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Personal injury: Do thy duty

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***Brent McDonald** on public duties & private remedies*

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In Brief

· Public authorities can be negligent if they fail to use statutory powers to fulfil their private law duties.

· There is no need to show circumstances are exceptional--a flexible and pragmatic approach should be used.

· Where policy areas are less discretionary with narrow elements policy, courts are much more likely to rule decisions justiciable in private actions.

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In *Connor v Surrey County Council* [2010] EWCA Civ 286 the Court of Appeal took a further look at the position where a local authority is alleged to have been negligent in failing to exercise its statutory powers, this time in the context of a "stress at work" case.

The claimant was the head teacher of a successful school. She was also a member of its governing body, with whom she had a good working relationship. In 2003 a new parent governor was appointed called Mr Martin. Mr Martin was concerned that there were insufficient links between the school (which was 90% Muslim) and the local community.

Due to the demanding, rude and intimidating behaviour of Mr Martin and his associates, the claimant became worried. She approached the defendant council for support. She said that he situation had become intolerable and that the council needed to intervene. Instead of intervening and using its powers to remove the board and appoint an interim executive board, the council instead undertook a review and in due course produced a report. The problems between Mr Martin and his associates and the claimant continued unabated. The claimant again made it clear to her employers that she was having difficulty. The council attempted to deal with the problems by proposing mediation between the parties, which in principle both Mr Martin and the claimant were prepared to attend.

However, before mediation could occur, things came to a head within the governing body itself. Amid much acrimony, Mr Martin was removed by members of the body, who had strongly disapproved of his behaviour toward the claimant and toward the school. As a result, Mr Martin stepped up his campaign against the claimant. He made a formal complaint of racism and Islamaphobia against her. Mr Martin was also found to have been probably behind a malicious petition, expressing no confidence in the claimant that was circulated around the school.

The local authority ordered an independent inquiry into Mr Martin's formal complaint. The inquiry adopted wide terms of reference causing much disruption in the school. This depressed the already

embattled morale of staff and the claimant. The inquiry produced a report which reached what the Court of Appeal described as "very surprising conclusions". The report criticised the claimant for indirectly displaying Islamaphobia and cultural and religious insensitivities, alleging that she had wrongly perceived Mr Martin and his associates as having a hidden agenda to turn the school into a Muslim only school (a conclusion which the Court of Appeal thought the claimant reasonable to draw).

As a result, the claimant referred herself to Occupational Health in 2005. On the September 27 2005, she was signed off for stress and pressure. She subsequently spent some time in hospital, after being referred there for psychiatric assessment.

Reasonable steps

The judge at first instance found that the authority had failed to take reasonable steps to protect the claimant's psychiatric health. He held that by failing to replace the governing body with an interim executive board pursuant to ss 14 and 16A of the School Standards and Framework Act 1998 (as amended) the council had breached its duty of care owed to the claimant and to the staff. He also found that the authority's decision to establish an inquiry into the complaint made against the claimant had been negligent.

On appeal, the council first challenged the decision both on the facts and on causation. Both arguments were strongly rejected by the Court of Appeal. Laws LJ concluded that the council had been too frightened to stand up to the bullying tactics used by Mr Martin and his associates and in effect it had capitulated to these "sombre pressures". Had a more robust line been taken the claimant would not have suffered injury. It had been clearly foreseeable that the claimant's mental health was in danger as a result of the intolerable pressure to which she was subjected unless she received a proper and effective response from her employers.

Precedent

More significantly in terms of precedent, the defendant argued that it was not liable in any event. The measures the judge held that it should have taken to protect the claimant's health were discretionary and formed part of its public law functions. As such the failure to exercise such powers was not justiciable in private law proceedings. The defendant criticised the judge below for not dealing with this argument in his judgment despite it having taken the point.

Laws LJ observed that there was much learning of high authority on the circumstances in which decisions taken by public bodies acting or declining to act under statutory power might give rise to liability for negligence. However, those cases were mainly concerned with situations where a duty of care was said to arise from the very exercise of the statutory function in question. The leading cases had much less to say about the situation before the court in this appeal where the council owed the claimant a duty of care (as an employer) in any event. That situation was more akin to those cases where a public body clearly owed a duty to others even though it was acting in the furtherance of its legislative powers, as was the case where (for example) the NHS provided medical care to patients.

