

Pocket Guide to the Laws of Navigation on Unregulated Inland Watercourses

This is not a statement of the law or legal advice but my own commentary on the law of navigation suggestions for alterations and additions welcome at navigation_rights@btconnect.com (navigation_rights@)

1. Types of Navigation Rights. There are two types of navigation rights.

1.1 **Private navigation rights.** These naturally derive from ownership of the soil of the river but like fishing rights they are separate assets and may be sold, leased, or rented out by the day. Private navigation rights are in addition to but not exclusive of any public navigation rights.

1.2 **Public Right of Navigation PRN.** This entitles the public to perform any type of navigation without let or hindrance except where navigation is also constrained by the bye-laws of a Statutory Navigation or Port Authority. A PRN also entitles the public to use the soil of the river for incidents to navigation such as poleing, punting, standing, walking about, and scouring to free grounded craft. (I have not properly investigated the use of banks.)

2. Extent of PRN

2.1 **Tidal Waters.** There is a PRN over all tidal waters, although this may be regulated by the bye-laws of local Statutory Authorities. The only exception being where a tidal navigation has been constructed at private expense on private land and kept private since its construction. These are rare.

2.2 **Enclosed Waters.** In general there is no PRN on lakes, reservoirs and other enclosed waters, unless these were constructed over rivers for which there was a pre-existing PRN. Here the principle appears to be that works that enhance navigation do not enhance or diminish the existing PRN [1664 An Act for Making Diverse Rivers Navigable] On some enclosed waters there exist a PRN by virtue of custom and usage.

2.3 **Flowing waters.** There is a PRN over all unregulated watercourses, that is, streams that are pent in on either side by walls or banks. The only restriction is that the act of navigation is physically possible. The legal argument for this is that:-

2.3 a) The 1472 *Act for Wears and Fishgarths* affirms that between the Statute of Magna Carta in 1297 and 1472 there existed a PRN on all rivers in all the Realm of England. Even if repealed this Act would still stand as an historical document testifying to this fact. This has not been repealed so is current legislation and for most rivers the last time Parliament spoke on this matter. Kent's 1828 comment indicates that the general PRN had lasted until that date.

2.3 b) Lord Lindsey [AG v Simpson] tells us that, once a highway always a highway applies as much to rivers as it does to roads.

2.3 c) Lightman J [Rowland v EA] after considering the matter in some detail tells us that a PRN may only be extinguished by legislation or the exercise of statutory powers. In general these are not to be found. Anyone claiming flowing water to be private should be challenged

to produce the legislation or exercise of statutory powers that has extinguished the PRN affirmed by the 1472 Act.

2.4 Arguments against a PRN.

2.4.1 An Establish Principle of English Law that there is in general no PRN. This claim seems to be founded on the statement and restatement of the doctrine first stated by Humphrey Woolrych in his Treatise on Waters 1830 (the year the ruling oligarchy used troops to massacre pro-democracy demonstrators on the streets of Manchester.) In 1828 Kent told us that a PRN on all rivers was an established principle of English law. Between 1828 and 1830 there was neither legislation nor exercise of statutory powers that may have generally extinguished the PRN on all rivers. Lord Denham [O'Connell v R] tells us that the statement and restatement of some doctrine, the mere cantalina of lawyers is of no use in establishing the truth unless supported by some competent authority. Woolrych, himself is not a competent authority because of the errors identified by Douglas Caffyn [Master of Law Thesis 2004 [Chapter 5](#)] Being aware of this most commentaries and texts do not cite Woolrych but cite *Bourke v Davis*. This now is not considered a competent authority because the premiss on which Kay J founded his judgement, that a PRN is the same as a highway on land was rejected by the House of Lords [AG v Brotherton] on the grounds that the soil of a river could not be a way unless it was a ford or a causeway. Lord Jauncey called the statement misleading. Thus claims that the statement and restatement of this doctrine show an established principle of English Law are unsupported assertions. In any case this is neither legislation nor the exercise of statutory powers so has no power to extinguish a PRN.

2.4.2 I am Claiming the Law is Wrong. This again is based on the fact that all commentaries and textbooks restate the Woolrych doctrine. The law is to be found in legislation and precedent. Commentaries and textbooks are writings about the law, the meta-language of law, not the law itself. They are certainly not legislation nor the exercise of statutory powers so have no power to extinguish a PRN.

2.4.3 Registered Titles to Fishing Rights are not encumbered with a PRN. It is an established principle of English Law that all conveyances are subject to pre-existing rights, easements, and covenants. The omission of such things from conveyances and Land Registry entries is not proof of non-existence or that they have been extinguished. If evidence of pre-existing rights, easements, and covenants is discovered then the conveyances and registers of title would be required to be amended. On all watercourses, the PRN pre-dates the very notion of riparian ownership and thus any conveyance, so must encumber any sort of riparian title.

3. **Have Fishermen Any Right to Control Navigation?** In general the answer is , no, they have no right whatsoever. Any fishing club making such claims should be challenged to produce documentary evidence to back up such claims.

3.1 Their Titles In general their title will be a *profit a prendre* of fishing rights with no mention of any powers relating to navigation. *Profit a prendre* is just a piece of Norman French that means that the thing owned is not a physical object. Fish Legal claim that a *profit a prendre* for fishing rights automatically conveys powers to control navigation. They can present no legislation nor case law in support. This is thus another unsupported assertion.

3.2 Letters of Empowerment. Some lawyers who specialise in fishery matters recognise the weakness of Fish Legal's claim and recommend obtaining a letter from the riparian

owner empowering them to control navigation. However, such a letter could only refer to the riparian owner's private right of navigation. The riparian owner has no powers to control a PRN so could not assign powers he does not possess.

3.3 Conveyances Conveying Powers to Control Navigation. If such things exist, they too could only refer to the riparian owner's private right of navigation. The riparian owner has no powers to control a PRN so could not assign powers he does not possess.

3.4 Rawson v Peters. This is often cited by fishermen in the mistaken belief that the judgement gave them powers over navigation. The matter Lord Denning decided on was the disturbance of fish. He clearly separated this from the control of navigation by refusing to grant an injunction to control Peters' navigation but gave leave to apply for an injunction in the County Court. On the question of disturbance of fish the only evidence was the unsupported testimony of the Secretary to the Plaintiff. Even the Angling Trust no longer believes this evidence since they now promote fishing from kayaks which would be pointless if fish were scared away for an hour and a half by the presence of a canoe. Subsequent research by the National Rivers Authority and their successor the EA has provided no evidence of adverse affects on fisheries by the activity of canoeing. The only available evidence is for salmon being induced to take a fly after the passage of a canoe. This is supported by historical evidence presented in *Wills Trustees v Cairngorm Canoe and Sailing School Limited* in the House of Lords that the owner of a salmon fishery on the Spey paid people to go out in boats and stir the waters to improve his catch.

- 4. Public nuisance.** Interference with a public right of navigation is a public nuisance [Tate and Lyle v GLC] This means that private action can not be undertaken if our navigation rights are interfered with. We must go through the Attorney General. He is a politician, a member of the House of Commons and has discretion which cases he takes up. He will also want £250000 up front to pay the London Barristers if he fails.