JUSTICIABILITY AND PUBLIC AUTHORITIES

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Introduction

1. "The doctrine of the separation of powers suggests that the principal institutions of state—executive, legislature and judiciary—should be divided in person and in function in order to safeguard liberties and guard against tyranny.

2. One of the earliest and clearest statements of the separation of powers was given by Montesquieu in 1748:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.

3. According to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of any two of the branches. Instead, the independent action of the separate institutions should create a system of checks and balances between them." [1]

4. This paper looks at the checks and balances between the legislature / executive and the judiciary in the context of the justiciability of acts of public authorities such as local government or privatised utilities where it is sought to bring a civil action. Often this is put in terms of there being no duty of care owed by the authority to the claimant but this is really the means of the court expressing its constitutional obligations.

5. As Laws LJ said in *Connor v Surrey County Council*[2]

"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

[1] House of Commons Library SN/PC/06053
[2] [2011] QB 429 at para. 82

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."

Justiciability

6. Justiciability is one element of the determination as to whether a public authority is liable for an injury. In *Carty v Croydon London Borough Council*[3] Mummery LJ said:
"... in principle, the correct approach to determining whether a common law duty of care is owed by a person, such as an education officer, who is employed to perform the statutory functions of a public authority, is to consider the substance of the act or omission in question and then determine (a) whether it is justiciable at all, and, if so, (b) whether it is fair, just and reasonable to impose a duty of care on the person in that situation."

7. 'Justiciability' means that the matter is one that can be tried in a court of law. In *Carty* it is a discrete issue. If the court determines that the matter is non-justiciable then there is no need to go on to decide whether or not to impose a duty of care in accordance with the standard test.

8. The essence of justiciability in this context was set out by Lord Hutton in *Barrett v Enfield London Borough Council*[4] to be
"....that the courts will not permit a claim for negligence to be brought where a decision on the existence of negligence would involve the courts in considering matters of policy raising issues which they are ill-equipped and ill-suited to assess and on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials."

9. The question of what is a policy issue for these purposes is open ended. As Laws LJ said in *Connor*[5]*:*
"There are policies and policies. The courts may be more, or less, competent to decide on the merits of some than on the merits of others. And the emphasis is firmly pragmatic: the court bars a claim in the circumstances envisaged because it would involve consideration of "issues which they are ill-equipped and ill-suited to assess ..... The competence of the court, rather than the authority of the legislature, is made the test of what is justiciable by way of private law claim".

[3] [2005] 1 WLR 2312
[4] [2001] 2 AC 550 at 580/1
[5] [2011] QB 429 at para.92.

Policy / operations

10. A distinction is drawn between policy decisions and operational matters. This is set out in *Barrett* where Lord Browne Wilkinson said at 557

"If certain careless conduct (operational) of a local authority is actionable and certain conduct (policy) is not, it becomes necessary to divide the decisions of the local authority between those which are 'policy' and those which are 'operational'. It is far from clear what the expressions 'operational' and 'policy' connote."

11. This was said in the context of public authorities exercising a statutory discretion. The reason why 'policy' decisions are not justiciable is because Parliament has conferred on the authority a statutory duty or power to be exercised according to its discretion – for example in relation to the resources available to it or to social policies. These are matters that under the separation of powers doctrine the courts should not become involved in – leaving aside judicial review.

12. 'Operational' matters carried out in accordance with the policy involve no exercise of such a discretion. Thus if the choice of how the policy is to be implemented or the way in which the policy is implemented is negligent the courts may find the authority liable.

13. In *Connor* Laws LJ summarised the position as:

These following states of affairs may be discerned in the succession of authority.

(1) Where it is sought to impugn, as the cause of the injury, a pure choice of policy under a statute which provides for such a choice to be made, the court will not ascribe a duty of care to the policy-maker. So much is owed to the authority of Parliament and in that sense to the rule of law.

(2) If a decision, albeit a choice of policy, is so unreasonable that it cannot be said to have been taken under the statute, it will (for the purpose of the law of negligence) lose the protection of the statute. While this must, I think, point to the same kind of case as does the *Wednesbury* rule [1948] 1 KB 223 (since only a *Wednesbury* perverse decision will be outwith the statute), *Wednesbury* is not made a touchstone of liability for negligence in such cases: the immunity arising in (1) is lost, but the claimant must still show a self-standing case for the imposition of a duty of care along *Caparo* lines and he may be unable to do so.

(3) There will be a mix of cases involving policy and practice, or operations, where the court's conclusion as to duty of care will be sensitive to the particular facts:

"the greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought": per Lord Slynn, in Barrett's case [2001] 2 AC 550 , 571.

