

## SUING STATE AGENCIES

### PROFESSOR JOSEPH THOMSON

#### PUBLIC LAW ISSUES

Ministers of the Crown, local authorities and other governmental agencies are often given statutory powers to implement policy. This will involve the exercise of discretion. Consider the following examples:

- (1) A minister is given the power to send some criminals to an open prison: if such a criminal should escape, steal and damage a person's motor car, is the minister liable in delict?<sup>1</sup>
- (2) A local authority is given the power to inspect and approve the plans of building: if the local authority approves the plans for the foundations of a house, is the local authority liable to the owner of the house if the foundations were unsuitable and have to be repaired?
- (3) A minister is empowered to give information to the public on the risks of HIV infection: is the minister liable to a person who contracts HIV through injecting heroin if the information only disclosed the risk of infection from sexual contact and omitted the danger of infection from drug abuse?

In *X (minors) v Bedfordshire County Council*,<sup>2</sup> the House of Lords recognised that if a state agency exercised its statutory powers carelessly, there could be liability at common law in negligence. But before there can be liability in negligence, the careless exercise of the statutory powers must amount to a breach of a pre-existing duty of care owed by the agency to the pursuer. Traditionally, the courts have been reluctant to impose on a state agency a duty of care to exercise its powers carefully unless three hurdles were overcome.

- (1) If the agency's statutory discretion involves broad issues of policy, the issue is non-justiciable. The paradigm is when an authority has to allocate scarce resources. If, for example, a local authority chose to spend resources on library provision rather than on increasing the number of fire engines, a person who suffered burns in a fire which could not be contained because of the absence of the fire brigade would be unable to sue because the issue of whether more resources should have been spent on fire engines as opposed to books is non-justiciable. In *Kent v Griffiths*<sup>3</sup> Lord Woolf

---

<sup>1</sup> Of course, the criminal will be liable in delict.

<sup>2</sup> [1995] 2 AC 633, [1995] 3 All ER 353, HL.

<sup>3</sup> [2001] QB 36 at 53.

MR recognised that the allocation of resources in respect of the provision of sufficient ambulances and enough staff to man them were matters which were probably not justiciable.

- (2) Where the statutory discretion operates at an operational as opposed to a broad policy level, a duty of care cannot be imposed unless the purported exercise of the power is beyond the ambit of the statutory discretion. In determining this issue, the courts have adopted – while occasionally denying they are doing so – quasi-administrative law principles. In particular, this hurdle is said only to be overcome if the exercise of the discretion was such that no reasonable state agency or local authority could have acted in this way. In other words, where the mistake, albeit careless, was one which a reasonable state agency or local authority could have made in the bona fide exercise of its powers, a duty of care will not be imposed, and accordingly liability at common law for negligence cannot lie. So, for example, if a fire authority prioritised calls, provided the prioritisation was not unreasonable, the decision would fall within the ambit of the statutory discretion and no liability would arise even if, with hindsight, the prioritisation was mistaken. However, in the light of developments discussed in (3) below, it is doubtful whether this hurdle will be as difficult to satisfy in the future.<sup>4</sup>
- (3) Even if the 'public law' hurdle in (2) is satisfied, the *Caparo* criteria for a duty of care have to exist, namely reasonable foreseeability of harm to the pursuer, proximity between the pursuer and defender, and that it is fair, just and reasonable to impose the duty.<sup>5</sup> Until recently, the courts tended to decline to impose the duty of care either because of the absence of proximity or on the broader 'fair, just and reasonable' criteria. Thus, for example, in *Hill v Chief Constable of West Yorkshire*,<sup>6</sup> the House of Lords held that the chief constable did not owe a duty of care to the mother of the last victim of the Yorkshire Ripper. Not only was there no proximity but Lord Templeman also considered that it would not be fair, just and reasonable to impose a duty of care on the chief constable in relation to his function of investigating crime. Similarly, in *X (minors) v Bedfordshire County Council*<sup>7</sup> it was not thought fair, just and reasonable to impose a duty of care on a local authority or its social workers when exercising their discretion whether or not to take potentially abused children

---

<sup>4</sup> In *Larmer v Solihull MBC* [2001] RTR 32 the Court of Appeal held that while the statutory duty on local authorities under the Road Traffic Act 1988, s 39 to take action to prevent road accidents gave them a considerable degree of discretion, this did not mean that a common law duty of care did not exist. If the discretion was exercised unreasonably, the authority could be liable in negligence. However, this decision has been disapproved by the House of Lords in *Gorringe v Calderdale MBC* [2004] UKHL 15.

