of this, there would appear to be no option but to either pulverize the current base before applying a surface dressing to it or removing it altogether.

The Isle of Wight Council's Form 3 raises some potentially questionable presumptions:

1) That the horse rider's right of passage on bridleways is restricted to that of not having passage altogether prevented. Since all public rights of highway passage are identical, this is clearly incorrect.

or

2) That a surface that creates instant vertical braking is superior, or equally as convenient a material on which to canter horses, to that of a shock-absorbing surface. Extensive expert evidence to the contrary is known very widely in general and has been repeatedly supplied to Isle of Wight Council Highways officers.

or

3) That in order to exercise equal rights of passage to those enjoyed by other rightful users, horse riders must knowingly cause damage to themselves and their property with no cause of action against the Highway Authority other than by proving personal injury/losses after the event, for which their own past actions would amount to contributory negligence.

None of the above seems altogether compatible with exercise of unobstructed public passage rights or ECHR Article 8(2).

Matters of Fact Relating to the Allegation of Obstruction

The roadway that has been constructed to cover the soil of the bridleway imposes a speed range for horses of 3-6mph, although normal speed range for a ridden horse is 3-25mph. Normal speed range use on a horse had, for over 20 years, been applicable to this bridleway prior to the laying of the current surface material. This amounts to a 75% reduction of average top speed of travel on a horse, which is the equivalent of providing a road surface in a 30mph zone that will cause foreseeable damage to a car being driven at more than 7.5mph (or max 17.5mph on a motorway) which, on a permanent basis, would be unreasonable and constitute a breach of statutory duty. In reality, walking at 3mph is now the only safe option for horse riders on this bridleway to avoid the known but inescapable adverse effects of vertical braking forces caused by an unyielding cycle track surface that has been applied to the bridleway by Isle of Wight Council Highway Authority.

Prior to the works, horses could be walked, trotted and cantered along this bridleway, which constitutes normal lawful use in relation to passage along a bridleway on horseback. Post-works, horses can only be ridden in walk and infrequent slow trot over the same route due to the failure of the replacement man-made concrete surface to adequately mimic the properties of the highway as it had existed and continues to exist, in raw form, beneath the sub base.

Where, prior to a bridleway being recorded on the Definitive Map, public bridleway rights have been exercised for a long period over one particular man-made surface, it would be reasonable to suggest that any man-made replacement should be no less conducive to continued lawful passage than that enjoyed previously. This, I believe, is actually a legal requirement of 'improvement' to public rights of way.

Despite a rightful complaint being lodged with Isle of Wight Council in January 2013 regarding unannounced, unauthorised works being undertaken to remove and replace the man-made surface of the bridleway over which normal use of a horse was possible with a surface known not to be suited to horses, Isle of Wight Council failed to deal with the complaint, choosing instead to continue with the works in contempt of said complaint.

Article 8: Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 protects your rights in four areas: your private life, your family life, your home and correspondence. It is a qualified right, which means that your right to respect in these areas can be infringed in certain circumstances (see paragraph headed 'A qualified right' below).

Article 8 refers to the right to respect and so in addition to protecting your rights from interference by a public authority, it imposes a positive obligation on public authorities to actively protect your rights in certain circumstances. This can include taking action to secure respect for your rights even where the interference is being caused by a private individual (see paragraph headed 'Positive obligations' below)

Private life

Many issues have been held to fall within the meaning of 'private life' and the ECHR has stressed that it is not possible to limit or define what will fall within its scope,. Things which clearly do form part of your private life are:
• Bodily integrity – Article 8 will come into play if someone is forced to have medical treatment or if he or she is forcibly restrained.

• Personal autonomy – this means the right to make decisions about how you lead your life. People have tried to argue that the right to smoke cannabis is an issue of personal autonomy and should therefore be protected by Article 8 but the courts have not been prepared to accept this.

• Sexuality – there have been a number of cases in which the ECHR has made it clear that laws which prohibit gay men having sex breach Article 8.

• Personal identity – the ECHR decided in 2002 that British law's failure to fully recognise the new gender of transgendered people breached Article 8.

• Personal information – the holding, use or disclosure of personal information about someone is covered by Article 8. The article may also give someone the right to access personal information held about them.
Family life

This element of Article 8 protects your right to respect for your close family relationships and matters relating to those relationships, for example how parents choose to discipline their children. The question of whether a relationship will fall within the ambit of 'family life' for the purposes of Article 8 will depend on the nature of the relationship and the existence of close personal ties. In addition to the relationship between a mother and father and between children and their parents, 'family life' will include unmarried couples and the relationship between an illegitimate child and either parent as well as other family relationships, for example relationships between siblings and between adopted children and adoptive parents.

The ECHR has so far been reluctant to recognise same-sex couples as families, holding that these relationships fall within the ambit of private life - not family life

Separation of family members will normally constitute an interference with the right to respect for family life, although such interference may be justified, for example where a child is taken into care for his or her own protection or where a parent is sentenced to imprisonment.

Family life can be engaged in deportation cases if the person to be deported has an established personal and family life in the UK (for example, if the person has children living and settled in the UK). However, the courts have been reluctant to find that deportation is a violation of Article 8. Where there is an alternative country in which the husband and wife or family can reside and there are no 'insurmountable obstacles' to moving there, or where a person could return to their country of origin and obtain entry clearance as a family member in the ordinary way without risk or excessive delay it is unlikely that the court will find that there has been a violation of Article 8.

Home

Your home is where you currently live. The right to respect for your home does not mean that you have the right to be given a home if you do not have one, or to be given a better one than you already have.

Environmental issues (noise or other pollution) may come within the scope of Article 8, because they affect both a person's private life and a person's enjoyment of their home. The right to respect for your home will also cover the right to enjoy your home without interference or intrusion by others and the right of access to and occupation of your home.

Correspondence

This element of Article 8 protects your right to communicate with others and the confidentiality of those communications.
All forms of communication are covered by Article 8 and include communication by way of phone calls and letters, as well as e-mails. Article 8 has been successfully used to challenge the bugging of phones by police or secret services.

A qualified right

Article 8 is qualified right. This means that an interference with the right can be justified in certain circumstances. Where the interference is justified, there will be no breach of Article 8.
The circumstances where an interference with the right can be justified are set out in the second part of the article (Article 8(2)).

For an interference to be justified it must:
• Be 'in accordance with the law' - this means that there has to be clear legal basis for the interference and that the law should be readily accessible.

• Pursue a legitimate aim - there are six legitimate aims set out in Article 8(2), including 'the prevention of disorder or crime' and 'the protection of the rights and freedoms of others'. A public authority which intends to interfere with a person's rights under Article 8 must be able to show that what they are doing pursues one of these six legitimate aims. This is rarely a problem, as the legitimate aims are so widely drawn.

• Be 'necessary in a democratic society' - This is usually the crucial issue. There must be a good reason for the interference with the right and the interference must be proportionate which means that it should be no more than is necessary. If there is an alternative, less intrusive, way of achieving the same aim then the alternative measure should be used.

Positive obligations

Article 8 and the other qualified articles are largely concerned with preventing the Government, the police or other state bodies interfering with people's rights. They are negative obligations in that they require the State to refrain from taking certain action. However, there may be circumstances where State is under a positive obligation - a duty to do something in order to protect or promote your rights.

In order to determine whether such a positive obligation exists, consideration must be given to the fair balance that has to be struck between the general community interest and the interests of the individual. Because a positive obligation will require the State to take active measures or steps, it will always be much harder to argue that the State is under a positive obligation than under a negative one. Examples of where courts found that a positive duty exists include:
• R (Bernard) v Enfield London Borough Council [2003] where the court held that the Borough Council had a duty to provide assistance to a disabled woman so that she could maintain basic physical and psychological integrity.

• X and Y v Netherlands (1985) where the ECHR held that the Netherlands should have taken steps to protect the applicants from sexual assault by their parents, as this assault was a grave breach of their right to respect for their private life.

Judgments - Director of Public Prosecutions v. Jones and Another (On Appeal from a Divisional Court of the Queen's Bench Division)

HOUSE OF LORDS
The Lord Chancellor Lord Slynn of Hadley Lord Hope of Craighead
Lord Clyde Lord Hutton
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE
DIRECTOR OF PUBLIC PROSECUTIONS
(RESPONDENT)
v.
JONES AND ANOTHER
(APPELLANTS)
(ON APPEAL FROM A DIVISIONAL COURT
OF THE QUEEN'S BENCH DIVISION)
ON 4 MARCH 1999

LORD IRVINE OF LAIRG L.C.

My Lords,

My Lords, this appeal raises an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?

On 1 June, 1995, at about 6.40 p.m. Police Inspector Mackie counted 21 people on the roadside verge of the southern side of the A344, adjacent to the perimeter fence of the Monument at Stonehenge. Some were bearing banners with the legends, "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." He concluded that they constituted a "trespassory assembly" and told them so. When asked to move off, many did, but some, including the Appellants, Mr. Lloyd and Dr. Jones, were determined to remain and put their rights to the test. They were arrested for taking part in a "trespassory assembly" and convicted by the Salisbury Justices on 3 October, 1995. Their appeals to the Salisbury Crown Court, however, succeeded. The court held that neither of the Appellants, nor any member of their group, was "being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

About an hour before, a different group of people had scaled the fence of the Monument and entered it. They had been successfully escorted away by police officers without any violence or arrests; but there were no grounds for apprehension that any of the group of which Mr. Lloyd and Dr. Jones were members proposed an incursion into the area of the Monument.

An appeal by way of case stated to the Divisional Court followed: *Director of Public Prosecutions v. Jones*

[1997] 2 All E.R. 119. It was assumed for the purposes of that appeal (*per* McCowan L.J. at p. 122D) that:

(a) the grass verge constituted part of the public highway; and

(b) the group was peaceful, did not create an obstruction and did not constitute or cause a public nuisance.

The defendants had been charged with "trespassory assembly" under section 14B(2) of the Public Order Act 1986 ("the Act of 1986"). Section 14A(1) of the Act of 1986 permits a chief officer of police to apply, in certain circumstances, to the local council for an order prohibiting for a specified period "trespassory assemblies" within a specified area. An order of that kind may be obtained only in respect of land "to which the public has no right of access or only a limited right of access"; had been obtained in this case; and covered the area in which the defendants, with others, had assembled.

Section 14A(5) of the Act of 1986 provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which (*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in prohibited circumstances, that is to say, without the permission of the occupier of the land or *so as to exceed* the limits of any permission of his or *the limits of the public's right of access*." (Emphasis added.)

Section 14A(5) thus indicates that a "trespassory assembly" must be "trespassory" in the sense that it must involve the commission of the tort of trespass by those taking part, either by entering land to which they have no right of access, or by exceeding a limited right of access to land.

Section 14A(9) of the Act of 1986 provides, inter alia:

> "In this section . . . 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) . . ."

The offence with which the defendants were charged is set out in section 14B(2) of the Act of 1986:

> "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The Divisional Court reinstated the defendants' convictions. It held that a peaceful assembly on the public highway exceeds the limits of the public's right of access (within the meaning of section 14A(5)). The "particular purpose" mentioned in the definition of "limited" in section 14A(9) was held not to include the use of the highway for peaceful assembly.

The central issue in the case thus turns on two interrelated questions: (i) what are the "limits" of the public's right of access to the public highway at common law? and (ii) what is the "particular purpose" for which the public has a right to use the public highway?

