"AND THAT'S MAGIC!"—MAKING PUBLIC BODIES LIABLE FOR FAILURE TO CONFER BENEFITS

THE facts of *Kent* v. *Giffiths* [2000] W.L.R. 1158 were that the claimant had suffered an asthma attack and was attended by a doctor at her home. At 4.25 p.m. the doctor called an ambulance, gave the patient's name, address, age and condition, and requested that she be transferred immediately to casualty where she was expected. Ambulance control replied "Okay doctor". At 4.35 p.m. the claimant's husband was assured, on making a second call, that the ambulance was on its way. He was told to hang on for another seven or eight minutes. A similar response was given to a third call made sixteen minutes later. The ambulance finally arrived forty minutes after the initial call was made. The claimant suffered respiratory arrest resulting in brain damage and a miscarriage. At trial Turner J. held that the London Ambulance Service (LAS) was liable for breach of a duty of care. He found not only that there was no reasonable explanation for the delay, but also that the ambulance crew had falsified their records ([1999] Lloyds Rep. Med. 424). Had the ambulance arrived when it should, there was a high probability that the respiratory arrest would have been averted.

The question for the Court of Appeal was whether the LAS owed the claimant a duty of care. In *Capital & Counties plc* v. *Hampshire CC* [1997] Q.B. 1004 the Court of Appeal had ruled that the fire service was under no duty to victims of fire, unless it made the damage any worse. Similar decisions had been given in favour of the police (*Alexandrou* v. *Oxford* [1993] 4 All E.R. 328) and the coastguard (*OLL Ltd.* v. *Secretary of State for Transport* [1997] 3 All E.R. 897). The case raised the perennial problem of whether a public body can be liable for failure to confer a benefit. This is an issue which has troubled the English courts, evoking different responses by the House of Lords in *East Suffolk River Catchment Board* v. *Kent* [1941] A.C. 74 and *Anns* v. *Merton LBC* [1978] A.C. 728 and again dividing the House in *Stovin* v. *Wise* [1996] A.C. 923. The uncertainty was compounded by the failure of the House of Lords to deal with the issue in *X (Minors)* v. *Bedfordshire County Council* [1995] 2 A.C. 633, although it was clearly pertinent to several of the claims in that case.

Two fundamental issues dominate the question. The first is the general aversion of tort law to liability for omissions. Several reasons can be given to justify this (see *Stovin* v. *Wise* at pp. 943 G–944 C), but the overriding objection is that it is contract, and not tort, which protects future benefits. The courts require an extremely high degree of proximity, a special relationship, before they will

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recognise a duty to act. The second issue is specific to public bodies. Where Parliament has conferred, not a duty to act, but a discretion whether or not to do so, it is said that it would be inconsistent with the statutory framework to impose a private law duty. Another aspect of this is that it is difficult to see how a mere discretion (or what is often referred to as a power) can underpin a finding of sufficient proximity on which to hang a positive duty in private law.

Lord Woolf M.R. in *Kent* also adverted to the favourable treatment usually afforded by the law of negligence to volunteers and rescuers (the fairness, justice and reasonableness points are beyond the scope of this note). He easily dismissed this point by observing that it was the public function of the LAS to assist the injured and unwell. It is publicly funded and its employees cannot be said to be deserving of any special treatment as rescuers or volunteers.

Lord Woolf neatly sidestepped the more problematic first two issues by recharacterising the public law discretion to act as, on the facts, a duty. He said that "it would have been irrational not to have accepted the request to provide an ambulance" (at p. 1170 H). In *Stovin* v. *Wise* (at p. 953 D) Lord Hoffmann said that it was a precondition for liability for failing to confer a benefit that "it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act". By finding such a public law duty to act Lord Woolf M.R. set the stage for finding a duty in private law.

In the light of this initial step in Lord Woolf's reasoning, establishing proximity becomes much more straightforward. Lord Woolf found that there *was* sufficient proximity, and did so by drawing a distinction between ambulance services and the other rescue services. The fire service and police owed duties to the public at large, which might conflict with the interests of specific individuals. A closer analogy, he thought, was with the other health services who often owed positive duties in private law to confer benefits on specific people in their care. At first instance Turner J. had emphasized the fact that, by contrast with claims against the fire service, the loss suffered was personal injury. Lord Woolf's way of distinguishing the cases seems generally sound, although (like Turner J.'s) it is much more difficult to justify with reference to the coastguard than the fire and police services. The facts of *Hardaker* v. *Newcastle Health Authority* (8 March 1996, unreported) illustrate this. The coastguard was there held to owe no duty of care for failing to ensure that the plaintiff was expeditiously transported to the appropriate decompression facility. Perhaps the coastguard

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ought to be regarded as a special case protected by the tortious rules on volunteers and rescuers, as while it is publicly funded it is staffed partly by volunteers and has no statutory powers or obligations of any sort. Turner J. had also put considerable emphasis on the common statutory origins of ambulance and medical services.