This is likely to be a large class of instances.

(4) There will be purely operational cases..... where liability for negligence is likely to attach without controversy.

Resource allocation

14. Generally, decisions about resource allocation are not justiciable. In *R v Cambridge Health Authority*[6] Sir Thomas Bingham MR said

" It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make....."

15. However, where an authority owes a duty of care it cannot necessarily rely on lack of resources to exonerate it from liability. For example in *Smith & Ors v Ministry of Defence*[7] the court said:

"There can be no doubt that the defendant is under a general duty to provide adequate training, suitable equipment and a safe system of work for members of the armed forces. Since the commencement of the Crown Proceedings (Armed Forces) Act 1987 , the defendant has been subject to three types of tortious liability, vicarious liability (section 2(1)(a)), employer's liability (section 2(1)(b)) and occupier's liability (section 2(1)(c)), and Parliament, through Health and Safety Regulations (Personal Protective Equipment at Work Regulations 1992 , the Provision of Use of Work Equipment Regulations 1998 and the Management of Health and Safety at Work Regulations 1999) made the defendant subject to duties to provide equipment, adequate training and safe systems of work for service personnel. The discharge of the common law duty of care and/or the statutory duties

[6] [1995] 1 WLR 898 at 906
[7] [2011] EWHC 1676 (QB) at para. 105. This case is with the Court of Appeal.

imposed under the regulations will commonly involve decisions as to procurement of equipment or deployment of resources. The fact that it does so does not of itself exclude liability. In relation to causes of action in negligence, the question in any particular case will be whether the circumstances are such that it would not be fair, just and reasonable to impose a duty of care. The answer to that question will be fact sensitive. It will depend upon inter alia, the nature of the equipment in issue, its expense, availability and a risk/benefit analysis."

Privatised Utilities

16. Utilities like water, electricity or gas have been privatised. However they cannot charge what they want for the services they provide. They are regulated under a statutory scheme imposed by the relevant Act. For the water industries there is a regulator (Ofwat) which periodically reviews undertakers' investment plans and sets annual price limits for each undertaker. Such price limits are set every five years. In effect Ofwat are determining what level of resources it is in the public interest to commit to improving water and sewerage infrastructure in the relevant period – the Asset Management Plan (AMP) period.

17. A claim against a privatised utility in respect of a nuisance from a particular facility would have to be brought on the basis of *Allen v Gulf Oil Refining*[8] as the utility will have a defence of statutory authority – or a similar defence - to such a claim.[9] In any event a Claimant is not going to succeed unless it can be shown that the utility has conducted its operation without reasonable care for the interests of its neighbours. Although if a nuisance is proved it will be for the defendant to show that it was not negligent.[10]

18. *Marcic v Thames Water*[11] was an action brought in nuisance in respect of flooding from sewers and an order was sought to require Thames to improve its system so that Mr Marcic's property would not be flooded. The basis of the claim was that Thames had failed in its duty under section 94(1) of the Water Industry Act 1991 to improve its system of public sewers. The only negligence alleged was in committing the nuisance. In essence it was a claim requiring Thames to spend more money in

[8] [1981] AC 1001
[9] See *Transco v Stockport MBC* [2004] 2 AC 1 per Lord Scott at paras 86-89
[10] *Marcic v Thames Water* (CA) [2002] QB 929 paras 84 – 87.
[11] [2004] AC 42

building new sewers. However the duty under section 94(1) is enforceable by Ofwat under section 18 of the 1991 Act and no enforcement order had been sought.

19. The Court of Appeal held that Thames was liable under the doctrine of *Leakey v National Trust*[12] on the basis of the duty that one landowner owes to another. The House of Lords rejected this approach. Lord Hoffman said at para 63:

> "Nevertheless, whatever the difficulties, the court in such cases is performing its usual function of deciding what is reasonable as between the two parties to the action. But the exercise becomes very different when one is dealing with the capital expenditure of a statutory undertaking providing public utilities on a large scale. The matter is no longer confined to the parties to the action. If one customer is given a certain level of services, everyone in the same circumstances should receive the same level of services. So the effect of a decision about what it would be reasonable to expect a sewerage undertaker to do for the plaintiff is extrapolated across the country. This in turn raises questions of public interest. Capital expenditure on new sewers has to be financed; interest must be paid on borrowings and privatised undertakers must earn a reasonable return. This expenditure can be met only be charges paid by consumers. Is it in the public interest that they should have to pay more? And does expenditure on the particular improvements with which the plaintiff is concerned represent the best order of priorities?
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> 64 These are decisions which courts are not equipped to make in ordinary litigation....."

