

THE LIABILITY OF PUBLIC AUTHORITIES

**(PRIVATE LAW CAUSES OF ACTION
AGAINST PUBLIC SERVICE PROVIDERS
EXERCISING THEIR STATUTORY FUNCTIONS)**

**CHRISTOPHER KENNEDY Q.C.
6 November 2010**

INTRODUCTION

- What is meant by a public authority?: bodies responsible for public services:
 - Local councils:
 - highways authorities,
 - education services,
 - social services;
 - Police;
 - Emergency Services;
 - (Utilities);
- What is peculiar about public authorities?
 - They are legal persons like any other
 - Employers,
 - Occupiers see (*Tomlinson v Congleton BC [2003] UKHL 47*);
 - Their peculiarity lies in their exercise of statutory powers and duties:
 - Examples of duties:
 - To maintain the roads,
 - To take positive steps to reduce accidents on the roads,
 - To educate children,
 - To respond to emergencies;
 - Example of powers:
 - To require a landowner to remove an obstruction;
- The regulation of these statutory powers and duties is by and large by public law (judicial review);
- The circumstances in which the exercise of these public powers and duties gives rise to a ‘private law cause of action’ are restricted;
- This lecture addresses when and why private law causes of action may arise against public service providers exercising their statutory functions;
- Not addressed:
 - Misfeasance in public office: exercise (or failure to exercise) powers with the deliberate intention of injuring C or knowing that the conduct is unlawful;
 - Liability of public authorities under the Human Rights Act 1998;
- ‘Caparo’ principles:

“[I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

(Lord Bridge in *Caparo v Dickman* [1990] 2AC 605)

PRIVATE LAW ACTIONS FOR BREACH OF STATUTORY DUTY

The Highways Act 1980

- No duty as citizens to maintain the highway;
- Section 41 imposes that duty on authorities who are for the time being a highway authorities: usually local councils
 - Section 41(1A) provides that a local authority is under a duty to ensure so far as reasonably practicable that safe passage along a highway is not endangered by snow and ice: overturning *Goodes v East Sussex CC (Case 17)*
- The highway usually has two parts: carriageway and footway (section 66 Highways Act 1980);
- If:
 - a highway is out of maintenance, and
 - a Claimant suffered injury as a result;
- then
 - the highway authority will be liable;
- unless
 - it can take advantage of the statutory defence afforded by section 58 whereby the authority must prove that it took 'such care as in all the circumstances was reasonably required to secure that part of the highway to which the action relates was not dangerous for traffic.
- The statutory list of factors to which the court must have regard (section 58(2)):
 - (a) The character of the highway and traffic reasonably expected to use it;
 - (b) The standard of maintenance appropriate to it;
 - (c) The state of repair a reasonable person would expect;
 - (d) The knowledge which the highway authority had or should have had;
 - (e) The kind of warning notices displayed pending repair.

Other instances of private law actions for breach of statutory duty:

Contamination by radioactive material (Nuclear Installations Act 1965)

Gas leak (Gas Act 1965)

Water abstraction (Water Resources Act 1991)

WHERE A PUBLIC AUTHORITY OWES A COMMON LAW DUTY OF CARE WHEN EXERCISING STATUTORY FUNCTIONS

X v Bedfordshire County Council (HL) (Cases 5 to 9)

- 5 conjoined appeals;
- Lord Browne-Wilkinson's 10 page introductory section;
- The division into 4:
 - (A) Breach statutory duty simpliciter;
 - (B) Careless performance of a statutory duty - no duty of care;
 - (C) Careless performance of a statutory duty- duty of care;
 - (D) Misfeasance in public office.

A. Breach of statutory duty simpliciter:

- General rule: no private law cause of action unless statute provides for one
Matter of fact in each case but observed that regulatory or welfare systems for society generally unlikely to carry with them private rights

B. Careless performance of a statutory power or duty – no duty of care

- No right of action.
- Home Office v Dorset Yacht (Case 1) 'explained':
a case where a common law duty was owed on 'Caparo' principles to the owner of the yacht and the duty was not qualified by the statutory powers.

