Public Right of Navigation

Current Case Law

A review of the current case law and its implications

by Andy Biddulph

Introduction

The, now infamous, statement by QC of the year (2005) Mr Jonathan Karas that the starting point of law is that there is no general right of navigation on non-tidal waters demonstrates how badly intelligent men may be misled by a quick dip in the textbooks and commentaries. Even more ludicrous is the argument that the law is to be found in a general consensus among commentary dippers. The curious thing is that although this "starting point" of law is much used in scary lawyer letters, it has never been put before a court of law since its inception in 1830. Prior to Humphrey Woolrych's first statement of this doctrine in his *Treatise on Waters* the idea of a private river had not seriously entered the mind of man. Two years before the American commentator, York, had observed that the public right of navigation on flowing water was an established principle of English law. Sir Matthew Hale - Lord Chief Justice (1671 - 1676) did mention, "There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people." Presumably these are too little to have the capacity for use but there may be contentious people who regard little as being anything except great.

Even more remarkable is the fact that the Woolrych doctrine continued in spite of the fact for most of its existence it was contrary to the legislation in force. This can only be explained by economic and social factors and the change of the perception of the function of law from the medieval concept of defending the common good from wealth and power to the capitalist concept of law being there to protect wealth and power from the common good.

The Common Law public right of navigation (PRN) was not created by legislation. The State Rolls show the PRN being enforced before a Parliament existed to legislate. The medieval statutes concerning navigation confirmed the Common Law and reinforced it with fixed penalty fines and regulated the commissioners responsible for ensuring that navigation was not obstructed. Principle among theses statutes were the 1297 Act Confirming Magna Carta c23 and 1472 An Act for Wears & Fishgarths which gave a statutory confirmation that c23 was for avoiding "the straightness of all rivers so that ships and boats may have their large and free passage." When Woolrych in 1830 proposed his novel doctrine, it was in contravention of both these pieces of legislation. The 1472 Act was repealed without comment by the 1861 Salmon Fisheries Act. Since Parliament did not see fit to propose any alternative interpretation of Magna Carta c23, this repeal left the historic interpretation unchanged. Magna Carta c23 remained in force until midnight on the 31st December 1969. Parliament's flirtation with the PRN had proved ephemeral.

Since 1970 the PRN is where it has always been in the province of the Common Law of England, the starting point of which is not the opinion of unaccountable persons found in textbooks and commentaries but judgements in actual cases brought before our senior judges. Let us start with the only case so far in the twenty first century.

Rowland v EA 2003

We should be grateful to Rosie Rowland for her diligence and persistence in this case which enabled Mr Justice Lightman to achieve a considerable clarification of the law. The judgements of general applicability are.

1. A PRN is not extinguished by lack of use. That means that once a PRN has been shown to exist then the fact that no one has bothered to use it in the past few hundred years has no effect on its existence.
2. A PRN may not be extinguished by obstruction.
3. A PRN may only be extinguished by legislation or the exercise of statutory powers or the permanent silting up of the watercourse.

4. Any loss of property value entailed in the preservation of a PRN is not a breach of the 1998 Human Rights Act and Convention. This prevents anyone seeking compensation or threatening to seek compensation from any authority which takes action to preserve a PRN.

AG v Brotherton 1990

This case came about as a result of an attempt by Yorkshire Derwent Trust to restore the navigation on the Yorkshire Derwent. The matter of general importance was the attempt by the AG to argue that the 1932 Rights of Way Act reference to ways over land under water and Mr Justice Kay's premiss in Bourke v Davis, that a PRN could be created in the same manner as a highway on land was sufficient to establish a PRN on the Yorkshire Derwent. There has been much confusion generated by arguing things relating to a PRN by analogy with highways on land. These arguments are still trotted out on a regular basis by those who have not taken care to acquaint themselves with current case law. The two main points of law in this judgement are:-

1. Lord Jauncey's statement that Mr Justice Kay's premiss was misleading and that a PRN is a different type of object to a highway.
2. The soil of a river may not be a way unless it be a ford or a causeway.

A PRN is a right of passage but not a way or a highway.

Bourke v Davis was often trotted out as case law supporting the Woolrych doctrine in spite of the fact that it was not presented or considered in Bourke v Davis. The 5th edition of Halisbury's Laws of England has downgraded Bourke v Davis to an authority on lakes but many commentaries still cite it as authority for the Woolrych doctrine.

1976 Wills' Trustees v Cairngorm Canoe and Sailing School Ltd

This is the most significant case in the twentieth century, coming as it does shortly after the repeal of Magna Carta c23 and the House of Lords Select Committee on Sports and Leisure 1973 report that found the law to be confused on the matter of the PRN. This case concerning the PRN on the Spey, originally raised under Scottish law found its way to the House of Lords where Lord Wilberforce seized the opportunity to consider general principles of law and bring much needed clarity.

