

FAO Sarah Hill

Dear Sarah,

Keith Day has forwarded your e-mail to me and I find your comment, "There is no clear case law on whether a 'common law right of navigation' exists on unregulated rivers. This is widely accepted to be an unclear and unresolved issue. " to be somewhat disingenuous. Although there has been some confusion in the past, current case law is so clear that the existence or non-existence of a public right of navigation may be simply determined as a matter of fact.

I will begin with Lord Lindsey's judgement in *AG v Simpson* 1905 "Once a highway always a highway ... applies to rivers as much as to roads." Which means that if the prior existence of a public right of navigation, PRN, can be found then that right still exists unless it has been extinguished by some lawful means.

1 Prior existence

1.1 In Roman times we know with absolute certainty that a PRN existed on all rivers in that they were, under the Justinian Code, *res publica*.

1.2 On the balance of probabilities, this state of affairs existed until the statute of Magna Carta in 1297 since there is no evidence whatsoever of the law being any different in this period. It should be noted in this context that Lord Wilberforce [*Wills Trustees v Cairngorm Canoe and Sailing School Ltd*] examined a number of different jurisdictions and concluded that the right to navigate on flowing waters "belonged to the common law of nations."

1.3 We know, with absolute certainty, that between 1297 and 1472 a PRN existed on all rivers because King Edward IV and his Parliament told us so in the Act for Wears & Fishgarths (attached.) If this was not sufficient authority then the Almighty himself lent His support via an Apostolic Curse pronounced by the Lords Spiritual. (A weighty matter in those days.) This clear and unambiguous affirmation of the Common Law right to navigate on all rivers (i.e. streams pent in on either side by wall and banks) happened after the 3rd September 1189 so is presumed to be retained in legal memory. It is still on the statute books and having stood unammended for over 500 years is one of our more robust pieces of legislation. Far from being an antiquarian curiosity the 1472 Act is current legislation and for almost all unregulated watercourses the last time that Parliament spoke on the matter of navigation rights. Note also that neither the 1472 Act nor Magna Carta 23 cited in the Act created a PRN but took measures to preserve the Common Law right that they found in existence. Even if repealed, the 1472 Act would still stand as an historical document and would still show with absolute certainty that a PRN existed in this period.

2 Lawful extinguishment.

The current case law on this matter is given in Mr Justice Lightman's judgement in *Rowland v EA* 2003. Rosie Rowland is a lady whose tenacity and thoroughness I greatly admire. She left no stone unturned in attempting to show the PRN through her estate had been extinguished. Mr Justice Lightman, having considered all possible arguments concluded that if the river was still flowing a PRN could only be extinguished by legislation or the exercise of statutory powers. I believe Halisbury's have some sophisticated search engines for finding documentation on such issues. For any particular unregulated watercourse it can be rapidly ascertained as a matter of fact if the PRN has been extinguished. If not then by Lord Lindsey's doctrine the PRN still exists.

3 Defra's confusion.

Defra's position is so mired in confusion and misapprehensions of the law that one would be excused from concluding that there is a deliberate attempt to hide the clarity to be found in current case law. On the other hand, Defra may be a victim of historical confusion concerning case law. However, ignorance of the law is no defence so one would presume a duty to keep up to date with current case law and perform joined up thinking about general matters of law.

3.1 The Woolrych Doctrine.

Many commentaries and law text books contain the statement, "there is no general right of navigation on inland watercourses." This, as you are well aware, rests not on legislation or case law but is an unsupported assertion made in Humphrey Woolrych's 1830 commentary on the laws of waters. Woolrych declared that he would not be intruding into the law of navigation then proceeded via a series of errors to state his doctrine which has been widely restated.

3.1.1 Lord Denham [*O'Neill v R*] has already ruled on how we should approach this situation, "the statement and restatement of some doctrine, the mere cantilena of lawyers, is of no use for finding the truth."

3.1.2 A commentary is not the law but some person's opinion on the law. If we were to make one heap of all the commentaries they would not stack up to become legislation or the exercise of statutory powers, so, would not have the power to extinguish the PRN affirmed by the 1472 Act.

3.1.3 There is no case law to support the Woolrych doctrine. It was formally believed that *Bourke v Davis* was one such case. Mr Justice Kay's judgement contains much of value for determining the creation of highways and it is a comfort to me that should I ride for recreation along an avenue of trees in some gentleman's park I would not be encumbering the unfortunate gentleman's estate with the creation of a highway. However, Kay J.'s premise that a PRN should be treated like a highway on land was rejected and declared misleading by the Law Lords [*AG v Brotherton* 1990] Thus there is no support in case law for the proposition, "there is no general right of navigation on inland watercourses."

3.1.4 In any case no combination of case law and commentaries could become legislation or the exercise of statutory powers. They are objects belonging to different categories.

3.2 Property rights.

Defra's policy statements seek to defend property rights and the related notion of, "established riparian rights." This can only be the result of neglecting basic principles of law.

3.2.1 As you are fully aware, property rights are not absolute but subject to pre-existing rights, easements, and covenants. The PRN on all rivers was affirmed by statute before the notion of private ownership of the soil of a river entered the minds of men. All subsequent conveyances of title to the soil of a river from the Crown to private interests and via a chain of conveyances to the present owners are by the laws of conveyancing encumbered with a PRN, whether or not this is stated explicitly. The only criterion being that such rights, easements, and covenants have prior existence. The date of discovery has no relevance.

3.2.2 The notion of, "established riparian rights," was raised before the House of Lords in [*AG v Brotherton* 1990] and was rejected out of hand with the comment, "Riparian owners are given to saying such things." Thus, "established riparian rights," have no legal status.

3.3 Voluntary Access Agreements.

Apart from the absurdity of the public begging for a moiety of what they already own in full, the legal status of any restrictive agreement is void. The public have no powers to rescind their rights. Any person or organisation purporting to make an agreement restricting the exercise of a PRN is

thus acting in *ultra vires*. The only place where a voluntary access agreement can have any place is if the PRN has been shown to be extinguished by legislation or the exercise of statutory powers. As far as I am aware, there are no unregulated watercourses in this category. I am puzzled as to why Defra is promoting an action which has no legal status. I doubt that an expression of belief is sufficient authority.

4 Required Remedial Actions.

In reply to a recent petition to Parliament, Defra failed to show any authority for its policies on navigation. One must presume that there is no authority for Defra policies. If we are to have the rule of law, not arbitrary policies designed to promote the unlawful wishes of a small privileged minority, then Defra will have to bring its policies within the framework of law defined by current legislation and case law.

4.1 Accept that the PRN on all unregulated watercourses still exists unless it can be shown that it has been extinguished by legislation or the exercise of statutory powers.

4.2 Publicise this policy change and ensure that riparian owners are aware that this means that unregulated watercourses form part of the Queen's highway and any action that is unlawful on the street, such as harassment or barbed wire across the way, is equally unlawful on a river.

4.3 Implement the provisions within the 1472 Act for the appointment of commissioners to inquire into the proscribed obstructions and where found to be unlawful order their destruction. Note that a fine of 100marks (£50 sterling at the 1472 exchange rate) per month applies if the order for the destruction is not complied with within 3 months. This need not be an excessive cost to the public purse. I am sure that persons of good standing may be found among the canoeing community who may be prepared to act as volunteer (expenses only) commissioners. Indeed it may be possible to finance the whole operation out of fines.

4.4 In future, proactively promote the rights of all the British people whenever the opportunity arises.

I look forward to Defra's detailed response to the issues raised in this e-mail. However, it would be advisable to obtain competent legal advice before making statements that may expose Defra to public ridicule.

Regards

Andy