<sup>5</sup> See *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL.

<sup>6</sup> [1989] AC 53, [1988] 2 All ER 238, HL.

<sup>7</sup> [1995] 2 AC 633, [1995] 3 All ER 353, HL.

into care. In doing so, the courts were in effect granting to state agencies blanket immunity from liability in negligence when exercising their discretionary powers.<sup>8</sup>

However, the courts can no longer grant blanket immunity as a matter of course. First, in *Osman v United Kingdom*<sup>9</sup> the European Court of Human Rights held that to strike out a claim on the ground that the police enjoyed blanket immunity was a breach of the claimant's right under article 6 of the European Convention on Human Rights which provides that 'In the determination of his civil rights and obligations .... Everyone is entitled to a fair and public hearing'. After a period of consternation on the scope of *Osman*,<sup>10</sup> the European Court of Human Rights then took the view that there was no breach of article 6 merely because an action was dismissed due to the absence of a duty of care, provided that the claimant had had the opportunity to argue that in the circumstances of her case it was fair, just and reasonable to impose a duty and that it would be disproportionate to the harm sustained not to do so.<sup>11</sup> Second, the European Court of Human Rights considered<sup>12</sup> that where a local authority failed to take steps to protect a child who was the subject of abuse, there could be a breach of the *child's* right under article 3 of the Convention which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Similarly, failure to have and follow fair procedures when taking a child into care was held by the Court to constitute a breach of the *parent's* right under article 8 of the Convention 'to respect for his private and family life'.<sup>13</sup> In these cases the claimants obtained substantial damages for breach of their Convention rights in circumstances where damages were not available in delict because of the judges' refusal to impose a duty of care.

As a result of these developments, the courts are now more ready to impose a duty of care on a local authority. In *D v East Berkshire Community NHS Trust*,<sup>14</sup> the House of Lords held that a local authority did owe a duty of care to a *child* in relation to the investigation of suspected abuse and the initiation and pursuit of care proceedings.<sup>15</sup> But their Lordships

---

<sup>8</sup> See also *Forbes v City of Dundee District Council* 1997 SLT 1330, 1997 SCLR 682, OH (not fair, just and reasonable to impose a duty of care on a local authority to ensure that steps were built in accordance with building regulations: the pursuer could, of course, sue the owner/occupier of the building); *Onifade v Secretary of State for Social Security* 1999 GWD 17-819 (no duty of care to prevent pursuer from suffering economic loss as a consequence of an erroneous decision by an adjudication offer refusing the pursuer income support).

<sup>9</sup> [1999] 1 FLR 193.

<sup>10</sup> See, for example, *Barrett v Enfield Borough Council* [2001] 2AC 550 per Lord Browne-Wilkinson at 559-560; *Kent v Griffiths* [2001] QB 36 per Lord Woolf MR at 50.

<sup>11</sup> *Z v United Kingdom* [2001] 2 FLR 612.

<sup>12</sup> *Z v United Kingdom* [2001] 2 FLR 612 ('appeal' from *X (minors) v Bedfordshire County Council* [1995] 2 AC 633); *E v UK* [2003] 1 FLR 348 (action against Scottish local authority for failure to protect children from sex abuse by their stepfather).

<sup>13</sup> *TP and KM v United Kingdom* [2001] 2 FLR 549.

<sup>14</sup> [2005] 2 AC 373.

<sup>15</sup> To that extent, the Court held that *X (minors) v Bedfordshire County Council* should not be followed, as being inconsistent with the European Convention on Human Rights.

were not prepared to hold that a local authority owed a duty to the *parents* of a child in such proceedings, while accepting that in certain circumstances a failure to follow fair procedures could result in an infringement of the parent's right under article 8: in the court's view the welfare of the child in care proceedings was the paramount consideration. Earlier, in *Barrett v Enfield London Borough Council*,<sup>16</sup> the House of Lords had distinguished *X (minors) v Bedfordshire County Council* and held that once a child had been taken into care, a local authority could owe the child a common law duty to prevent him suffering mental harm caused by the authority's failure to provide suitable support: it was irrelevant that the local authority's decisions involved the exercise of discretion on the part of professional social workers.