The basis of the Divisional Court's decision

The reasoning underlying the Divisional Court's judgments is not altogether clear: [1997] 2 A11 E.R. 199. McCowan L.J. states at page 124C-D:

> "counsel for the respondents . . . argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding

> of any assembly which occurs to restrict the limited right of access to the highway by the public."

In my judgment that reasoning is circular. There is no suggestion in the Act of 1986 that the making of any order under section 14A(1) *in itself* defines the limits on the public's right of access to the highway. Rather, the conditions under which it is appropriate to make an order, and the conditions for the breach of such an order, are defined by reference to the *existing* limits upon the public's right of access. In other words, section 14A presupposes limited rights of access; it does not purport to impose such limits.

Collins J., at p. 125F-G concludes that, at common law, an assembly on the highway, however peaceable, exceeds the limits of the public's right of access. This is the conclusion which lies at the heart of the Divisional Court's decision.

In addition, Collins J. rejected the respondents' argument that Article 11(1) of the European Convention on Human Rights requires that there is a *right* of assembly on the public highway (albeit a right which may be subject to restrictions under Article 11(2)), as opposed merely to a toleration of assemblies. Collins J. concluded, at p. 127H, that the common law conforms with the Convention right of assembly because "The reality is that peaceful and non-obstructive assemblies on the highway are normally permitted."

Thus in broad terms the basis of the Divisional Court's decision is the proposition that the public's right of access to the public highway is limited to the right to pass and repass, and to do anything incidental or ancillary to that right. Peaceful assembly is not incidental to the right to pass and repass. Thus peaceful assembly exceeds the limits of the public's right of access and so is conduct which fulfils the actus reus of the offence of "trespassory assembly."

The position at common law

The Divisional Court's decision is founded principally on three authorities. In *Ex parte Lewis* (1888) 21 Q.B.D. 191 the Divisional Court held obiter that there was no public right to occupy Trafalgar Square for the purpose of holding public meetings. However, Wills J, giving the judgment of the court, had in mind, at p. 197, an assembly " . . . to the detriment of others having equal rights . . . in its nature irreconcilable with the right of free passage." Such an assembly would probably also amount to a public nuisance, and, today, involve the commission of the offence of obstruction of the public highway contrary to section 137(1) of the Highways Act 1980 ("the 1980 Act"). Such an assembly would probably also amount to unreasonable user of the highway. It by no means follows that this same reasoning should apply to a peaceful assembly which causes no obstruction nor any public nuisance.

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the plaintiff had used the public highway, which crossed the defendant's land, for the sole and deliberate purpose of disrupting grouse-shooting upon the defendant's land, and was forcibly restrained by the defendant's servants from doing so. The plaintiff sued the defendant for assault; and the defendant pleaded justification on the basis that the plaintiff had been trespassing upon the highway. Lord Esher M.R. held, at p. 146:

> ". . . on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, *or for any reasonable or usual mode of using the highway as a highway*, I think he was a trespasser." (Emphasis added.)

Plainly Lord Esher M.R. contemplated that there may be "reasonable or usual" uses of the highway beyond passing and repassing. He continued, at pp. 146-147:

> "Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

Lopes L.J., by contrast, stated the law in more rigid terms, at p. 154:

> ". . . if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil . . . "

Similarly, Kay L.J. stated, at p. 158:

> ". . . the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

The rigid approach of Lopes L.J. and Kay L.J. would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.

The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway.

The third authority relied upon by the Divisional Court is the decision of the Court of Appeal in *Hickman v. Maisey* [1900] 1 Q.B. 752. In that case, the defendant, a racing tout, had used a public highway crossing the plaintiff's property for the purpose of observing racehorses being trained on the plaintiff's land. A. L. Smith L.J. expressly followed the approach of Lord Esher M.R. in *Harrison.* Applying that reasoning, he accepted, at p. 756, that a man resting at the side of the road, or taking a sketch from the highway, would not be a trespasser. The defendant's activities, however, fell outside "an ordinary and reasonable user of the highway" and so amounted to a trespass. Collins L.J. similarly approved Lord Esher M.R.'s approach, noting, at pp. 757-758, that:

> " . . . in modern times a reasonable extension has been given to the use of the highway as such . . . The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

Romer L.J. was to similar effect, at p. 759.

I do not, therefore, accept that, to be lawful, activities on the highway must fall within a rubric incidental or ancillary to the exercise of the right of passage. The meaning of Lord Esher's judgment in *Harrison*, at pp. 146-147 is clear: it is not that a person may use the highway only for passage and repassage and acts incidental or ancillary thereto; it is that any "reasonable and usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's right of passage. I understand Collins L.J.'s acceptance in *Hickman*, at pp. 757-758, of Lord Esher's judgment in *Harrison* in that sense.

To commence from a premise, that the right of passage is the only right which members of the public are entitled to exercise on a highway, is circular: the very question in this appeal is whether the public's right is confined to the right of passage. I conclude that the judgments of Lord Esher M.R. and Collins L.J. are authority for the proposition that the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage.

Nor can I attribute any hard core of meaning to a test which would limit lawful use of the highway to what is incidental or ancillary to the right of passage. In truth very little activity could accurately be described as "ancillary" to passing along the highway; perhaps stopping to tie one's shoe lace, consulting a street-map, or pausing to catch one's breath. But I do not think that such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book, would qualify. These examples illustrate that to limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The law should not make unlawful what is commonplace and well accepted.

Nor do I accept that the broader modern test which I favour materially realigns the interests of the general public and landowners. It is no more than an exposition of the test Lord Esher proposed in 1892. It would not permit unreasonable use of the highway, nor use which was obstructive. It would not, therefore, afford carte blanche to squatters or other uninvited visitors. Their activities would almost certainly be unreasonable or obstructive or both. Moreover the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance.

Nor do I accept that the "reasonable user" test is tantamount to the assertion of a right to remain, which right can be acquired by express grant, but not by user or dedication. That recognition, however, is in no way inconsistent with the "reasonable user" test. If the right to use the highway extends to reasonable user not inconsistent with the public's right of passage, then the law does recognise, (and has at least since Lord Esher's judgment in *Harrison* recognised), that the right to use the highway goes beyond the minimal right to pass and repass. That user may in fact extend, to a limited extent, to roaming about on the highway, or remaining on the highway. But that is not of the essence of the right. That is no more than the scope which the right might in certain circumstances have, but always depending on the facts of the particular case. On a narrow footpath, for example, the right to use the highway would be highly unlikely to extend to a right to remain, since that would almost inevitably be inconsistent with the public's primary right to pass and repass. A highway may be created either by way of the common law doctrine of dedication and acceptance, or by some statutory provision. Dedication presupposes an intention by the owner of the soil to dedicate the right of passage to the public. Whilst the intention may be expressed, it is more often to be inferred; but the requirement of an inference of an intention to dedicate does not, in my judgment, advance the question of the extent of the public's right of user of the highway. The dedication is for the public's use of the land as a highway and the question remains: what is the proper extent of the public's use of the highway? Given that intention to dedicate is usually inferred, it would be a legal fiction to assert that actual intention was confined to the right to pass and repass and activities incidental or ancillary to that right. There is no room in the judgment of Collins L.J. in *Hickman,* at pp. 757-758 for the fiction of an immutable, subjective original intention. Neither highway users nor the courts are in any position to ascertain what the landowner's original intentions may have been, years or even centuries after the event. In many cases, where the intention to dedicate is merely inferred from the fact of user as of right, there will not even have been a subjective intention. Nor would it be sensible to hold that the extent of the public's right of user should differ from highway to highway, as necessarily it would if actual subjective intention were the test. It is time to recognise that the so-called intention of the landowner is no more than a legal fiction imputed to the landowner by the court.

It would have been possible for the common law to have imposed tight constraints on the public's right of user of the highway in one of two ways. First, it could have held that the right was no wider than the bare minimum required for the use of the highway as such: a test of necessity. Or, secondly, it could have been held that the right was static, so that a user which could not have been in contemplation as reasonable and usual at the time of dedication could never become a lawful user in changing social circumstances. I have already demonstrated that the former has been rejected. Nor could the latter be sustained. I doubt whether, when a highway was first dedicated in, say, the early nineteenth century, a landowner would have contemplated the traversal at very high speed of the land dedicated by vehicles powered by internal combustion engines. The fact is that the common law permits vehicles to be driven at high speed on the highway because that is a reasonable user in modern conditions: it would be a fiction to attribute that to an actual intention at the time of dedication.

I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.

Since the law confers this public right, I deprecate any attempt artificially to restrict its scope. It must be for the magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass. In particular, there can be no principled basis for limiting the scope of the right by reference to the subjective intentions of the persons assembling. Once the right to assemble within the limitations I have defined is accepted, it is self-evident that it cannot be excluded by an intention to exercise it. Provided an assembly is reasonable and non- obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature. To draw a distinction on the basis of anterior intention is in substance to reintroduce an incidentality requirement. For the reasons I have given, that requirement, properly applied, would make unlawful commonplace activities which are well accepted. Equally, to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and degree for the court of trial.

Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the sub-soil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways.

Finally, I regard the conclusion at which I have arrived as desirable, because it promotes the harmonious development of two separate but related chapters in the common law. It is neither desirable in theory nor acceptable in practice for commonplace activities on the public highway not to count as breaches of the criminal law of wilful obstruction of the highway, yet to count as trespasses (even if intrinsically unlikely to be acted against in the civil law), and therefore form the basis for a finding of trespassory assembly for the purposes of the Public Order Act. A system of law sanctioning these discordant outcomes would not command respect.

Wilful Obstruction of the Highway

By section 137 of the Highways Act 1980: "(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence . . . " The relevant case law was extensively considered by the Divisional Court in *Hirst and Agu v. Chief Constable of West Yorkshire* (1987) 85 Cr.App.R. 143.

The appeal was by animal rights supporters, who had been demonstrating against the use of animal fur both outside and in the doorway of a furrier's shop. They handed out leaflets, held banners and attracted groups of passers-by who blocked the street. The issue whether they were guilty of the statutory offence was held to turn on three questions:

(i) was there an obstruction (with "any stopping on the highway", unless de minimis, counting as an obstruction)?

(ii) was the obstruction deliberate? and

(iii) was the obstruction without lawful excuse?

The latter question, if the obstruction was not unlawful in itself (as in the case of unlawful picketing), was "to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway" *per* Glidewell L.J., pp. 150-151. Glidewell L.J. instanced

> "what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? . . . It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates." (at page 150).

In so holding Glidewell L.J. applied the reasoning of the Divisional Court in *Nagy v. Weston* [1965] 1 All E.R. 78, where the activity in question, the sale of hot dogs in the street, "could not . . . be said to be incidental to the right to pass and repass along the street." The question was one of fact: "whether the activity was or was not reasonable." (at p. 150).