Lord Woolf did not advert to Turner J.'s test for determining proximity. This was that there must be an initiating call to the ambulance service giving sufficient information for it to "understand the nature of the call on its services" and that time was of the essence. Secondly there had to be an acceptance by allocating an ambulance. Lord Woolf preferred to leave the proximity question to the facts of each case, perhaps having one eye on the ruling of the European Court of Human Rights in *Osman* v. *UK* 29 E.H.R.R. 245. This approach is fundamentally different from that adopted in the *Capital & Counties* line of cases, which favoured the articulation of broad areas where sufficient proximity could not exist. Lord Woolf noted that if the complaint had been that the ambulance had failed to respond properly to a multiple victim accident, liability might have been denied, not on the grounds of no-proximity, but rather no-fault. He also, wisely, avoided resting the decision on specific reliance. Had he done so, this might have led to a situation where liability would only arise in those cases where the claimant had access to a car or other means of transport to hospital. Lord Woolf also said that there was no question of the issue's being non-justiciable in negligence: the ambulance had been assigned, and there was therefore no issue of resource allocation or conflict of priorities.

Arguably these proximity and justiciability points were all that were needed to decide the case. Lord Woolf himself at one point said: "... even when a statute creates only a power for a body to act ... the body can be liable for negligence if there is also a common law duty created on the particular facts of the case" (p. 1170 D–E). Indeed the public law concept of irrationality is better seen as neither necessary nor sufficient for liability.

It is not *sufficient* because even when irrationality is proved the negligence tests must still be satisfied. The irrationality may spring from factors wholly unconnected to the negligence claim. It should not be *necessary* because failure to comply with other public law duties (for example, failure to take into account relevant considerations) may also disclose negligence, as well as rendering the decision ultra vires. The irrationality test renders these situations immune from liability. Moreover recourse to *any* public law concepts may be thought unnecessary (for one such view, see

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Bailey and Bowman [2000] C.L.J. 85), and the ultra vires nature of a decision certainly cannot in English law be sufficient for liability.

The concept is also *unhelpful*. The contention that an irrational decision not to act in effect gives rise to a public law duty to act is, in public law terms, a *non sequitur*. Even where mandamus is granted it is usually to compel the remaking of a decision which is irrational and not to compel the conferment of a benefit on the claimant. Only in the controversial area of substantive legitimate expectations is such an approach envisaged (see for example Forsyth [1997] P.L. 373, but see *Ex p. Coughlan* [2000] 2 W.L.R. 622, noted above, p. 421). Lord Woolf attempted to avoid this issue by arguing that providing an ambulance would have been the only rational response which the LAS could have made. This assertion was not supported by reasoned analysis of any sort. Nor did Lord Woolf, or their Lordships in *Stovin* v. *Wise*, advert to the unconventional use to which the public law test is being put.

The concept of irrationality, so used, is better avoided altogether (although this is not to say that public duties cannot be implied: see *Lonrho* v. *Tebbit* [1991] 4 All E.R. 973, 981 c–e, 983 h). Moreover proximity and justiciability ought to be able to provide the answer (always remembering that a common law duty "must be profoundly influenced by the statutory framework . . .": *Bedfordshire* at p. 739 C, *per* Lord Browne-Wilkinson), and arguably did so in *Kent* in any case. In fact, Lord Woolf comes close to saying that it would be irrational not to act *because* of the private law duty. This would clearly be circular reasoning. While the outcome itself, and the majority of Lord Woolf's judgment, is therefore to be welcomed, the use of irrationality (like the conjuror's decoy) seems no more than a cover for a judicial sleight of hand.

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EMPLOYERS' LIABILITY—ASSESSMENT OF DAMAGES—REDUCTION TO REFLECT FAULT OF OTHER PARTIES

THE claimant was employed for 39 years as a marine fitter, working for various employers. For 24 of those years he was exposed to asbestos, and eventually he developed asbestosis, presumably as a result of that exposure. He sued the defendants, one of the firms that had employed him; about 12 years of his exposure, half the total, were suffered through the defendants' negligence and breach of statutory duty. General damages were assessed at £32,000. The issue was whether or to what extent those damages should be

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