Of course, the pursuer may still have difficulty in satisfying the *Caparo* tripartite criteria. In cases where a pursuer alleges that the police or local authority were under a duty to prevent her suffering harm as a result of a third party's criminal activities, it may be impossible to establish a sufficient degree of proximity. There is unlikely to be sufficient proximity unless the pursuer knew that she was in danger from a particular person and had made her fears known to the relevant authority:<sup>17</sup> geographical proximity is not enough.<sup>18</sup> Moreover, the courts have become more ready to accept that an employee of a state agency may owe a direct duty of care to the claimant for which the local authority is vicariously liable if the employee is negligent. In *Phelps v Hillingdon London Borough Council*,<sup>19</sup> the House of Lords held that while, in the performance of their duties under the Education Acts, education authorities owed no relevant duty of care to school children, nevertheless individual employees of the authorities might be in such a relationship with a particular child as to owe a common law duty of care, breach of which would render the local authority vicariously liable: consequently, the local authority could be vicariously liable for an educational psychologist's failure to assess and provide appropriate assistance for a pupil with special needs.<sup>20</sup>

Once a duty of care is established, the pursuer must prove that there was breach of duty. It can be very difficult to establish professional negligence. But since the courts can no longer provide blanket immunity, a local authority's major defence is that the authority and its

---

<sup>16</sup> [2001] 2 AC 550. See also *S v Gloucester County Council* [2003] 3 All ER 346 (local authority owed a duty of care to a child not to be sexually abused by a foster parent).

<sup>17</sup> As happened in *Osman v UK* [1999] 1 FLR 193.

<sup>18</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Palmer v Tees Health Authority* (2000) 2 LGLR 69 (mental hospital not liable to victim of a discharged patient); *Surrey County Council v M (A child)* [2001] EWCA Civ 691 (local authority not liable for sexual assault on a child by a boy whose family lived in the same neighbourhood as the victim).

<sup>19</sup> [2001] 2 AC 619.

employees were not negligent. In *Bradford-Smart v West Sussex County Council*,<sup>21</sup> for example, a girl was bullied on a bus going to and from school. The Court of Appeal held that the school would not be in breach of duty if it failed to take steps which were unlikely to do much good. A reasonable body of opinion would have taken the view that the school had done enough to protect her from bullying and accordingly her claim failed as she could not prove that the school had been negligent. Because of the need to establish negligence, courts have been reluctant in these cases to hold that there can be liability for breach of statutory duty where liability is strict.

The pursuer must also prove that the defender's negligence was the cause of the harm he sustained. He must show that he was worse off as a result of the carelessly delivered service than if the service had not been provided at all. In *Gibson v Orr*,<sup>22</sup> a bridge carrying a public road collapsed. The police assumed control of the hazard. They coned off the north side and positioned a police vehicle on the bridge as a warning to drivers on the south side. After an hour, they left without having received confirmation that any barrier or warning was in place on the south side. The pursuer was injured when the car in which he was a passenger was driven onto the bridge from the south side and fell into the river. In a fully reasoned speech, the Lord Ordinary (Hamilton) held that the police authority owed the pursuer a duty of care. By purporting to take control of the hazard, the police constables entered into proximate relationships with those road users likely to be immediately and directly affected by that hazard. Moreover, unlike the case of the investigation of crime, there were no policy reasons why it would not be fair, just and reasonable to impose the duty. The difficulty is that the accident would have happened in exactly the same way, even if the service had not been provided at all. However, the whole point of the defender's duty was to prevent an accident occurring after the officers had taken control. If the duty of care had been performed, the accident in which the pursuer was injured would not have happened.

This is quite different from the situation where, owing to its operational carelessness, a fire brigade increases the risk of damage to the pursuer's life or property ie when the pursuer's position is worse off as a consequence of the careless delivery of the service. In *Duff v Highland and Islands Fire Board*,<sup>23</sup> it was held that a fire brigade owed a duty of care not to be careless when engaged in fire fighting. The defender had attended to a fire in the

---

<sup>20</sup> See also *A v Essex County Council* [2003] 1 FLR 615 (local authority vicariously liable for social workers' failure to inform potential adoptive parents that the child to be adopted was seriously disturbed).

<sup>21</sup> [2002] EWCA Civ 7.