I find it satisfactory that there is a symmetry in the law between the activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway

Article 11 of the European Convention on Human Rights

If, contrary to my judgment, the common law of trespass is not as clear as I have held it to be, then at least it is uncertain and developing, so that regard should be had to the Convention in resolving the uncertainty and in determining how it should develop: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] 1 Q.B. 770 (C.A.), *per* Balcombe L.J. at p. 812B-C; and Butler-Sloss L.J. at p. 830A-B; and see *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, at p. 283, *per* Lord Goff of Chieveley. Article 11 confers a "right to freedom of peaceful assembly" and then entitles the state to impose restrictions on that right. The effect of the Divisional Court's decision in this case would be that any peaceful assembly on the public highway, no matter how minor or harmless, would involve the commission of the tort of trespass. Its conclusion is that all peaceful assemblies on the highway are tortious, whilst seeking to justify that state of affairs by observing that peaceful assemblies are in practice usually tolerated. In my judgment it is none to the point that restrictions on the exercise of the right of freedom of assembly may under Article 11 be justified where necessary for the protection of the rights and freedoms of others. If the Divisional Court were correct, and an assembly on the public highway always trespassory, then there is not even a prima facie right to assembly on the public highway in our law. Unless the common law recognises that assembly on the public highway *may* be lawful, the right contained in Article 11(1) of the Convention is denied. Of course the right may be subject to restrictions (for example, the requirements that user of the highway for purposes of assembly must be reasonable and non-obstructive, and must not contravene the criminal law of wilful obstruction of the highway). But in my judgment our law will not comply with the Convention unless its *starting-point* is that assembly on the highway will not necessarily be unlawful. I reject an approach which

entails that such an assembly will always be tortious and therefore unlawful. The fact that the letter of the law may not in practice always be invoked is irrelevant: mere toleration does not secure a fundamental right. Thus, if necessary, I would invoke Article 11 to clarify or develop the common law in the terms which I have held it to be; but for the reasons I have given I do not find it necessary to do so. I would therefore allow the appeal.

LORD SLYNN OF HADLEY

My Lords,

In section 14A of the Public Order Act 1986 (inserted by section 70 of the Criminal Justice and Public Order Act 1994) Parliament gave a new power of control to local councils and to the police to deal with assemblies of twenty or more persons on land to which the public had a limited right of access or no right of access.

A chief officer of police who reasonably believes that such an assembly is intended to be held and that it is likely to be held without the permission of the occupier of the land, or to conduct itself in such a way as to exceed the public's limited right of access, and to cause significant damage to land or buildings of historical or archaeological importance, may apply to the council of the district for an order "prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it as, specified." It is thus necessary to show that the land is such that the public has no or only a limited right of access, and "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to *use for a particular purpose (as in the case of a highway or road)*" (emphasis added).

With the consent of the Secretary of State the council may then make an order prohibiting such assemblies for a period not exceeding four days and in respect of an area not exceeding five miles from a specified centre. When such an order is made: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence": (section 14B(2)).

This new offence is thus subject to important conditions being satisfied before prosecutions can be brought--the reasonable belief of the Chief Officer of Police as to the matters specified, the consent of the Secretary of State and the decision of the council to make such an order, but it is plain that Parliament in 1994 was intending to give additional powers to councils and to the police to disperse trespassory assemblies over and above any other remedies (often slower and less effective) which might be available where people trespassed, committed nuisance or were violent.

On 22 May 1995 Salisbury District Council made an order prohibiting the holding of trespassory assemblies within a four mile radius of Stonehenge for a period from 29 May to 1 June 1995 inclusive.

It is agreed that on 1 June 1995 a group of people were on the grass verge of the A344 road. The group was not fixed or static, people came and went. At about 6.45 p.m. the present appellants were on the verge in a group said by the police to have numbered 21 persons. A Police Inspector formed the view that this group constituted a prohibited trespassory assembly and they were told to move on. Some apparently did. The two appellants refused and were subsequently charged with the offence under section 14B(2) of the Act. They were convicted by the Salisbury justices but on appeal the Crown Court ruled that there was no case to answer and allowed the appeal.

The Crown Court found that the group, including the appellants, were not "destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway." The court further concluded that the group's use of the highway was a "reasonable user" and that the conduct of the appellants and the group as a whole did not exceed the public's right of access to the highway.

The Divisional Court on appeal allowed the appeal and ruled that a peaceful assembly of twenty or more persons on the highway which does not obstruct the highway is still a trespassory assembly for the purposes of section 14B(2). The sole question on the appeal to your Lordships is thus whether the public has the right of access to the highway in order to assemble there when it does not at the time obstruct the highway and when those present are not violent and are not threatening a breach of the peace.

It cannot, of course, be said that the public has no right of access to the highway; it is not suggested that the public's right of access is absolute. The question is what are the limits to the right (not, it should be noted, the practice) of the public to use or be on the highway. For this purpose it is not necessary to distinguish between "highway" and "road" since the definition of "limited" includes both, though no issue has been raised that the place where the appellants were was not a highway. I assume that it was and that as such the public had some right of access to it.

It is necessary to remember when considering this case that both at common law and by the Highways Act 1980 the public have an analogous right of way over bridleways and footpaths. It is not, however, necessary in this case to consider the case of a private road or another place where the permission of the occupier is needed and where additional factors may need to be taken into account, but the arguments here have implications in principle for both.

It is hardly surprising that the public's rights of access to and use of the highway have been considered on previous occasions by the courts though in different contexts. As I see it the essential feature of the public's right was explained in the judgment of Lopes L.J. with whom in substance Kay L.J. agreed, in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142. At p. 152 Lopes L.J. said:

> "The interest of the public in a highway consists solely in the right of passage."

At p. 153 he quotes Crompton J. in *Reg. v. Pratt* (1855) 4 E.& B. 860, 868-869 who said:

"I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

(back to preceding text)

Lopes L.J. added:

> "I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public."

At p. 154 he said:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

Thus the core right is to pass and to repass although I do not think that Lopes L.J. would have said that uses incidental to passing and repassing - stopping to adjust a bridle or to repair a carriage wheel-would have constituted a trespass. Lord Esher M.R. was more specific. He said, at p. 146:

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual

mode of using the highway as a highway, I think he was a trespasser."

He added that if the language of Crompton J. inter-alios were construed too largely the effect might be to interfere "with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

It does not seem to me that his words "any reasonable or usual mode of using the highway as a highway" or "a reasonable and usual mode of using a highway *as such*" (emphasis added) were intended to include acts done by people who were not in the ordinary sense of the term "passing and repassing along the highway." This is how A. L. Smith L.J. appears to have read Lord Esher in his judgment in *Hickman v. Maisey* [1900] 1 Q.B. 752, 755-756. He then said:

> "I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a *slight* extension of the rule as previously stated." (Emphasis added.)

He accepted that for a man to stop to rest or to take a sketch in the highway would not be considered an act of trespass but he continued:

> "I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

Collins L.J. at p. 757 said:

> "The question must in the last resort be whether what the defendant did after he got upon the highway comes within the ordinary and reasonable use of the highway *as a highway*, that is, for the purpose for which it is dedicated to the public. Now primarily the purpose for which the highway is dedicated is that of passage, as is shown by the case of *Dovaston v. Payne*; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage." (Emphasis added.)

It seems to me that Collins L.J. is saying no more than that developments which were incidental to the right of passage might be accepted as falling within the public's right of limited access to the highway.

That ruling as to the law had already been reflected in two cases involving specifically the holding of public meetings in Trafalgar Square. Thus in *Reg. v. Cunningham Graham and Burns* (1888) 16 Cox 420, 429 Charles J., rejecting the claim that there was a right of public meeting in Trafalgar Square or any other thoroughfare, said:

> "So far as I know the law of England, the use of public thoroughfares is for people to pass and repass

> along them. That is the purpose for which they are, as we say, dedicated by the owner of them for the use of the public, and they are not dedicated to the public use for any other purpose that I know of other than for the purpose of passing and repassing."

Similarly, in *Ex parte Lewis* (1888) 21 Q.B.D. 191 Wills J. said that a public right of passage is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

It was reflected subsequently in *Randall v. Tarrant* [1955] 1 W.L.R. 255 where Lord Evershed M.R. said, at p. 259:

> "The rights of members of the public to use the highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use,"

and in *Clerk & Lindsell, The Law of Torts*, 17th ed. (1995), para. 17-41, p. 861, viz.:

> "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The right of assembly, of demonstration, is of great importance but in English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored.

These cases, in limiting or linking rights of user by the public of the highway to passage or repassage, in themselves exclude a right to stay on the highway other than for purposes connected with such passage, but they are to be read with cases of wider application which reject the possibility of a right of staying or wandering over land being acquired by user or prescription. See, for example, *Attorney-General v. Antrobus* [1905] 2 Ch. 188, where a claim of a right for the public to visit Stonehenge acquired by user was rejected, and in *In re Ellenborough Park* [1956] Ch. 131 where a claim that the public had acquired a right to wander in a pleasure park was asserted. In the latter case, Lord Evershed M.R. said, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by Statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

On existing authority, I consider that the law is clear. The right is restricted to passage and reasonable incidental uses associated with passage.

It seemed to be suggested or at least implicit in argument that demonstrations and assemblies are a new development of the late twentieth century and cannot have been in the mind of judges when they defined the law in the nineteenth century and even as late as Lord Evershed's judgment to which I have referred. This is plainly wrong as the two Trafalgar Square cases (and nineteenth century descriptions of contemporary conditions) show, even though the extent, nature, size and object of such demonstrations and assemblies have changed. I am willing to assume that more people are now more conscious of the importance of assembly and demonstration than they were in previous centuries, but I do not see that this in itself is enough to justify changing the nature and scope of the public's right to use the highway. That it cannot in itself justify as of right assemblies or demonstrations on private land is obvious. The appellants' argument in effect involves giving to members of the public the right to wander over or to stay on land for such a period and in such numbers as they choose so long as they are peaceable, not obstructive, and not committing a nuisance.

It is a contention which goes far beyond anything which can be described as incidental or ancillary to the use of a highway as such for the purposes of passage; nor does such an extensive use in my view constitute a reasonable, normal or usual use of the highway as a highway. If the appellants' claim is right, it seems to me to follow that other uses of the highway than assembly would be permitted--squatting, putting up a tent, selling and buying food or drinks--so long as they did not amount to an obstruction or a nuisance. To get over the fence from adjoining land (as could have happened here) and to sit or stand on the highway, including the verge, in order to demonstrate does not seem to me to be a normal or usual use of the highway as such and has nothing to do with passing and re-passing.

The fact that the purpose of the demonstration or assembly is one which most or many people would approve does not change what is otherwise a trespass into a legal right. Nor does the fact that an assembly is peaceful or unlikely to result in violence, or that is not causing an obstruction at the particular time when the police intervene, in itself change what is otherwise a trespass into a legal right of access.

It is objected that very often people on the highway singly or in groups take part in activities which go beyond passage and repassage and are not stopped. That is no doubt so, but reasonable tolerance does not create a new right to use the highway and indeed may make it unnecessary to create such a right which in its wider definition goes far beyond what is justified or needed. It may well be that in the situation with which your Lordships are concerned that, but for Section 14, nothing would have been done to a peaceful non-obstructive group like the one in which the appellants took part. But Parliament in 1994 has enabled action over and above existing remedies to deal with trespass on the highway, or on land for entry on which the landowner's permission is required, to be taken to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do so. I do not consider that disapproval of this power justifies a change in the law as to the public's rights over the highway, which is what at times seems to be one of the bases of the appellants' arguments.

Reference was made to cases such as *Lowdens v. Keaveney* [1903] 2 I.R. 82; *Hirst and Agu v. Chief Constable of West Yorkshire* (1987) 85 Cr.App.R. 143 (under section 137(1) of the Highways Act 1980); *Nagy v. Weston* [1965] 1 W.L.R. 280; and *Hubbard v. Pitt* [1976] 1 Q.B. 142, which concern wilful obstruction of the passage along a highway without reasonable excuse. That is a different question from the one raised in the present case and I do not consider that the passages relied on from those judgments directly assist in answering it.