C. Careless performance of a statutory power or duty –duty of care

- Common law duty can arise when a public authority is performing its functions in three situations:
 1. When the existence of the statutory duty gives rise to a parallel common law duty;
 2. When, in exercising the statutory power or fulfilling the duty, the authority has entered into a relationship with the Claimant which gives rise to a duty of care;
 3. When the authority's servant, in the course of performing the statutory function, is under a duty of care for which the authority is vicariously liable.

The first situation has proved the most problematic:

Question: Does the exercise of a statutory discretion e.g. to close a school carry with it any potential for a private law cause of action?

1995 Answer: You start from the position that it does not, because it is a question of policy which is not one on which a court can adjudicate (**not justiciable**). However the answer might be different (i) if the decision was wholly irrational and (ii) if other factors favoured the imposition of a duty of care.

Examples of other factors to be considered:

- whether the potential Claimants were involved in the statutory process;
- the availability of other avenues of redress;

- whether the existence of a private law cause of action would cut across the multi-disciplinary nature of the process set up by statute and thereby undermine it;
- the sensitivity of the discretion exercised;
- the danger of defensive behaviour if a duty were found to exist;

Largely unanswered question: How are non-justiciable questions of policy to be identified?

Attempts to distinguish between policy and operational decisions

- decisions of policy not justiciable;
- operational decisions taken in pursuit of a policy justiciable.

The second situation: the authority enters into a relationship with the Claimant

- An example: LEA runs schools
 - that carries with it a duty to supervise breaks.
 - Direct relationship thereby created with pupils supervised

The third situation: vicarious liability

- A psychologist or psychiatrist retained by Defendant LA is himself or herself in a relationship with the Claimant which gives rise to a common law duty of care. If he/she breaches that duty, the LA is vicariously liable.
- The danger of circularity arising out of the third situation
 - The third situation assumes that independently of the statutory power or duty there is a liability
 - If (i) there is no independent vicarious liability and (ii) no direct cause of action for breach of the statutory duty exists, then the fact that an employee performs the statutory duty negligently will not lead to a finding of liability.

84. The authorities draw an important distinction. On the one hand, there are the established grounds of liability in private law for advice negligently given, or not given, by an individual possessing professional skills. The duty of care may arise out of a special relationship, which may exist in a statutory as well as in a non-statutory setting. The duty is owed to the other person in the relationship, who claims to have suffered non-physical damage and loss as a result of the negligent exercise of those skills. On the other hand, the courts have firmly rejected the notion that, in a case where, as here, it is accepted that there is no cause of action for breach of statutory duty, it is sufficient for the purposes of establishing common law liability in negligence to show that an employee of a public authority, such as an education officer, has not performed, or has not properly exercised, relevant statutory obligations and discretions of the public authority.

(Mummery L.J. *Carty v Croydon (Case 23)*)

Stovin v Wise (Case 11)

- Given that section 41 could not be engaged, could the HA owe Mr Stovin a duty of care on conventional principles?
- HL, (3-2), no;
- Lord Hoffmann gave the majority judgment. He identified a tension between
 - *East Suffolk Rivers Catchment Board v Kent [1941] AC 74* where the possibility of suing on the basis of a mere power was expressly disavowed;
 - the judgment of Lord Wilberforce in *Anns v Merton LBC [1977] AC 728* where he said that that this area of the law was in its infancy and now it was time to recognise that it had developed;
- Lord Hoffmann favoured the *East Suffolk* approach:

“I do not think that is a fair description of the reasoning of the majority... What the majority found impossible was to derive [a duty of care] from the existence of a statutory power: to turn a statutory ‘may’ into a common law ‘ought’.”

- He was sceptical about how helpful policy/operations distinction was;
- Re **the first situation**, Lord Hoffmann appeared to suggest that would need wholly irrational exercise of the power/duty and grounds (which would be exceptional) for supposing that the remedy should be one in private law.

Barrett v Enfield LBC (Case 18)

- Question of whether private law cause of action arising out of a series of decisions taken by an authority relating to a child in care;
- First adoption of an issue by issue approach to justiciability;
- Distinction drawn between decision to take into care (non-justiciable) and acts and omissions once in care (justiciable);
- Application of ‘Caparo’ principles to decisions once in care;
- The issues relevant to the justiciability of the discretion could equally addressed at the third, ‘fair just and reasonable’, stage and on the basis of facts found proved.
 - Discouraging ‘strike-out’ applications;
- Case allowed to proceed to trial.