20. He went on in paragraph 70 to say

> "...The 1991 Act makes it even clearer than the earlier legislation that Parliament did not intend the fairness of priorities to be decided by a judge. It intended the decision to rest with the director, subject only to judicial review. It would subvert the scheme of the 1991 Act if the courts were to impose upon the sewerage undertakers, on a case by case basis, a system of priorities which is different from that which the director considers appropriate."

21. Thus in the statutory scheme for privatised utilities resource allocation is primarily for the industry regulator. Any challenge to a utility's expenditure should be through the enforcement regime under – for the water industry – section 18 of the Water Industry Act 1991.

22. But the enforcement regime is not the last word. Section 18 (8) of the 1991 Act provides that:

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[12] [1980] 1 QB 485

> "Where any act or omission constitutes a contravention of ... a statutory or other requirement enforceable under this section, the only remedies for that contravention, apart from those available by virtue of this section, shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention."

23. This preserves private rights of action that can exist alongside the enforcement regime. An action in nuisance on its own that effectively requires the court to enforce the duties of a sewerage undertaker to improve its system under section 94(1) could not exist alongside the enforcement regime. An action in negligence on the other hand for failure to properly clean or maintain a sewer could exist alongside the regime because an allegation of fault takes the matter beyond the regime.[13] The question in such an action would turn on the policy / operational aspect or whether, if the court determined that a matter was negligent, such a determination would be in conflict with the statutory scheme – non-justiciable.

The statutory scheme

24. In *Dobson v Thames Water*[14] the statutory scheme was analysed more extensively than in *Marcic*. The Claimants brought an action against Thames for odour and mosquito nuisance from the Mogden Sewage Treatment Works. They alleged negligence in the operation of the works and negligent failure to improve the works by spending money on plant and equipment. The Defendants conceded that some particulars fell within the 'operational' aspect but said that any works that required capital expenditure was non justiciable

25. The court distinguished between two types of capital expenditure. It considered (766) that for significant investment in new plant Thames Water could only reasonably be expected to fund that work under the funding mechanism in the relevant AMP period – i.e on projects approved by Ofwat. The question of investment in major plant or projects would necessitate the use of money derived from customers' bills and the decisions on what plant and projects a water company can invest in is evidently a matter for determination by Ofwat in any particular period; balancing the needs of the water industry and the particular water company against the amount which should be paid by customers. Thus, for example, projects for covering the inlet works or storm

[13] See *Dobson v Thames Water*[2007] EWHC 2021 (TCC) at paras 142-3.
[14] [2011] EWHC 3253 (TCC)

tanks were major works clearly within the scope of the Ofwat funding mechanism, and allegations of negligence for failing to cover this plant were not justiciable. (773).

26. On the other hand water companies are allocated a sum in every AMP period for 'capital maintenance.' This is a pot of money for maintenance of assets which water companies are free to allocate in any way they like as long as they deliver the broad overall outputs expected of them in order to maintain their assets fit for purpose. The court (767) considered that in general minor capital plant or minor capital projects would come under capital maintenance where a water company would have to allocate funds that it has for capital maintenance by balancing the needs of a particular facility with the needs of its overall facilities. Whilst the overall sums available for capital maintenance would depend on funds made available by Ofwat through customers' bills, it is the water company's decision to spend the money. Thus where *Allen* negligence is alleged in relation to minor capital plant or minor capital projects which would generally come within capital maintenance the issue is justiciable because such decisions would not conflict with or be inconsistent with the statutory scheme. On that basis an allegation of failure to automate the storm tank emptying process was justiciable.

27. In addition where a water company is provided with sufficient funding through the Ofwat funding mechanism to carry out improvements but does so negligently they must fund the remedial works. Any allegation in respect of such negligence is also justiciable. (772).

28. However the fact that a company has other sources of revenue – such as dividends or the proceeds of sales of land – is not relevant (834). While these may not be revenue directly from customer charges they are nevertheless part of a determination by Ofwat under section 2(2A)(c) of the WIA 1991 to ensure that the company by securing reasonable returns on its capital can finance the proper carrying out of its relevant functions.

Conclusion

29. Justiciability is concerned with constitutional issues as to the role of a court in a democratic society. Just as the executive should not interfere with the courts, so too the courts should not trespass on policies determined by the executive; although a judicial review may determine the lawfulness of the policy.

30. In a civil action against a public authority resource allocation decisions can be challenged as negligent if to do so does not conflict with the statutory scheme to which the authority is subject. This entails a close examination of the scheme as some allocation decisions may be ‘operational’ matters and thus justiciable.

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