Reference was also made to the European Convention on Human Rights and Fundamental Freedoms, not, of course, as in itself governing the legal position in the United Kingdom, but as indicating what our law should now be. It is desirable to look at the Convention for guidance even at the present time, but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is (see *per* Butler-Sloss L.J. in *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830. In any event, I am not satisfied that the existing law on highways is necessarily in conflict with Article 11 of the Convention providing for a right of assembly, or of Article 10 relating to freedom of expression. Both provide for exceptions to the rights created. I accept that it is arguable that a restriction on assembly even on the highway may interfere with the right of assembly in some situations, as the decisions of the European Court of Human Rights, which have been referred to, show, but I am not satisfied that there was here such a violation either by the law relating to access to the highway as it stands, or in its application to the facts of this case which should compel us to change the law as I believe it to be.

It follows in my view that the Crown Court deciding essentially that what happened was a reasonable use of the highway erred in law and that the Divisional Court was right in the result to reverse their decision. The Justices who heard the case through were entitled to find that there had been a trespassory assembly.

The question certified in essence asks whether the lack of obstruction prevents an assembly of 20 or more persons on the highway from being a trespassory assembly. I would answer that in the negative. Put in the way in which the question is framed, i.e. whether such an assembly where there is no obstruction does

exceed the public right of access to the highway so as to constitute a trespassory assembly contrary to section 14A of the Public Order Act 1986, I would answer in the affirmative.

I would accordingly dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

The point which is at issue in this appeal arises out of an incident which took place on I June 1995 on the grass verge of the A344 road beside the perimeter fence of the monument at Stonehenge. It relates to the extent of the use which members of the public are entitled to make of a highway in the exercise of the public's right of access to it. The question is whether members of the public who join together to form a peaceful, non-obstructive assembly upon the highway, their purpose being not to pass along it the road but to remain in the place where they have gathered for such time as they choose to remain there, are acting in such a way as to exceed their public right of access to the highway.

On 22 May 1995 Salisbury District Council made an order under Section 14A(2) of the Public Order Act 1986, as amended by the Criminal Justice and Public Order Act 1994, prohibiting the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining Stonehenge from 2359 hours on Sunday 28 May 1995 until 2359 hours on Thursday 1 June 1995. At about 6.40 p.m. on 1 June 1995 the appellants had gathered with others on the grass verge of the perimeter fence to the west of the Heelstone. They were spread out along the verge, which was about five feet wide, over a distance of about ten to fifteen yards. The conduct of the group was entirely peaceful. No obstruction was being caused to anybody who wished to use the highway. No member of the group was on the roadway, and nobody was abusive, offensive or violent to the police or anybody else in any way. There had been some movement, as people joined the group and others left it during the afternoon and those who were on the verge moved around. But the group was in the nature of an assembly, not a procession. Its members were not pausing for conversation, rest or refreshment while passing along the highway. They had taken up a position upon it in a place where they proposed to stay for the time being. It can be assumed that they did so because they believed they had a right to be there.

A police officer who was at the scene formed the view, after counting its members, that this was an assembly of 20 or more persons and that it was a trespassory assembly which had been prohibited by the order made under section 14A. He informed those present of the terms of the order and at about 6.45 p.m. he instructed them to move on. Most of those who were present complied with this instruction. But the appellants refused to do so, and just after 7.00 p.m. they were arrested on the ground that they were committing an offence under section 14B of the Act by taking part in an assembly which they knew was prohibited by an order under section 14A. They were tried before the Salisbury magistrates and convicted of an offence under section 14B(2). They appealed against their convictions to the Salisbury Crown Court, which allowed their appeals on the ground that the group's user of the highway was a reasonable one which did not exceed the public's right of access. This decision was reversed when the case came before a Divisional Court of the Queen's Bench Division on the ground that the public's right of access to the highway was limited to a right of passage and that an assembly, although peaceful and non-obstructive, could not be said to be on the highway in the exercise of that right. McCowan L.J. rejected the suggestion that the holding of an assembly of 21 persons was incidental to the right of passage and repassage. Collins L.J. said that the holding of a meeting, demonstration or vigil on the highway, however peaceable, has nothing to do with the right of passage.

The case has obvious implications for the relationship between the criminal law and the right of peaceful assembly under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as it arises out of a prosecution brought under the Act of 1986. But the problem which it has raised seems to me to depend for its answer upon an application of the principles which are to

be found in the law of real property and landownership. This is because of the words which section 70 of the Criminal Justice and Public Order Act 1994 has used to define what it describes as a trespassory assembly. Section 14A(5), which it has inserted into Part II of the Public Order Act 1986, states:

> "14A(5) An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which--
> (*a*) is held on land to which the public has no right of access or only a limited right of access, and
> (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

"Assembly" for this purpose means an assembly of 20 or more persons, and "land" means land in the open air: see subsection (9). The word "limited" is defined by subsection (9) in these terms:

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

This section may be contrasted with section 14 of the Public Order Act 1986 which deals with the imposition of conditions on public assemblies. Section 16 of the Act defines "public assembly" as "an assembly of 20 or more persons in a public place which is wholly or partly open to the air." It defines "public place" for this purpose as meaning any highway and any place to which the public or any section of it has access, on payment or otherwise, as of right or by virtue of express or implied permission. The technique which section 14 uses to enable the police to control assemblies of this kind is that of enabling the police to impose conditions on the place where it may be held, its numbers and its duration. A person who knowingly fails to comply with any of these conditions commits an offence. The assumption is that, so long as the conditions are complied with, a public assembly in a public place is lawful and that the police have no power to require its members to disperse.

The technique which section 14A uses is entirely different. It brings into the arena of the criminal law the rights, if any, which the public have as against the occupier of the land in private law. It does so by enabling the police to take action against those taking part in an assembly if the occupier of the land would be entitled to treat the assembly as trespassing on his land. But the police may exercise their powers independently of the occupier, whose knowledge of or consent to the action which they are taking is not required. It is sufficient that an order under section 14A is in force for the time being and that the assembly is within the area to which it applies.

In this situation it is necessary first to identify the extent of the public's right of access to a highway before looking more broadly at the human rights issues which this case has raised. Mr. Fitzgerald Q.C. for the appellants accepted that the public's right of access was a limited one, and he did not suggest that there was any relevant distinction in this regard between a "road" and a "highway." The definition of "limited" in section 14A(9) uses both expressions. At common law the expression "highway" includes all ways to which the public have access, from footpaths and bridleways to carriageways. It may therefore be said to include a "road", and in particular a road such as the A344 the solum of which is vested in the statutory highway authority. The most important point to note about these expressions is their generality. The certified question refers to "*the public* highway" (emphasis added). The use of the definite article and the addition of the adjective "public" suggest that a distinction can be drawn between those highways which are public and those which are not. But section 14A(9) refers simply to "a highway." In doing so it follows the wording used in other statutes to which I shall refer later. It also follows the common law, which uses the word "highway" to describe a place to which the public have access in order to exercise the public right. All highways are in that sense "public." The only distinction which might relevantly be drawn is that the land over which a highway passes is not always vested in a public authority. But it has not been suggested that the right of access is different according to the public or private character of the landowner. The conclusions which I would draw from this are that the addition of the word "public" is tautologous, and that anything

which we may say about the limits of the public right of access to a highway must be taken, in law, to apply to each and every highway.

The next point is that no question arises in this case as to the limits of any permission given by the occupier. But it is worth noting that section 14A(5), by treating an assembly which exceeds the limits of such permission as a trespassory assembly, is relying for its application on a matter which the law would normally be content to leave to the discretion of the occupier. The same may also be said of cases where the assembly is held on land to which the public have a right of access which is limited. The law would normally be content to leave it to the occupier to intervene if any members of the public were acting in a way which exceeded the limits of the public right. Although the right to complain that there is a trespass has been taken out of the hands of the occupier and placed at the disposal of the police by section 14A, the extent of these limits must nevertheless be found in the relationship in private law between the public and the occupier.

It may be convenient to begin an examination of this subject with some general statements. A highway is a way over which there is a public right of way. A public right of way is similar to but not in all respects the same as an easement of way. The right is exercisable by anyone whether he owns land or not, whereas an easement is a right exercisable by the owner of land for the time being by virtue of his estate in the land of which he is the dominant proprietor. There are other differences. But a public right of way closely resembles an easement of way in regard to the nature of the user from which its creation may be inferred and the nature of the use which may be made of it. *Halsbury's Laws of England*, 4th ed, vol. 21, para. 110 states that it is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper use of it as such. In paragraph 1, p. 9 of the same volume it is stated that a highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. In *Megarry and Wade, The Law of Real Property,* 5th ed. (1984), p. 844 it is stated:

> "The land over which a public right of way exists is known as a highway; and although most highways have been made up into roads, and most easements of way exist over footpaths, the presence or absence of a made road has nothing to do with the distinction. There may be a highway over a footpath, while a well-made road may be subject only to an easement of way, or may exist only for the landowner's benefit and be subject to no easement at all."

In *Clerk & Lindsell, The Law of Torts*, 17th ed. (1995), para. 17-41 the current state of the law as to the question of use is summarised in these terms:

> "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The law of Scotland, which is relevant to this case as section 14A applies also to Scotland, is the same on the question as to the use which may be made of the public right. In *Rankine, The Law of Land, Ownership in Scotland*, 4th ed. (1909), p. 325 it is stated that the definition of a highway in English law as "a right of passage in general to all the King's subjects" applies also to Scotland. At p. 327 it is observed that "the public right of passage, called a highway" is regarded as a limitation or restriction on the landowner's use of his property. In *Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd.*, 1976 S.C. (H.L.) 30, 125 Lord Wilberforce said: "A public right of way on highways is established by use over the land of a proprietor."

But it is worth nothing that there are some important differences between the law of Scotland and the law of England as to the constitution of the right. I think that it is right to mention this, because Scots law does not regard the assertion that actual intention is confined to the right to pass and repass and to activities incidental or ancillary to that right as a legal fiction. This is regarded in Scotland as a matter of fact which requires to

be established by the evidence. The differences between the laws of the two countries on this matter were discussed in *Mann v. Brodie* (1885) 10 App.Cas. 378. Lord Blackburn observed at p. 385 that any reference to the law of England in that case, which was to be governed by the law of Scotland, was apt to mislead unless the difference of the law of the two countries was borne in mind. At p. 386 he pointed out that, although in both countries a right of public way may be acquired by prescription, it was in England never practically necessary to rely on prescription to establish a public way. It was enough that there was evidence on which those who had to find the fact may find that there was a dedication by the owner whoever he was. Lord Watson said at pp. 390-391 that the constitution of such a right according to the law of Scotland does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. There are many examples in the Scottish authorities of cases where the parties have joined issue on the question whether the evidence of user was sufficient to establish this fact: e.g. *Duke of Athol v. Torrie* (1849) 12 D. 328, aff'd 1 Macq. 65; *Macpherson v. Scottish Rights of Way and Recreation Society Ltd.* (1887) 13 App.Cas. 744. As *Rankine*, *op. cit.*, pp. 329-330 puts it: "The books are rich in illustrations of this matter, for no actions have been more obstinately fought out than cases of right of way."

