

of Appeal in *Robinson* to follow *Henderson* and allow the limitation tail to wag the substantive dog is to be welcomed.

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NEGLIGENCE LIABILITY OF PUBLIC BODIES: LOCATING THE INTERFACE
BETWEEN PUBLIC AND PRIVATE LAW

THE law on the negligence liability of public bodies is complex and in a state of evolution. Underlying it is a tension between public and private law. Public bodies exercise discretionary powers granted by Parliament and their decisions often involve policy-making of a political nature. They are challengeable in public law, which is concerned with the validity of the action taken, rather than compensation. In contrast, the tort of negligence seeks to compensate the victims of careless actions. The difficulty, arising at the interface of the two legal spheres, is how to deal with claims in negligence against public bodies exercising their statutory powers. English courts apply the ordinary rules of negligence, but public law considerations play a role within them. The nature and scope of these considerations has recently been examined in *Connor v. Surrey County Council* [2010] EWCA Civ 286, [2010] 3 W.L.R. 1302.

Connor was employed as a head teacher at a mainly Muslim school. Problems began to arise after February 2003, when Martin and his associates joined the governing body. They frequently criticised and verbally abused Connor for allegedly failing to promote closer links with the Muslim community, creating tension in the governing body. Connor informed the local council but it was slow to act. In May 2005 the governing body removed Martin. Subsequently, he made a complaint of Islamophobia against Connor and in July 2005 the council commissioned an independent inquiry into Martin's complaint. It was only in October that it intervened in a manner supportive of its teacher by replacing the governing body with an Interim Executive Board ("IEB") pursuant to the School Standards and Framework Act 1998, ss. 14 and 16A. In September 2005 Connor was signed off work with depression and later retired. She sued the council in negligence.

At first instance, the judge found that the council failed to take reasonable steps to protect the claimant against work-related psychiatric injury and was therefore in breach of its duty of care as employer. The breach consisted in failing to exercise its power to replace the governing body earlier and by establishing the inquiry into Martin's complaint. Both decisions were guided by the council's exaggerated fears over accusations of prejudice against Islam. The council appealed,

challenging the judge's finding of facts and arguing that its decisions were non-justiciable in a negligence claim.

The Court of Appeal rejected the appeal on all grounds. Laws L.J.'s judgment raises important points regarding the public/private law interface in negligence claims. Examining the case-law on justiciability, he made the following observations. (1) Where public bodies make "a pure choice of policy under a statute", there can be no duty of care in negligence, (2) unless that choice "is so unreasonable that it cannot be said to have been taken under the statute". In such cases, there may still be no duty depending on the application of the factors in *Caparo Industries v. Dickman* [1990] 2 A.C. 605. (3) In cases involving "policy and practice, or operations", the decision on duty depends on the specific facts, though "the greater the element of policy involved... the more likely it is that the matter is not justiciable". (4) Purely operational decisions are straightforwardly justiciable. The judgment clarifies several issues regarding justiciability. First, it affirms the flexible approach in *Barrett v. Enfield LBC* [2001] 2 A.C. 550 and *Phelps v. Hillingdon LBC* [2001] 2 A.C. 619, which focuses on the courts' institutional sphere of competence. Secondly, the distinction between policy and operational decisions remains useful for determining justiciability, notwithstanding Lord Hoffmann's criticism in *Stovin v. Wise* [1996] A.C. 923. Thirdly, the fact that a public body decision falls within the ambit of statutory discretion does not automatically mean that no duty arises. Fourthly, the public law test of reasonableness is not a pre-condition for the existence of a duty of care arising from the exercise of statutory powers. These mean that public law notions remain relevant within justiciability, but happily they no longer form independent hurdles to be overcome before a duty is established.

Laws L.J.'s comments were *obiter* because, unlike the cases discussed, in the present one there was a duty of care independently of the statutory power. This arose out of the parties' employment relationship. The key legal issue was whether this duty could be breached by a failure to exercise the statutory discretion. Laws L.J. held that, with certain qualifications, it could. "The law will in an appropriate case require the duty-owner to fulfil his pre-existing private law duty by the exercise of a public law discretion, but only if that may be done consistently with the duty-owner's full performance of his public law obligations" (at [106]). The qualification is that the decision must be lawful in public law according to the tests of legality, rationality, fairness and proportionality. Especially important is that the public and private law duties are consistent so that the use of public law powers to fulfil the private law duty does not undermine the statute's purpose. Here there was no inconsistency between the defendant's duty to protect the claimant's psychiatric health by exercising its power to replace

the governing body and the public purpose of the power to prevent a breakdown in the school's governance from prejudicing the pupils' performance. The court unanimously held that the two duties "marched together".

The court, however, was split on whether the decision to hold an inquiry into Martin's complaints constituted a breach of duty. Laws L.J. thought that it did. No inconsistency arose with a public law duty since there were no public law imperatives against declining to hold such an inquiry. Disagreeing, Thomas L.J. held that it did not amount to a breach of duty, especially because it was consistent with the performance of the council's duties in the wider public law context. In his view, "the public and private law duties... did not necessarily march together" (at [133]).

The case arguably "breaks new ground" (*per* Sedley L.J., at [116]) in requiring the deployment of public law powers to fulfil a pre-existing private law duty. It makes public law notions relevant at the breach of duty stage. On the facts, the decision seems right. To uphold the defendant's argument of non-justiciability despite the independent duty of care would have offered too much protection to public bodies at the expense of those they owe duties in tort or contract. At the same time, the decision appropriately has limits. Not only will similar cases be rare (*per* Laws L.J., at [109] and [114]), but even in such cases public bodies will not be negligent if there is any inconsistency between their public and private law duties. Of course, the relationship between the relevant public law tests and that of breach in negligence will need further elaboration, as will also the way of deciding whether public and private law duties are consistent in specific situations. In light of the Supreme Court's refusal of leave to appeal, that elaboration will have to await a new case.

STELIOS TOFARIS

DEFAMATION AND THE HUMAN RIGHTS ACT 1998

CLIFT v. Slough [2010] EWCA Civ 1484 is a significant ruling on the impact of the HRA 1998 on the law of defamation. It clarifies the relationship between the Human Rights Act 1998 and qualified privilege in cases involving public authorities, but it leaves a number of questions concerning the application of the Act in private proceedings.

The case itself derived from an unfortunate series of events in Slough. In essence, Clift observed a small boy destroying flowers in a public garden, she protested to the boy's mother, and the mother's male companion responded by trampling the plants himself. Clift