Phelps v Hillingdon LBC (Cases 19 and 20)

- 7 member House of Lords;
- Educational failures alleged:
 - to diagnose dyslexia,
 - to provide a computer needed by a pupil with special needs;
- Starting point on justiciability turned on its head from the *X v Bedford* position:
 - Then the assumption was that the exercise of statutory powers and duties was not justiciable. After ‘Phelps’ the assumption is that they are and it is for the public authority to show that they are not.

Gorringe v Calderdale (Case 22)

- No duty under section 39 Road Traffic Act 1988 to paint the word 'SLOW' on the road even though:
 - It had been there in the past;
 - It was re-painted after the accident;
 - Diligent exercise of the LA's powers under section 39 would have resulted in its being painted there before the accident;
- HL considered this a pure omission case, on all fours with *Stovin*.
- Awkward questions raised by earlier case *Bird v Pearce [1979] 77 LGR 753*
 - LA had removed give way lines from a minor road and not repainted them. Court of Appeal found liability on basis that they had created an expectation that the lines would be there;
 - A 'difficult case' (Lord Hoffmann in *Gorringe*)
 - Explained as the council 'creating a potential source of danger';
- This ties in with the 'reasonable expectation' line of argument - where
 - (a) A public authority creates an expectation that a power would be used; and
 - (b) C suffered damage from reliance on that expectation;Example given, publically maintained lighthouses: there is a general expectation that they will be operated.
- Query potential for expansion e.g. to areas where individual members of the public lack the resources to protect themselves individually: general dependence creates reliance:
 - Air traffic control?
 - Fire authorities? Lord Hoffman sceptical in *Stovin* because the availability of insurance undermines argument of dependence and see *Capital and Counties (Case 12)*

The long view: Laws L.J. in 2010 - Connor (Case 23)

82. What is the essence of *X v Bedfordshire CC*'s teaching? It is to locate the limit or the edge of an old principle of the common law, namely that public bodies' acts or omissions which are authorised by Parliament generally cannot, though they cause injury, sound in damages recoverable by private law cause of action. This principle is close to, but not I think identical with, the proposition that (leaving aside the law of the European Union) English law knows no right of compensation for administrative tort short of misfeasance in public office. It has constitutional roots in the rule of law and in the sovereignty of Parliament, here in harness (but in modern constitutional debate often seen in opposition). Thus the rule of law requires that the exercise of discretionary power by a public authority must be justified by law, usually statute. If the statute authorises action free of private law claims in the action's wake, legislative supremacy requires that the actor is immunised from private law suit. The immunity is a necessary incident of the statute's authority. It extends, however, only to the distinct act or omission with which the statute is concerned: the choice of policy, or the exercise of discretion, which the statute distinctly allows. This, with respect, is what is meant by Lord Browne-Wilkinson's reference to a "decision... fall[ing] within the ambit of [a] statutory discretion".

83. Accordingly "operations" carried out under the policy are not immune. There will often be different operational means of executing a policy once settled. The choice between such means is logically subsequent to, and distinct from, the choice of the policy itself. There may be negligence in the choice of means, or a chosen means may be negligently carried out (as by the bus driver). But the force of the statute's authority only requires the conferment of immunity on the choice of the policy itself: not on the choice of means, nor the execution of means once chosen.

84. In addition – and here I think is the true effect of Lord Browne-Wilkinson’s treatment of the “unreasonableness” issue – *X* shows that the immunity which this principle gives will not apply to a decision so unreasonable that it cannot be said to have been taken under the statute. This approach marches with what I have said about the immunity principle’s constitutional roots. The authority of statute cannot require protection to be given to an act having no claim upon it. It does not mean, of course, that the unreasonable decision-maker owes automatically and without more a duty of care to an injured party. Whether he does so or not will depend on the court’s view of the overall question whether it is fair, just and reasonable in the circumstances to impose liability in negligence – the formulation in the leading case of *Caparo Industries plc v Dickman*. [1990] 2 AC 358, to which I will return.