The statutes which make provision as regards highways in England and Wales and as regards roads in Scotland follow the approach of the common law as to the nature of the public right of access. Section 328(1) of the Highways Act 1980 provides that in that Act, except where the context otherwise requires, "highway" means the whole or part of a highway other than a ferry or waterway. Section 329(1) defines "bridleway," "carriageway," "footpath" and "footway" respectively as meaning a way over which the public have a right of way on horseback, for the passage of vehicles or on foot only, as the case may be. As the term "highway" is not itself defined, it is necessary to apply the common law meaning of the word as a way over which members of the public have a right to pass and repass. Section 151(1) of the Roads (Scotland) Act 1984 is more explicit on this point. It defines "road" as meaning any way over which there is a public right of passage by whatever means. From this it follows that it is not possible to draw any relevant distinction as regards the nature of the public right of access between a highway which passes over land which is in private ownership and a highway which is vested in the statutory highway or roads authority.

It seems that at one time the extent of the right of passage was stated more narrowly than appears from the current textbooks. In *Ex Parte Lewis*, (1888) 21 Q.B.D. 191 it was held that there was no right in the public to occupy Trafalgar Square for the purpose of holding public meetings there. Wills J. said, at p. 197:

> "The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.' A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."

In *Reg. v. Cunningham Graham and Burns* [1886] 16 Cox C.C. 420, 429-430 Charles J. addressed the jury in these terms:

> "I have anxiously considered the observations of Mr. Asquith, and I can find no warrant for telling you that there is a right of public meeting either in Trafalgar Square or any other public thoroughfare. So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose that I know of other than for the purpose of passing and repassing; and, if you come to regard Trafalgar Square as a place of public resort simply, it seems to me it would be very analogous to the case of public thoroughfares."

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 152 Lopes L.J. said that the interest of the public in a highway consisted solely in the right of passage. At p. 154 he went on to say this:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of a highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

Kay L.J. at p. 158 was to the same effect. He said that the right of the public upon a highway is that of passing and repassing over the land the soil of which may be owned by a private person, and that using the land for any other purpose lawful or unlawful was a trespass.

I note in passing that he also made the point that, for trespass, the purpose need not be unlawful in itself, it being enough that it should be a user of the soil for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it. These observations seem to me to be directly in point in the present case. On this approach it would not matter in the least whether the assembly was or was not a peaceful one or whether or not it was causing an obstruction to anyone. The motives or behaviour of those who constitute the assembly are irrelevant to the question whether there is a trespass. The mere fact that it was a use of the soil for a purpose other than that of passing or repassing along the highway would be enough to make it a trespassory assembly.

But the strict approach indicated by the earlier authorities was departed from by Lord Esher M.R. in the same case. At p. 146 he observed that, if the proposition that the use of the highway for any purpose, lawful or unlawful, other than that of passing or repassing was a trespass were to be construed too largely, the effect might be to interfere with the universal usage as regards highways in a way which would derogate from the reasonable exercise of the rights of the public. He went on to give this explanation:

"Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway *as such*. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." (Emphasis added.) In *Hickman v. Maisey* [1900] 1 Q.B. 752, 755 A.L.Smith L.J. said that he agreed with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, although he thought that it was a slight extension of the rule as previously stated which showed that the right of the public was merely to pass and repass along the highway. At p. 756 he gave, as examples of acts which no reasonable person would regard as trespassing, that of a man who sat down by the road for a time to rest himself or who took a sketch from the highway -of which the modern equivalent might be the tourist who pauses to take a photograph. But it is important to notice that the distinction which he drew was between acts which were an ordinary and reasonable use of the highway as such, which were permissible, and acts which were not within that description, which were not. Collins L.J. at p. 757-758 put the matter in this way:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. This is in effect what Lord Esher M.R. said in *Harrison v. Duke of Rutland*."

While therefore Lord Esher M.R. may be said to have extended the previous statements of the law, the extension which he was willing to accept did not depart from the essential principle. The test of what was

ordinary and reasonable is not to be applied in the abstract, as one might legitimately do in order to discover whether the activity was in itself lawful. It has to be applied in the context of the exercise of the right of passage, which is the only right which members of the public are entitled to exercise when "using the highway *as a highway*" (emphasis added): see his words at [1893] 1 Q.B. 142, 146. So the question remains whether what is being done is an ordinary and reasonable thing for a person to do while using the highway as such in the exercise of that right.

Some of the cases indicate a disinclination on the part of the judges to favour resort to the courts for a remedy in cases where the trespass was so trivial or technical that no reasonable person would have objected to it: *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, where the objection was to a clergyman holding services and delivering addresses on the seashore; *Fielden v. Cox* (1906) 22 T.L.R. 411, where the defendants had set up appliances on the highway for the purpose of catching moths. But the fact that some activities on the highway are or ought to be tolerated does not mean that they are being done there in the exercise of the public's right of access to it. It is the extent of the right of access, not the question whether the activity in question ought to be tolerated, which is in issue in the present case. For the purposes of section 14A(5) the question is not whether the assembly is of a kind which a reasonable occupier of the land would tolerate, but whether it exceeds the limits of any permission of his or the limits of the public's right of access.

We were referred to a number of later authorities, but these seem to me to be illustrations of the application of the law as settled by these previous cases and not to indicate that the law is in need of any further extension or relaxation as to the test to be applied. For example, in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Lord Evershed M.R. said:

> "The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

These observations are consistent with the opinion which the Lord President (Dunedin) expressed in *McAra v. Magistrates of Edinburgh* 1913 S.C. 1059. The question in that case was whether the Magistrates were entitled to issue a proclamation ordering that "persons shall not assemble or congregate or hold meetings" in certain streets of the city unless they had been licensed to do so. It was held that they had no power to do so either under the Act of 1606, cap.17, for staying unlawful conventions or at common law. As the Lord President explained at pp. 1074-1075, they had power by means of the police to move the people on if they were causing an obstruction or their conduct was such as to be likely to amount to a breach of the peace. What they could not do without statutory authority was to create an offence and impose penalties. (It should be noted that the Lord President was referring here to the Magistrates not as judges--not as a tribunal of fact of that kind--but as members of the town council, with the power at common law by means of the police--and by proclamation, if necessary--of moving on people who were causing an obstruction: see pp. 1074, 1075.) At p. 1073 he said this as to the limits of the public right of access:

> "As regards the common law, I wish most distinctly to state it as my opinion that the primary and overruling object for which the streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets."

He went on to say that, although the streets are for passage and that passage is paramount to everything else, this does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along--the whole question being one of degree. As for the right of free speech, he said that it undoubtedly exists but that:

> "the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised."

I think therefore that the law as stated by Lord Esher M.R. in *Harrison v. Duke of Rutland* can be taken to be the law as it must be applied between members of the public who seek to exercise the public's right of way on a highway and the occupier of the land which has been dedicated to that right. The question is one of degree. But the principle which must be applied is that the highway is for passage, and such other uses as may be made of it as of right must be capable of being recognised as a reasonable and usual mode of using the highway as such.

This brings me to the wider questions which were raised in the course of the argument. Mr. Fitzgerald's submission was that the assembly in this case was a reasonable use of the highway because it was an entirely peaceful one and because it was not obstructing anybody. His argument was that this was a reasonable use of the highway, not because it was incidental or accessory to the activity of passing and repassing along it, but because as a purpose and end in itself it was reasonable. He said that the test which had been stated by Lord Esher M.R. was capable of development to bring it into line with what society in the late 20th century would consider to be reasonable. In order to strike a fair balance between the rights to freedom of expression and of assembly and the rights of those who wished to pass and repass on the highway, an assembly which was causing an obstruction could not be considered to be reasonable. But an assembly which was not obstructive and was otherwise lawful was a reasonable and usual use of the highway simply because the activity was in itself a reasonable one. So it should not be regarded as a trespassory assembly within the meaning of section 14A.

I do not think that this broad argument can be reconciled with Lord Esher M.R.'s statement of the law or with principle. In my opinion the distinction between the use of a highway for passage and its use as a place of assembly as an end in itself is a fundamental one, although the question is ultimately one of fact. The purpose of those who are said to have formed an assembly may be to remain in the place where they have gathered for a short time only before continuing to pass along the road, in which case it may be inferred that they are making reasonable use of the highway as a highway. Or it may be that their purpose to remain there indefinitely, in which case the only inference which can be drawn is that they are using the highway as a place of assembly. This point that the right is to pass or repass, not to remain, is perhaps best illustrated by using the language which Farwell J. adopted in *Attorney-General v. Antrobus* [1905] 2 Ch. 188 when he was asking himself whether the public could acquire by user the right to visit a public monument.

> In that case also, as it happens, Stonehenge was the subject of the controversy--although in rather different circumstances, as the monument was then in private ownership. The owner of the land had enclosed the monument by fencing on the view that this was necessary for its protection. The Attorney-General wished to remove the fencing in order to keep the place open so that the public could visit it. The action failed, because there could be no public right of way to the monument acquired by mere user or by the fact that the public had been in the habit of visiting it. At p. 198 Farwell J. said that the jus spatiandi--the right to walk about or to promenade--was not known to our law as a possible subject-matter of prescription. At p. 206 he said that the public had no jus spatiandi or manendi--the right to stay or remain--within the circle. In *In re Ellenborough Park* [1956] Ch. 131, in which it was held that the jus spatiandi, in regard to a right to use a pleasure park, could be acquired by grant as an easement, Lord Evershed M.R. observed at p. 163 that Farwell J.'s rejection of it may have been derived in part from its similar rejection by the law of Rome, and that there was no other judicial authority for adopting the Roman view in this respect into English law. But as to the matter of public right he went on at p. 184 to say this: "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by Statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

Although the use of these Latin words may seem out of date in present circumstances, they serve nevertheless as a valuable reminder of the place which the right to assemble must occupy in the context of the law relating to real property. Easements and public rights to land which are acquired by user or by dedication are limited rights, as against the occupier or owner of the land which is affected by them. They are granted or acquired for a particular purpose only, and they are not to be confused with the use of the land for other purposes. Thus a right of way or passage is entirely different from a right to walk about or a right to remain in one place. The law recognises that a right of way or passage may be acquired by user or by dedication. But it takes a different view of the right to walk about or to remain in one place. These are not rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at all they can be acquired only by express grant. So they cannot be included among the rights of access which the public can enjoy as of right without the consent of the landowner.

The assembly which was said by the police to have formed on this occasion was undoubtedly a peaceful and non-obstructive one and, as it was on the grass verge of a road which was vested in the statutory highway authority, it may reasonably be said to have been doing no harm to anyone. But the consequences of accepting that anyone who was behaving in this way was exercising the public's right of access to the highway --was doing so as of right and not by mere tolerance--would have implications far beyond the facts of this case. It would affect the position of every private owner of land throughout the country over which there is a public right of way, irrespective of whether this is a made up road or a footpath or bridleway. The right of assembly which Mr. Fitzgerald was seeking to establish was what would be described in the terms of property law as a right to remain. I wish to stress that the purpose for which the appellants were seeking to remain where they had gathered is not material in this context. Any member of the public may use a highway for passage in the exercise of the public right whatever his reason may be for doing so. In the same way, if such a thing as a public right to assemble and remain in one place on the highway were to be recognised, the purpose of those who wished to exercise it would be immaterial. If it was an unlawful purpose it could be stopped on that ground. But if it was lawful there would be nothing to prevent those who wished to exercise it from remaining where they were for however long they wished, whatever their number and whatever their purpose might be in doing so.