“I have referred to these cases drawn from differing systems of law to support the existence of a rule, which is really one of the common law of nations, resting ultimately on facts and needs not confined to any one place or time, that the use of river according to its natural quality and capacity, for downstream floating is recognised by law, and to support the use of broad and liberal principle for the statement and application of the rule.” This is a restatement of the Justinian code that all rivers were *res publica*. This was an empirical observation that all the nations ruled by Rome recognised a general PRN on flowing water. The Justinian code informed the medieval Common Law and there is no evidence that the law has ever been different throughout legal history. The implications are that no one proceeding downstream on flowing water can be committing a trespass since their action is recognised by law. This will be a comfort to all parents whose children play pooh sticks. Their actions are lawful and no one has the right to send large men armed with shotguns to defend their property against this or any other downstream floating.

Lord Wilberforce then goes on to consider the user who may have generated a PRN. He comes to the common sense conclusion that if a river was usable then we must presume that at some point in time it would have been used, “Rivers, with a few exceptions have always been there inviting use

by man and man since long before history has had the means and occasion to use them. The interaction between natural and visible capacity for use and human exploitation thus produces by inevitable process a segregation between rivers of public use and other rivers and streams." That this test of natural and visible capacity is a principle in English Law is demonstrated by Bourke v Davis. Before proceeding Mr Justice Kay had to determine whether a PRN had existed before the construction of the dam. He had the sluices drawn and applied the test of natural and visible capacity, observing that the remaining pools and trickle would not support navigation "even by a canoe."

Lord Fraser came to the same conclusion from a different starting point. "Until the right of way (on land) is constituted along a definite route, it does not exist at all, and even after it has been constituted there may not be any visible indication of its existence. But a river exists as a physical feature plainly marking the route of any right of navigation and the purpose of use by the public is not in my opinion to constitute the right but to prove that the river is navigable. The theoretical basis of the right is that the Crown has not, and could not have, alienated the right to use the river for navigation but has retained it in trust for the public."

The PRN on all flowing water having the natural and visible capacity for use is thus protected under the Common Law as surely as it was under the statutory protection Magna Carta c23. This is further reinforced by the final judgement in this case "... in my opinion, the public right of navigation which has been established would extend to permit any operation which could reasonably be described as navigation by any vessel that could reasonably be described as a boat, as the word has hitherto been understood."

The Common Law appears straightforward and clear. This is a general statement of the principles of law. There is nothing peculiarly Scottish in the common law of nations or necessary process.

These principles of Common Law are embedded in Part 1 of the Land Reform (Scotland) Act 2003

Rawson v Peters. 1972

This case involved a canoeist and his family taking a day trip on the river Wharfe The Bradford Waltonians objected to this and sought redress through the courts. This was really a bid by the anglers to seize control of navigation in the hiatus between the repeal of Magna Carta c23 and Lord Wilberforce's clarification of the Common Law. It failed completely but the anglers are still citing it as a complete victory. That it failed is evidenced by the fact that in a recent County Court case, Fish Legal (The legal wing of the Angling Trust) spent two and a half hours studying Rawson v Peters but could find nothing that they could present to the court in support of their claim that a profit a prendre for fishing rights gave them the right to control navigation. In Rawson v Peters the issue of the PRN was not raised, considered, nor was a judgement on the PRN given. By the time the matter reached Lord Denning it was a matter of the disturbance of fish. This was decided as a matter of fact based on the unsupported opinion of the secretary for the plaintiff and Lord Denning's own belief. Subsequent research by the National Rivers Authority could produce no evidence that canoeing disturbs fish and EA Technical Report W266 finds no evidence that canoeing adversely affects fish stocks.

Lord Denning was careful to separate out the issue of control of navigation by refusing an injunction but giving leave for Rawson to seek an injunction in the County Court which would set no precedent.

Overview

Case law, in the post Magna Carta era has tended towards simplification. The clear separation of highways and PRNs removes all considerations as to who did what, when, and was it by right, that derives from the law concerning highways. These things always were accretions on the simpler medieval assumption of a PRN on all flowing water.

Once lawyers began to examine the boundary between waters with a PRN and those without, we ran into difficulties. By analogy with highways, there was the notion of king's rivers and lesser rivers but there was never any objective test of what constituted a king's river.

Lord Wilberforce took the medieval universality and provided us with an objective test that could be applied anywhere, at any time, without protracted arguments. There was nothing novel in the test of natural; and visible capacity but it needed spelling out in precise and clear terms that took into account the notion of rights of passage requiring a user. The test of natural and visible capacity for use means that the question do I have the right to navigate there becomes the same question as can I navigate there. With an objective test there should be no need to bother the courts with this issue again.

Also the question of extinguishment is taken out of the courts. Any legislation or exercise of statutory powers which may have extinguished a PRN will be found, if it exists, in the public records.

Thus the public right of navigation is any operation which could reasonably be described as navigation by any vessel that could reasonably be described as a boat, on any flowing water which has the natural and visible capacity for use, unless Parliament has said otherwise. This is the Law.