THREE IMPORTANT RECENT CASES

A v Essex C.C. (Case 21)

- Statutory requirement to disclose information under the Adoption Rules 1984.
- Decision taken to disclose but administrative error
- Had disclosure been afforded Cs would not have adopted a disturbed child who caused them psychiatric injury:

“Whenever the question of a common law duty of care arises in the context of the statutory functions of a public authority, there are three potential areas of inquiry: first, whether the matter is justiciable at all or whether the statutory framework is such that Parliament must have intended to leave such decisions to the authorities, subject of course to the public law supervision of the courts; second, whether even if justiciable, it involves the exercise of a statutory discretion which only gives rise to liability in tort if it is so unreasonable that it falls outside the ambit of the discretion; third in any event whether it is fair just and reasonable in all the circumstances to impose such a duty of care. The considerations relevant to each of these issues overlap and it is not always possible to draw hard and fast lines between them.”

(Hale L.J. para 33)

- Policy of an adoption agency classical example of a non-justiciable question
- Two further questions:
 - Is there a duty of care to adopters re the contents of the report – no because not fair just and reasonable
 - Is there a duty of care to adopters in relation to the implementation of the policy. - yes
- Possible conflict with Stovin

Carty v Croydon LBC (Case 23)

- A re-casting of the debate by Dyson L.J.

28. In my view, there is much to be said for the view that there should only be two areas of potential enquiry where the issue arises whether a public authority is liable for negligence in the performance of its statutory functions. The first is whether the decision is justiciable at all. And the second is to apply the classic three stage enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 601, 617–618: foreseeability of damage, proximity, and that the situation is one in which it is fair, just and reasonable that the law should impose a duty of care.

43....The present case is a paradigm case. In essence, the claimant alleges that the education officer was negligent in (a) failing to carry out a re-assessment and amend his statement of special educational needs to substitute a different school for the one named in the statement (the named school no longer being suitable to his needs), and (b) allowing him to remain at a school which was not suitable to his needs. But the nature of the statutory function and the difficulty of decisions such as the assessment of the needs of a child with special educational needs and the determination of the special provision that should be made are such that a court will usually only hold that it is fair, just and reasonable to impose a duty of care to avoid decisions that are plainly and obviously wrong.

- Duty owed but discharged

Connor v Surrey CC (Case 30)

- Head teacher suffered work-related nervous breakdown. LA sued as employer but key allegation was that it failed timeously to dismiss board of governors, i.e. to exercise a statutory power.
- Factual findings of vacillation lack of support;
- Valuable analysis of previous decisions (see extract above);
- Application to a novel situation;
- Finding that could rely on a failure to exercise a statutory function as a breach of a common law duty: the common law duty required the exercise of the statutory duty provided that it could be validly exercised, which it could.

AREA BY AREA ANALYSIS

1. Detaining/Supervising Authorities (Cases 1, 14, 16 and 27):
 - Particular relationship needed
 - *Home Office v Dorset Yacht* survives but is at an extreme as is *Reeves*
 - See also *Palmer v Tees H.A. [2000] PIQR P1*
2. Anns (Case 2)
3. Police cases (Cases 3, 4, 10,14 and 29)
 - Investigation of crime and other operational priorities not justiciable
 - Administrative errors can give rise to private law causes of action;
4. Social services (Cases 5. 6. 18, 21 and 28)
 - Much less protection against the bringing private law actions especially by children;
 - Likely to be significant leeway in relation to day to day decisions
5. Education (Cases 7, 8, 9. 19. 20, 23 and 30)
 - The *Carty* approach is likely to dominate;
6. Highways (Cases 11, 17, 22, 25, and 31)
 - 1 win for Claimants out of 5 illustrates the difficulties if section 41 cannot be engaged;
7. Emergency services (Cases 12, 13, 14 and 15)
 - Generally operational priorities not justiciable but *Kent* has not been doubted;
8. Care Home registration (Case 26)
 - Novel claims are difficult;

CONCLUSIONS

- The even spread of the results hides an important area of difference between the cases with identifiable Claimants and those without;
- The lesson of the contrasting fates of the education and highway cases is that the ability, at the time of the act or omission relied on, to identify the individual Claimant is very important;
- This is well illustrated by *Kent v Griffiths* (Case 15);
- The ‘Carty’ approach may represent the way in which the courts will analyse future, similar questions;
- The future: Potential relevance of the Young report

CHRISTOPHER KENNEDY Q.C.
27 October 2010