It is not difficult to see that to admit a right in the public in whatever numbers to remain indefinitely in one place on a highway for the purpose of exercising the freedom of the right to assemble could give rise to substantial problems for landowners in their attempts to deal with the activities of demonstrators, squatters and other uninvited visitors. It would amount to a considerable extension of the rights of the public as against those of both public and private landowners which would be difficult for the courts to control by reference to any relevant principle. The margin between what is and what is not a nuisance is an imprecise one, as to which he who wishes to put a stop to it may be in difficulty in obtaining an immediate remedy. The test of reasonable use of the highway as such is consistent with the rule that the public's right of way is essentially a right of passage. It is also consistent with the law as to the kind of user which must be shown in order to show that a public right of way has been constituted over the land of the proprietor. The proposition that the public are entitled to do anything on the highway which amounts in itself to a reasonable user may seem at first sight to be an attractive one. But it seems to me to be tantamount to saying that members of the public are entitled to assemble, occupy and remain anywhere upon a highway in whatever numbers as long as they wish for any reasonable purpose so long as they do not obstruct it. I do not think that there is any basis in the authorities for such a fundamental rearrangement of the respective rights of the public and of those of public and private landowners.

Mr. Fitzgerald said that, whatever the difficulties might be in regard to the holding of assemblies on footpaths and bridleways over the property of private landowners, there was no good reason why the same view should be applied to highways which were vested in the statutory highway authority. He said that, as highways which are used as roads by the public are now almost all in public ownership and as section 14A had brought the whole issue of trespass into the realm of public law, there should now be a coherent system of public law to deal with assembly cases. His argument was that the approach which the criminal law had

taken in obstruction cases showed that the concept of reasonable user was capable of providing the required symmetry.

I do not need to go into a detailed analysis of the obstruction cases. We were referred to *Hirst and Agu v. Chief Constable of West Yorkshire* (1987) 85 Cr.App.R. 143, in which the question was considered in the context of the offence which is created by section 137(1) of the Highways Act 1980 where a person without lawful authority or reasonable excuse in any way wilfully obstructs the free passage along a highway. In that context it is necessary to consider whether what was done was in itself reasonable, striking a balance between the right to free speech and to demonstrate on the one hand and the need for peace and good order on the other: *per* Otton L.J. at p. 151.

Mr. Fitzgerald said that the common law was capable of development within the concept of reasonable user in order to rationalise what he accepted were two conflicting lines of authority. But I do not think that section 14A requires us to attempt such an exercise. On the contrary, the intention of Parliament as disclosed by the language of that section was to rely upon the existing state of the law relating to trespass as between members of the public and the occupiers of land to which members of the public have no right of access or only a limited right of access. Like it or not, this approach makes the lack of symmetry of which Mr. Fitzgerald complains inevitable. The private law upon which section 14A depends for its application is concerned to regulate the rights of the owners and occupiers of land in regard to the use of their land by the public. Public law, which is concerned with the relationship between the state and its citizens, depends upon entirely different concepts. Furthermore it is a striking feature of the present case that the question whether the law relating to the public's right of access should be rationalised in order to give the public greater freedom in the exercise of that right is being discussed in a case to which no landowner is a party. It seems to me to be contrary to elementary concepts of justice that the rights of landowners as against the public in relation to access to their land should be diminished by a decision of your Lordships' House when nobody who is in a position to defend their interest has yet been heard.

We were invited to have regard to the European Convention on Human Rights and Fundamental Freedoms both as an aid to statutory interpretation and as a yardstick against which to resolve any uncertainty in the common law or to guide its development. I do not think that there is any need to have resort to the Convention as an aid to statutory interpretation, as there is no ambiguity in the statutory provisions which are relevant to this case. Nor do I think that there is any uncertainty as to the test which must be applied under the common law relating to the use which the public may make of a highway in the exercise of the public's right of access. In *Attorney-General v. Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109, 283G Lord Goff of Chieveley said that he conceived it to be his duty, when he was free to do so, to interpret the law in accordance with the obligations of the Crown under the treaty. Adopting this approach, in *Derbyshire County Council v. Times Newspapers Ltd* [1992] Q.B. 770, 830B-C Butler-Sloss L.J. said that, where there was an ambiguity in the law or the law was otherwise unclear or so far undeclared by an appellate court, the English court was not only entitled but obliged to consider the implications of the Convention. For the appellants it was contended that the law is unclear because the inconsistency between the private law relating to trespass and the criminal law relating to obstruction in public places had still to be reconciled. For the reasons which I have already given I do not accept that there is such an inconsistency.

In any event it seems to me that there are clear indications in the Convention that restrictions on the exercise of fundamental rights and freedoms such as the freedom of assembly under Article 11(1) may be justified where this is necessary for the protection of the rights and freedoms of others. This is stated in terms in Article 11(2). Article 1 of the First Protocol states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The precise effect of these provisions in regard to the right of a landowner to exclude trespassers from his property was not explored in the course of the hearing before us. But I do not think that it would be right to regard the Convention as providing unqualified support to the argument that the public's right of access should be enlarged so as to enable the public to exercise what Article 11(1) of the Convention describes as "the right to freedom of peaceful

assembly" wherever there is a public right of access to a highway. Such an enlargement would be bound to result in loss of the protection of the owners of land which the existing state of the law gives to them. In that sense and to that extent it could be said that they were being deprived of their right to the quiet enjoyment of their possessions contrary to Article 1 of the First Protocol.

It seems to me therefore that what I can best describe as the horizontal effect of the appellants' argument as to the Convention in regard to the private rights of landowners gives rise to questions of considerable difficulty. I am not persuaded that the balance which is struck in private law between the rights of the public and those of landowners is in need of adjustment in order to enable members of the public to exercise their freedom of assembly. In practice members of the public are allowed to assemble in public places as they wish without objection or hindrance so long as they do not obstruct others and are peaceful. As Lord Goff of Chieveley said in *Attorney-General v. Guardian Newspapers Ltd (No. 2)* at p. 283, everybody is free to do anything in this country, subject only to the provisions of the law. The law of trespass exists to protect the interests of landowners where such assemblies exceed the limits which they are willing to tolerate. Such provisions as exist in public law, as in the case of section 14A, may be justified on the ground that they have been carefully drafted having regard to the need to protect the public from arbitrary action on the part of the police while at the same time enabling the police to intervene to prevent disorder or crime. I do not think that the Convention requires us to attempt to reform the private law relating to trespass on which section 14A relies in order to mitigate the effects of its application to trespassory assemblies which are held in breach of an order obtained under that section. For these reasons I would answer the certified question in the affirmative and dismiss the appeal.

LORD CLYDE

My Lords,

The appellants were convicted of having taken part in an assembly which they knew was prohibited under section 14 of the Public Order Act 1986. The question is whether the assembly was a prohibited one. Section 14A(5) explains what is meant by a prohibited, or a "trespassory," assembly. The relevant words for the purposes of the present case are that the assembly "(*a*) is held on land to which the public has. . . only a limited right of access, and (*b*) takes place in the prohibited circumstances. . . ."

There is no doubt but that the assembly in the present case took place on a highway and that a highway is land to which the public had a limited right of access. So one has next to consider the prohibited circumstances. Those circumstances are defined in section 14A(5)(*b*). The critical qualification here claimed is that the assembly so took place "as to exceed . . . the limits of the public's right of access." So the question comes to be what is the extent of the public's right of access. That is a quite general question which will apply universally, whether an individual member of the public or a group of people is involved. It will also be applicable to any other kind of public road, subject to any particular limitations which may restrict the use of such a road, whenever or however imposed.

The Act gives a little further explanation. Section 14A(9) defines "limited" in relation to a right of access by the public to land as meaning that "their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions." So one has to consider what was the particular purpose for which Parliament considered the use of a highway was restricted.

The fundamental purpose for which roads have always been accepted to be used is the purpose of travel, that is to say, passing and re-passing along it. But it has also been recognised that the use comprises more than the mere movement of persons or vehicles along the highway. The right to use a highway includes the doing of certain other things subsidiary to the user for passage. It is within the scope of the right that the traveller may stop for a while at some point along the way. If he wishes to refresh himself, or if there is some particular object which he wishes to view from that point, or if there is some particular association with the place which he wishes to keep alive, his presence on the road for that purpose is within the scope of the

acceptable user of the road. The view was expressed by A. L. Smith L.J., in *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, that if a man took a sketch from the highway no reasonable person would treat that as an act of trespass. So as it seems to me the particular purpose for which a highway may be used within the scope of the public's right of access includes a variety of activities, whether or not involving movement, which are consistent with what people reasonably and customarily do on a highway. In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146 Lord Esher M.R. defined trespass in terms of a person being on the highway "not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway." But what is reasonable or usual may develop and change from one period of history to another. That was recognised by Collins L.J. where in *Hickman v. Maisey* [1900] 1 Q.B. 752, 758 he said:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

On the other hand the purpose for which the road is used must be for ordinary and lawful uses of a roadway and not for some ulterior purpose for which the road was not intended to be used. Thus in the case of *Hickman v. Maisey* to which I have already referred, it was held to be a trespass for someone to use the road as a vantage point for observing the performance of racehorses undergoing trial. To use the language of Collins L.J. (at p. 758) that was a use of the highway "in a manner which is altogether outside the purpose for which it was dedicated." So also in the earlier case of *Harrison v. Duke of Rutland* (1893) Q.B.D. 142 it was held to be a trespass for a person to use the road for the purpose of disrupting the adjoining landowner's enjoyment of his sporting rights.

But it must immediately be noticed that the public's right is fenced with limitations affecting both the extent and the nature of the user. So far as the extent is concerned the user may not extend beyond the physical limits of the highway. That may often include the verges. It may also include a lay-by. Moreover, the law does not recognise any jus spatiendi which would entitle a member of the public simply to wander about the road, far less beyond its limits, at will. Further, the public have no jus manendi on a highway, so that any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there.

So far as the manner of the exercise of the right is concerned, any use of the highway must not be so conducted as to interfere unreasonably with the lawful use by other members of the public for passage along it. The fundamental element in the right is the use of the highway for undisturbed travel. Certain forms of behaviour may of course constitute criminal actings in themselves, such as a breach of the peace. But the necessity also is that travel by the public should not be obstructed. The use of the highway for passage is reflected in all the limitations, whether on extent, purpose or manner. While the right to use the highway comprises activities within those limits, those activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with that use even if they are not strictly ancillary to it. As was pointed out in *McAra v. Magistrates of Edinburgh* 1913 S.C. 1059 and in *Aldred v. Miller* 1924 J.C. 117 the use of a public street for free unrestricted passage is the most important of all the public uses to which public streets are legally dedicated. No issue regarding the nature of the user arises in the present case. It appears that everyone was behaving with courtesy and civility and restraint. Moreover there was no obstruction at all to any traffic.

In the generality there is no doubt but that there is a public right of assembly. But there are restrictions on the exercise of that right in the public interest. There are limitations at common law and there are express limitations laid down in Article 11 of the Convention on Human Rights. I would not be prepared to affirm as a matter of generality that there is a right of assembly on any place on a highway at any time and in any event I am not persuaded that the present case has to be decided by reference to public rights of assembly. If a group of people stand in the street to sing hymns or Christmas carols they are in my view using the street

within the legitimate scope of the public right of access to it, provided of course that they do so for a reasonable period and without any unreasonable obstruction to traffic. If there are shops in the street and people gather to stand and view a shop window, or form a queue to enter the shop, that is within the normal and reasonable use which is matter of public right. A road may properly be used for the purposes of a procession. It would still be a perfectly proper use of the road if the procession was intended to serve some particular purpose, such as commemorating some particular event or achievement. And if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so. All such activities seem to me to be subsidiary to the use for passage. So I have no difficulty in holding that in principle a gathering of people at the side of a highway within the limits of the restraints which I have noted may be within the scope of the public's right of access to the highway.