<sup>22</sup> 1999 SC 420. Cf *Alexandrou v Oxford* [1993] 4 All ER 328 (no duty of care to owner of property which police had inspected in response to a burglar alarm).

pursuer's chimney which restarted after the brigade had left, causing the destruction of the pursuer's house!<sup>24</sup>

We have been considering potential liability in negligence for the careless exercise of statutory powers. A similar approach has been taken when a local authority or state agency has failed to use a statutory power which it was not obliged to exercise under the legislation. In *Stovin v Wise and Norfolk County Council*,<sup>25</sup> a local authority had a statutory power to direct a landowner to remove a wall which was a danger to users of the highway. Before the plaintiff was injured in a road accident, the local authority had known the wall was a hazard but had not exercised the power to have the danger removed. The House of Lords held that the local authority had a public law duty to consider whether or not to exercise the power, but this did not automatically confer a common law right on an individual or obtain damages if injured as a consequence of the authority's decision not to exercise its powers. A common law duty of care would only arise from such an omission if (i) the local authority's failure to exercise the power was irrational (the 'public law' hurdle), and (ii) the legislation did not exclude the right of a person to seek damages if harm was sustained because the power was not exercised. However, in *Gorringe v Calderdale MBC*<sup>26</sup> Lord Hoffman held that it was 'difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public duty) to provide'.<sup>27</sup> Here the local authority had not provided a warning on a stretch of road of the danger of driving too fast. This omission could not in itself generate a common law duty of care when the authority's failure to exercise its powers under s 39 of the Road Traffic Act 1988 to promote road safety did not give rise to a private law remedy for breach of statutory duty. Accordingly the possibility raised in *Stovin v Wise* of deriving a common law duty of care merely from a failure to exercise a statutory power would appear to be closed.<sup>28</sup>

---

<sup>23</sup> 1995 SLT 1362.

<sup>24</sup> In *Capital and Counties plc v Hampshire County Council* [1997] QB 1004, [1997] 2 All ER 865, CA, the Court of Appeal held that a fire brigade did not owe a duty of care to a member of the public to answer calls for help because there was no proximity at that stage. Once the brigade had turned up and begun fighting the fire, a duty of care arose not to increase the risk of injury or damage caused by the original fire as a result of carelessness in carrying out the operations. In *Duff v Highland and Islands Fire Board* 1995 SLT 1362, it was not thought to be necessary that the damage sustained should be worse as a result of the defender's negligence. In *Oll v Home Office* [1997] 3 All ER 897, following *Capital and Counties plc*, Moy J held that the coastguard service was under no enforceable private law duty to respond to an emergency call: if it did, it was only liable in negligence for positive acts which directly caused greater injury than would have occurred if it had not intervened at all.

<sup>25</sup> [1996] AC 923, [1996] 3 All ER 801, HL.

<sup>26</sup> [2004] UKHL 15.

<sup>27</sup> [2004] UKHL 15 at para 32.

<sup>28</sup> In *McKnight v Clydesdale Buses Ltd* 1999 SLT 1167, the Lord Ordinary (Lady Cosgove) allowed a proof before answer when the pursuer alleged that an accident occurred as a result of a local roads authority's failure to provide warning signs in respect of a low bridge. The authority had a duty to remedy a situation of foreseeable danger and it was not certain in the absence of evidence that this was simply a case of mere omission to

It is important to appreciate that in this section we have been concerned with the possibility of delictual liability arising from the exercise of a discretionary power by a minister of the Crown, a local authority or another government agency. When there is no degree of discretion involved, then the 'public law' hurdle withers away. In *Kent v Griffiths*,<sup>29</sup> the plaintiff suffered brain damage because an ambulance which she had summoned failed to arrive within a reasonable time of her call. No explanation was given for the delay: indeed, the crew had falsified the time records. The Court of Appeal held that since there was an ambulance available and there had been no alternative demands on the crew, they owed the plaintiff a duty of care to arrive within a reasonable time of her call which they had accepted. This was not a case which involved policy or resource issues but consisted of a routine task which had been carried out carelessly, to the plaintiff's cost. Similarly, the driver of a ministerial motor car or a local authority bus, for example, owes the same *Donoghue v Stevenson* duty of care<sup>30</sup> to a fellow road user as an ordinary driver and will be liable in delict if the duty of care is breached. In other words, the defender owes the pursuer a duty of care independent of her status as an employee of a state agency. In these circumstances, the state agency will be vicariously liable for the delict of its employee provided, of course, the employee was acting within the scope of her employment at the time the accident occurred.

---

exercise a statutory power: *Stovin* was distinguished. In *Bennett v J Lamont & Sons* 2000 SLT 17 the court refused to impose a duty on a roads authority to take reasonable care to prevent cattle roaming on the highway: there might, of course, be a duty on the owner of the cattle to do so. Cf *Kemp v Secretary of State for Scotland* 2000 SLT 471.

<sup>29</sup> [2001] QB 36.

<sup>30</sup> See *Donoghue v Stevenson* 1932 SC (HL) 31, 1932 SLT 317.