In his lordship's opinion, the key question was whether the council's duty was violated by a failure to exercise a statutory discretion. The Appeal involved the edge between the council's private law duties and its public law functions. The essence of the teaching of *X v Bedfordshire* (1995) 2 AC 633 HL was to locate the limit of an old principle of the common law, namely that a public body's acts or omissions which were authorised by Parliament generally could not be relied upon by someone in a private law case to recover damages.

Common law duties of care could not be imposed on a statutory duty if the observance of such a duty of care would be inconsistent with or have a tendency to discourage the due performance by the Local Authority of its statutory duties, as set out in the speech of Lord Brown-Wilkinson in *X v Bedfordshire*.

However on proper analysis the law only provided immunity in respect of the choice of policy made in the exercise of statutory decisions. It did not extend to the means by which the choice was executed or the manner in which the choice was carried out. Further, the immunity did not apply to any decision which was so unreasonable that it could not be said to have been taken under the statute.

Reservations

Laws LJ expressed reservations as to the utility of Lord Hoffman's observations in *Stovin v Wise* [1996] AC 923 HL that "the distinction between policy and operations is an inadequate tool with which to discover whether it is appropriate to impose a duty of care or not". In *Stovin* it had been said that a claimant must show both that it was irrational not to exercise the power and that there were exceptional grounds for holding that the policy of the statute required compensation to be paid to people who suffered loss because the power was not exercised. However, that did not mean that a public body's acts or omissions authorised by Parliament could not generally sound in damages recoverable by a private law cause of action.

Laws LJ referred to the subsequent case of *Barrett v Enfield LBC* [2001] 2 AC 550 HL. In that case, Lord Hutton had observed that a claim for negligence should not be brought where making a decision would involve the Courts in considering matters of policy, raising issues which they were 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.

In Laws LJ's view, Barrett set out a more open ended, pragmatic and flexible approach: there were policies and policies. The Court might be more or less competent to decide on the merits of some matters than on the merits of others. The greater the element of policy involved, the wider the area of discretion accorded and therefore the more likely it was that the matter was not jusiticiable.

The court observed that this case differed from those previously decided, as it was common ground that a duty of care owed to the claimant as an employee. As such, and in an appropriate case, the law could require a person owing a private law duty to exercise its public law discretion, but only if that might be done consistently with the full performance of its public law obligations.

Such a finding did not offend the general rule that public body's acts or omissions authorised by Parliament do not sound in damages recoverable under a private law cause of action even if injury results. The right to claim damages in this case arose from the duty already owed between employer and employee.

Policy

Nor in this case was any difficulty created by nuanced questions of policy. The choice before the council had been a concrete one--whether or not to appoint an Interim Executive Board. Further the performance of that duty did not require the Public Authority to act in a way which would be unlawful in public law terms.

The standard tests of legality, rationality and fairness had to be met as they applied to the use of the public law power in the particular case. Discretion had to be exercised only for the purposes for which the statute had provided it, applying *Padfield v Minister of Agriculture*. If however the conditions are met for the exercise of the power it would then be open to a court to require its deployment to fulfil a private duty of care.

In their lordships' opinion such cases would be few in number. However in this case the appointment of an Interim Executive Board by February 2005 was justified both in furtherance of the council's private and public law duty to meet the situation created by Mr Martin and his associates.

The court was split on whether or not the decision to hold an inquiry into Mr Martin's complaints of racism and Islamaphobia had been a breach of duty. Laws and Sedley LJJ accepted that although there were pros and cons in ordering an inquiry, nonetheless the council's private law duty had obliged it to decline to do so given the harm which would foreseeably be caused to the claimant. Dissenting on this point, Thomas LJ decided that public and private law duties in choosing to hold an inquiry did not necessarily march together on this point. The council may be required under its public duty to hold an inquiry into misconduct even if it is plainly foreseeable that such an inquiry may cause distress to those under investigation. Further, Thomas LJ questioned whether the insensitive manner in which independent persons carried out that inquiry could result in the council being liable in negligence.

Favouring claimants

Although the decision contains the usual caveats that each case is fact sensitive, there is no doubt that this decision represents a significant shift in the law in favour of claimants. Lawyers advising public authorities on the exercise of their discretionary powers are henceforward going to need to think defensively about the potential impact on other persons to whom they owe private duties. It is submitted that the decision will cause much uncertainty in those cases where public and private

duties clash. As with the advent of the Human Rights Act 1998, local authorities should brace themselves for greater level of judicial review should the Supreme Court uphold *Connor*.