In my view the argument for the appellants, and indeed the reasoning of the Crown Court, went further than it needed to go in suggesting that any reasonable use of the highway, provided that it was peaceful and not obstructive, was lawful, and so a matter of public right. Such an approach opens a door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway. I do not consider that by using the language which it used Parliament intended to include some distinct right in addition to the right to use the road for the purpose of passage.

I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway.

The only point which has caused me some hesitation in the circumstances of the present case is the evident determination by the two appellants to remain where they were. That does seem to look as if they were intending to go beyond their right and to stay longer than would constitute a reasonable period. But I find it far from clear that there was an assembly of twenty or more persons who were so determined and in light of the fluidity in the composition of the grouping and in the consistency of its component individuals I consider that the Crown Court reached the correct conclusion.

I do not find it possible to return any general answer to the certified question. The matter is essentially one to be judged in light of the particular facts of the case. But I am prepared to hold that a peaceful assembly which does not obstruct the highway does not necessarily constitute a trespassory assembly so as to constitute the circumstances for an offence where an order under section 14A(2) is in force. I would allow the appeal.

(back to preceding text)

LORD HUTTON
My Lords,

On 1 June 1995 a number of people were present in the vicinity of Stonehenge. There were tourists and sightseers, and there were also a number of people who were present because it was the tenth anniversary of a disturbance known as "the Battle of the Beanfield" when the police had had to eject persons who had tried to enter the site of Stonehenge.

About 6.45 p.m. on 1 June the two appellants together with about 19 other persons, constituting a group of more than 20 persons, were on the grass verge between the perimeter fence of Stonehenge and the metal

surface of the roadway of the A344. Some of the group were carrying banners with the words "Never Again", "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge". The grass verge was about 4 feet 6 inches to 5 feet wide and the group, which was not static but fluid, was moving around on the verge and was spread out over 10 to 15 yards. It is not in dispute that the grass verge is to be considered as part of the public highway.

In 1994 Parliament amended the Public Order Act 1986 by section 70 of the Criminal Justice and Public Order Act 1994 which inserted sections 14A and section 14B after section 14 in the Act of 1986. The effect of section 14A in relation to the circumstances of the present case can be broadly stated as follows: where a chief officer of police reasonably believes that an assembly of 20 or more persons is intended to be held in any district at a place on land to which the public has only a limited right of access, and that the assembly is likely to conduct itself in such a way as to exceed the limits of the public's right of access and may result in serious disruption to the life of the community or in significant damage to a monument of historical, architectural, archaeological or scientific importance on the land, he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or in part of it. On receiving such an application a council in England, with the consent of the Secretary of State, may make such an order.

On 22 May 1995 Salisbury District Council made an order pursuant to section 14A that the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining the monument at Stonehenge were prohibited for four days commencing at 2359 hours on 28 May 1995 and terminating at 2359 hours on 1 June 1995.

Section 14A(5) provides:

"An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which--

(a) is held on land to which the public has no right of access or only a limited right of access, and (b) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

Section 14A(9) provides:

"'limited', in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions;"

Section 14B(2) provides:

"A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The two appellants were charged with an offence under section 14B(2). They were tried before the Salisbury Justices and on 3 October 1995 they were each convicted of that offence. They appealed against their convictions to the Salisbury Crown Court and their appeals were heard by His Honour Judge Maclaren Webster Q.C. and two Justices on 3 and 4 January 1996. At the close of the prosecution case the appellants submitted that there was no case to answer and the Crown Court accepted this submission and allowed the appeals in a fully reasoned judgment setting out its findings and conclusions. The Director of Public Prosecutions appealed by case stated to a Divisional Court of the Queen's Bench Division, constituted by McCowan L. J. and Collins J., which allowed the Director's appeal and ordered that the case be remitted to the Salisbury Crown Court to be reheard by a differently constituted bench.

In its judgment the Crown Court set out its findings of fact. These included the following at p. 9 of its judgement:

"At no time was either Appellant or, for that matter any other person in the group of people in the area extending 10-15 yards westward from the Heelstone abusive, obstructive or in any way offensive or violent

to the Police or anyone else. None of those to whom Inspector Mackie addressed himself was in the roadway--the A344 itself, they were not obstructing the freedom of movement of others on the verge nor were they causing a public nuisance."
And at p. 15:

"I pause to remind us that we have found that the assembly of 20 or more people was merely that. It was a presence. It was not, let alone any member of it, let alone either of the appellants, other than present. Neither as a group nor as individuals were any of those twenty, and in particular, of course, the Appellants (whom it must always be remembered we have to consider individually as distinct both from the group and each other) being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

Therefore the issue which arose for determination before the Crown Court and the Divisional Court was whether the entirely peaceful assembly which did not obstruct passage along the highway constituted a trespassory assembly because it was taking place "so as to exceed the limits of . . . the public's right of access" to the highway, the A344.

The conclusion of the Crown Court was stated as follows at p. 26:

> ". . . we find that everything that was done by the Appellants was done peaceably and in good order. Although Lord Denning in Hubbard was dealing with an interlocutory injunction and Otton J. in Hirst and Agu with obstruction (which, let it be recalled, did not occur in the instant case), we too are of the view that the passage cited from Lord Denning is, to adopt and adapt the words of Otton J., of importance when considering whether Appellants (behaving as we find, on the evidence thus far, these Appellants to have been behaving), have committed a criminal offence of knowingly taking part in a prohibited assembly. "What the Order prohibited was a trespassory assembly. We accept Mr. Butt's contention [for the prosecution] that a trespassory assembly is one where the public's right of access to land has been exceeded. We do not in the light of our conclusion on that aspect have to consider whether the Appellants knew they were taking part in a prohibited assembly. Their user of the highway was a reasonable user.
> "Accordingly, for the reasons we have sought to explain we have unanimously reached the conclusion that the evidence is not such that properly directed we could properly convict of that offence. Accordingly there is no case for the Appellants to answer and their appeals must be allowed."

In the case stated to the Divisional Court two questions were stated for its opinion:

> "(i) Where there is in force an Order under Section 14A(2), and on the public highway within the area and time covered by the Order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of Section 14A?
> (ii) In order to prove an offence under Section 14B(2) of the Public Order Act 1986, is it necessary for the prosecution to prove that each of the 20 or more persons present is exceeding the limits of the public's right of access or merely that 20 or more persons were present and that some of them were exceeding the limits of the public's right of access?"

The Divisional Court answered the first question in the affirmative. In his judgment in the Divisional Court McCowan L.J. stated at p. 6:

> "In the present case counsel for the respondents, Mr. Starmer, argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the Order made under Section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access

> to the highway by the public. I would accordingly answer the first question posed by the Crown Court for this Court in the affirmative.
> "Counsel for the respondents also argued before us that a right to passage and repassage must include anything incidental thereto. I would accept that, but it leaves the question of what is incidental to passage or repassage. Passing the time of day with an acquaintance whom one happens to meet on the highway might well qualify, but I would reject the suggestion that the holding of an assembly of 21 persons possibly could, any more than I would accept counsel's suggestion, by way of analogy, that a photographer on a public highway adjacent to the Queen's land taking photographs from the highway of members of the Royal Family on that land would only be doing something which was incidental to his right of passage or repassage on that highway."

Collins L.J. stated at p. 9:

> "The holding of a meeting, a demonstration or a vigil on the highway, however peaceable, has nothing to do with the right of passage. Such activities may, if they do not cause an obstruction, be tolerated, but there is no legal right to pursue them. A right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it."

And at p. 11 he said:

> "The existence of a lawful excuse for doing something does not necessarily establish a legal right to do it. In the context of the criminal offence of obstruction, lawful excuse is naturally seen in terms of offending and not in terms of civil trespass."

It was agreed before the Divisional Court that the second question should be answered in the negative, in the sense that the prosecution need prove no more than that the assembly consisted of 20 or more persons and that the particular person accused was taking part in that assembly knowing it to be prohibited by an order under section 14A.

The point of law of general public importance stated for the opinion of this House is the same as that contained in the first question stated for the opinion of the Divisional Court and is as follows:

> "Where there is in force an Order made under Section 14A(2), and on the public highway within the area and time covered by the Order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of Section 14A?"

My Lords, I consider that in the light of the well known authorities cited to the House the present state of the law is correctly stated in the following passage in *Halsbury's Laws of England* 4th ed. Vol. 21 para. 110:

> "The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for those purposes and not with a legitimate object, and as against the owner of the soil he is to be treated as a trespasser."

However I consider that there are indications in the authorities that the public's right to use the highway may be extended and I consider that the important issue before your Lordships' House is whether that right should be extended so that the public has a right in some circumstances to hold a peaceful assembly on the public highway provided that it does not obstruct the use of the highway.

To consider this issue I must first turn to the principal authorities which establish the principle stated in *Halsbury*. In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 it was held that the plaintiff was a trespasser

when, on the occasion of a grouse drive upon a moor owned by the Duke of Rutland, the plaintiff went upon a highway which crossed it, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the guns. Lopes L.J. stated at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

In his judgment, having considered the authorities, Kay L.J. stated at p. 158:

> "According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it."

In *Hickman v. Maisey* [1900] 1 Q.B. 752 the defendant, who published information as to the performances of racehorses in training, walked backwards and forwards on a portion of the highway over the plaintiff's land about 15 yards in length for a period of about an hour-and-a-half, watching and taking notes of the trials of racehorses on the plaintiff's land. The Court of Appeal following the decision in *Harrison v. Duke of Rutland* upheld a verdict that the defendant was a trespasser.

In *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, 126, 127 Slesser L.J. stated the right of the public to use the highway in the terms employed by Lopes L.J. in *Harrison v. Duke of Rutland*, and in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Evershed M.R. stated:

> ". . . it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

Therefore, as I have stated, the issue which arises in the present appeal is whether the right of the public to use the highway, as stated by Lopes L.J. in *Harrison v. Duke of Rutland*, should be extended and should include the right to hold a peaceful public assembly on a highway, such as the A344, which causes no obstruction to persons passing along the highway and which the Crown Court found to be a reasonable user of the highway. In my opinion your Lordships' House should so hold for three main reason which are as follows. First, the common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern and I consider that the common law should now recognise that this right, which is one of the fundamental rights of citizens in a democracy, is unduly restricted unless it can be exercised in some circumstances on the public highway. Secondly, the law as to trespass on the highway should be in conformity with the law relating to proceedings for wilful obstruction of the highway under section 137 of the Highways Act 1980 that a peaceful assembly on the highway may be a reasonable use of the highway. Thirdly, there is a recognition in the authorities that it may be appropriate that the public's right to use the highway should be extended, in the words of Collins L.J. in *Hickman v. Maisey* at p. 758:

> "in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

I now turn to state these reasons more fully.

The common law right of public assembly is unduly restricted unless it can be exercised in some circumstances on the public highway

In *Hubbard v. Pitt* [1976] Q.B. 142, 178 Lord Denning M.R. stated:

> "Finally, the real grievance of the plaintiffs is about the placards and leaflets. To restrain these by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in *Bonnard v. Perryman* [1891] 2 Ch. 269, and repeatedly applied ever since. That case spoke of the right of free speech. Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority--at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of Common Council of London affirmed 'the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.' Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited: see *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308. I stress the need for peace and good order. Only too often violence may break out: and then it should be firmly handled and severely punished. But so long as good order is maintained, the right to demonstrate must be preserved. In his recent inquiry on the Red Lion Square disorders, Scarman L.J. was asked to recommend that 'a positive right to demonstrate should be enacted.' He said that it was unnecessary: 'The right, of course, exists, subject only to limits required by the need for good order and the passage of traffic': The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38. In the recent report on Contempt of Court (1974) (Cmnd. 5794), the committee considered the campaign of the 'Sunday Times' about thalidomide and said that the issues were 'a legitimate matter for public comment': p. 28, line 7. It recognised that it was important to maintain the 'freedom of protest on issues of public concern': p. 100, line 5. It is time for the courts to recognise this too. They should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right of free speech; provided that everything is done peaceably and in good order."

In *Hubbard v. Pitt* the issue before the Court of Appeal was whether the judge in the High Court was right to grant an interlocutory injunction. Lord Denning dissented on this issue from the other members of the court, Stamp and Orr L.JJ., but they did not express an opinion on the right of public assembly.

In *Hirst and Agu v. Chief Constable of West Yorkshire* (1987) 85 Cr.App.R. 143, 151 Otton J. cited the above passage from the judgment of Lord Denning in *Hubbard v. Pitt* and said:

> "The courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other."

If, as in my opinion it does, the common law recognises the right of public assembly, I consider that the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens, because otherwise the value of the right is greatly diminished. The principles of law in Canada governing the right of public assembly are different to those in England, in part because the Canadian Charter of Rights and Freedoms gives an express right of freedom of expression, but I consider that the reasoning in the following passage in the judgment of Lamer

C.J.C. in the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 394 should also apply to the common law right of public assembly:

> ". . . the freedom of expression cannot be exercised in a vacuum . . . it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression."

Conformity between the law of trespass to the highway and the law relating to wilful obstruction of the highway

Section 137(1) of the Highways Act 1980 provides:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence . . ."

In *Hirst and Agu v. Chief Constable of West Yorkshire* the defendants were members of a group of animal rights' supporters which stood on the public street in the vicinity of a furrier's shop offering leaflets to pedestrians and holding banners. They were charged with an offence contrary to section 137(1). They were convicted by the Justices and their appeals to the Crown Court were dismissed. They then appealed by case stated to the Divisional Court. Both in the Crown Court and in the Divisional Court the submission of the prosecutor was:

> '"that unless the presence of the defendants upon the highway was for the purpose of its lawful use (i.e. passing and re-passing over and along it) or some purpose incidental to that lawful use then their presence on the highway constituted an obstruction. He further contended that the question of 'reasonableness' did not fall to be decided if the court was satisfied that the presence of the defendants upon the highway was not for the purpose of its lawful use or some purpose incidental to it."'

The Crown Court stated its conclusion as follows:

> "We considered ourselves bound by the decision in *Waite v. Taylor* (1985) 149 J.P. 551. We found that to stand in the highway offering and distributing leaflets or holding a banner was not incidental to its lawful user, and accordingly that each of the defendants had wilfully obstructed the highway contrary to section 137 of the Highways Act 1980. We therefore dismissed the appeals."

The Divisional Court allowed the appeals and quashed the convictions. In his judgment Glidewell L.J. cited the judgment of Lord Parker C.J. in *Nagy v. Weston* (1965) 1 All E.R. 78, 80 in which Lord Parker said:

"It is undoubtedly true--counsel for the appellant is quite right - that there must be proof that the user in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and, of course, whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

(back to preceding text)

Glidewell L.J. also cited the judgment of Lord Denning in Hubbard v. Pitt where a group of persons picketed the plaintiffs' offices by standing on the public footpath in front of the premises holding placards and distributing leaflets and Lord Denning, after quoting the passage from the judgment of Lord Parker in Nagy v. Weston which Glidewell L.J. quoted, continued:

"In the present case the police evidently thought there was no breach of this law. The presence of these half a dozen people on Saturday morning for three hours was not an unreasonable use of the highway. They did not interfere with the free passage of people to and fro. Of course, if there had been any fear of a breach of the peace, the police could have interfered: see Duncan v. Jones [1936] 1 K.B. 218. But there was nothing of that kind." (My emphasis.)
Glidewell L.J. then stated at p. 150:

"In Nagy v. Weston itself, the activity being carried on, that is to say the sale of hot dogs in the street, could not in my view be said to be incidental to the right to pass and re-pass along the street. Clearly, the Divisional Court took the view that it was open to the magistrates to consider, as a question of fact, whether the activity was or was not reasonable. On the facts the magistrates had concluded that it was unreasonable (an unreasonable obstruction) but if they had concluded that it was reasonable then it is equally clear that in the view of the Divisional Court the offence would not have been made out.

"That is the way Tudor Evans J. approached the matter in the recent decision of Cooper v. M.P.C. (supra) and I respectfully agree with him.

"As counsel pointed out to us in argument, if that is not right, there are a variety of activities which quite commonly go on in the street which may well be the subject of prosecution under section 137. For instance, what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? In my judgment that is a question that arises. It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates, in my view . . .

"Some activities which commonly go on in the street are covered by statute, for instance, the holding of markets or street trading, and thus they are lawful activities because they are lawfully permitted within the meaning of the section. That is lawful authority. But many are not and the question thus is (to follow Lord Parker's dictum): have the prosecution proved in such cases that the defendant was obstructing the highway without lawful excuse? That question is to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway."
In his judgment Otton J. referred to the balance between the right to demonstrate and the need for peace and good order and stated at p. 152:

"On the analysis of the law given by Glidewell L.J. and his suggested approach with which I totally agree, I consider this balance would be properly struck and that the 'freedom of protest on issues of public concern' would be given the recognition it deserves."

The importance of this decision (which in my opinion was correct) was that, in deciding whether there was a lawful excuse for a technical obstruction of the highway, the Divisional Court rejected the test applied by the Crown Court, which was that a use of the highway which was not incidental to passing along it could not give rise to a lawful excuse, and applied the test whether the use of the highway (even though not incidental to passage) was reasonable or not.

In my opinion the law would be left in an unsatisfactory state if your Lordships' House held that in this case the peaceful assembly on the highway, which caused no actual obstruction to persons passing along the highway, constituted a criminal trespass under section 14B because the assembly was not incidental to passage along the highway, whilst the law recognised, as held in Hirst and Agu, that such an assembly may be a reasonable use of the highway and in consequence there is a lawful excuse under section 137 of the Highway Act 1980 to a charge of wilfully obstructing the free passage along a highway.

The extension of the public's right to use the highway

In the judgments in Harrison v. Duke of Rutland the words of Crompton J. in Regina v. Pratt 4 E. & B. 860 were quoted:

"I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."
In Pratt's case Erle J. made a similar statement. But in Harrison v. Duke of Rutland Lord Esher M.R. stated the principle in less restrictive terms at p. 146:

"Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of Erle J., and of Crompton J., in Reg. v. Pratt (1), were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

In their judgments in Hickman v. Maisey A. L. Smith L.J. and Collins L.J. accepted that the right of the public to pass and repass on the highway was subject to some degree of extension. A. L. Smith L.J. stated at p. 755:

"Many authorities, of which the well-known case of Dovaston v. Payne (1) is one, shew that prima facie the right of the public is merely to pass and repass along the highway; but I quite agree with what Lord Esher M.R. said in Harrison v. Duke of Rutland (2), though I think it is a slight extension of the rule as previously stated, namely, that, though highways are dedicated prima facie for the purpose of passage, 'things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such'; and, 'if a person on a highway does not transgress such reasonable and usual mode of using it,' he will not be a trespasser; but, if he does 'acts other than the reasonable and ordinary user of a highway as such' he will be a trespasser. For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, to take a case suggested during the argument, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass. But I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of race-horses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned." And Collins L.J. stated at p. 757:

> "Now primarily the purpose for which a highway is dedicated is that of passage, as is shewn by the case of *Dovaston v. Payne* (1); and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities shew that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

It can be contended that these passages in the judgments of Lord Esher M.R. and A. L. Smith and Collins L.JJ. only contemplate an extension of the rights of the public provided that the highway is used "as such," and that the extended use must be connected with using the highway for passing and repassing. But I consider that the passages are open to a broader construction and that they do not exclude a reasonable use of the highway beyond passing and repassing, provided always that the use is not inconsistent with the paramount purpose of a highway, which is for the use of the public to pass and repass. Therefore for your Lordships' House to uphold the appellants' argument would not constitute a reversal of a well established principle but rather would be an extension of the law in a way foreshadowed by earlier judgments. In *C. v. Director of Public Prosecutions* [1995] 2 All E.R. 43 this House was considering whether a long established rule of the criminal law should be set aside and I consider that the approach stated by Lord Lowry at page 52G-J is not applicable to the present case.

Therefore, for the reasons which I have given, I am of opinion that the holding of a public assembly on a highway can constitute a reasonable user of the highway and accordingly will not constitute a trespass and I would allow the appeal. But I desire to emphasise that my opinion that this appeal should be allowed is based on the finding of the Crown Court that the assembly in which the appellants took place on this particular highway, the A344, at this particular time, constituted a reasonable use of the highway. I would not hold that a peaceful and non-obstructive public assembly on a highway is always a reasonable user and is therefore not a trespass.

It is for the tribunal of fact to decide whether the user was reasonable. In *Hirst and Agu* at p. 150 Glidewell L.J. makes it clear that a reasonable activity in the street may become unreasonable by reason of the space occupied or the duration of time for which it goes on, "but it is a matter on the facts for the magistrates, in my view."

If members of the public took part in an assembly on a highway but the highway was, for example, a small, quiet country road or was a bridleway or a footpath, and the assembly interfered with the landowner's enjoyment of the land across which the highway ran or which it bordered, I think it would be open to the Justices to hold that, notwithstanding the importance of the democratic right to hold a public assembly, nevertheless in the particular circumstances of the case the assembly was an unreasonable user of the highway and therefore constituted a trespass.

In conclusion I refer to one further matter. In setting out the facts the judgment of the Crown Court states at p. 5:

> "At 5.45(p.m.) (Inspector Mackie) and other officers saw a sizeable group (he said by that he meant one he estimated at about 20 people) scale the fence of the monument and enter it. The officers also saw that group escorted out again either by Police or Security Officers without any arrests or violence."

And at p. 16:

> "Of course the basis of Inspector Mackie's undisputedly reasonable and sensibly intended intervention was to prevent any such thing as an incursion into the Monument such as had occurred an hour earlier in which there was no evidence that the Appellants were involved."

I thought for a time in the course of the argument that the decision of the Crown Court might be erroneous because it appears that Inspector Mackie thought that the assembly of which the appellants were a part was about to commit an act of trespass by entering the monument, as had happened an hour earlier. I consider that there is an argument of some force that a reasonable user of the highway by an assembly may become an unreasonable user so that the non-trespassory assembly becomes a trespassory assembly if it appears that members of the assembly are about to commit unlawful acts. However, this point did not arise in the questions stated for the opinion of the Divisional Court and was not argued before the Divisional Court, and

the point does not arise on the question stated for the opinion of your Lordships' House. Therefore it would not be right to decide the appeal on this point. Accordingly I express no concluded opinion on the point or on the circumstances in which a non-trespassory assembly may become a trespassory assembly.

For the reasons which I have given I would allow the appeal and would answer the certified question before your Lordships' House as follows. "No, if the tribunal of fact finds that the assembly was a reasonable user of the highway."