NEGLIGENCE CLAIMS AGAINST PUBLIC BODIES – WHERE ARE WE NOW?

On 1 April 2004, the House of Lords handed down judgment in Gorringe v Calderdale MBC [2004] 1 WLR 1057. Although on its facts concerned solely with a failure to act by a statutory body, I argue in this article that it provides an important opportunity to take more general stock of where we stand with respect to private law claims against public bodies.

Gorringe been considered in some detail in two subsequent decisions, at first instance by Gray J in Godden and others v Kent and Medway Strategic Health Authority [2004] EWHC 1629, and by the Court of Appeal in Sandhar v DETR [2004] EWCA Civ 1440. However, the case has been the subject of remarkably little wider consideration; this article attempts to redress the balance.

Gorringe – the decision

Mrs Gorringe was seriously injured when she braked sharply just before the crest of a country road and skidded into the path of an oncoming bus on a country road. She sued the local authority on the basis that it should have warned her by means of suitable signs that she was approaching a dangerous part of the road. This, she claimed, put the local authority in breach of its duty to maintain the highway under s.41(1) Highways Act 1980 (‘the s.41 point’). She further claimed that the statutory duty imposed on the local authority by s.39(2) Road Traffic Act 1988 to prepare and carry out a programme of measures designed to promote and improve road safety generated a parallel common law duty to take reasonable steps to promote and improve road safety (‘the s.39 point’).

Mrs Gorringe succeeded at first instance, but failed in both the Court of Appeal and before the House of Lords. The s.41 point failed because their Lordships found that s.41 did not include a duty to take reasonable care to secure that the highway was not (by virtue of its design or associated signage) dangerous to traffic. Their Lordships also
found against Mrs Gorringe on the s.39 point, concluding that the broad public duty imposed by s.39 did not generate a common law duty of care.

Gorringe – the principles


Their conclusions can be summarised in the form of two specific questions that practitioners should ask themselves in respect of each claim that appears on its face to be a negligence claim against a public body:

1. On a proper analysis, is the claim founded on breach of statutory duty or in negligence?

2. On a proper analysis, is the claim that the public body omitted to act or is it, rather, that the public body has been negligent in its actions?

Breach of statutory duty or negligence?

Breach of statutory duty

The distinction between claims brought in breach of statutory duty and in negligence is often blurred. However, as Lord Steyn emphasised at paragraph 3 of his speech in Gorringe, this can be highly misleading.

If a claim is founded on breach of statutory duty, the central question is whether from the provisions and structure of the statute the intention can be gathered to create a
private law remedy. In construing the statute, key factors identified by Lord Hutton in *Barrett* (at 583) will be (1) whether the statutory duty was imposed for the protection of a limited class of the public; and (2) whether Parliament intended to confer on members of that class a private right of action for breach of that duty.

In contrast to the position, for instance, as regards claims against employers, the case-law makes it clear that it will often be difficult to establish a right of action against public bodies for breach of statutory duty: see, for instance, *X* (no cause of action for breach of the Children and Young Persons Act 1969, the Children Care Act 1980 and the Children Act 1989) and *Phelps* (no cause of action for breach of the Education Acts 1944 and 1981).

Although pre-*Gorringe*, another recent case in the same vein is *Thames Trains v HSE* [2003] EWCA Civ 720, arising out of the Ladbroke Grove train crash. Thames Trains claimed that the Health and Safety Executive were in breach of their duties under the Health and Safety at Work Act 1974 in respect of their regulation of the infrastructure in the Paddington Area. The Court of Appeal upheld the first instance decision of Morland J ([2003] PIQR 202) that the Act gave rise to no private law cause of action for breach. Nonetheless, as examined further below, the Court of Appeal declined to strike on the basis that it was possible that a parallel common law duty of care might have arisen on the particular facts of the case.

**Negligence**

By contrast to the position in respect of claims in breach of statutory duty, if the claim is brought in negligence against a backdrop of a statutory duty or power, the first question that the Court must ask itself is whether the statute in question excludes a private law remedy.

Only if it is satisfied that it does not can it then go on to consider whether a common law duty of care can co-exist with the statutory duty or power. Importantly,
however, although statutory duties and powers may constitute part of the relevant factual background, the existence of those duties and powers cannot reinforce parasitically the existence of a common law duty of care owed by the public authority (for a trenchant, post-\textit{Gorringe}, review of this position, see the judgment of May LJ in \textit{Sandhar}).

In deciding whether a common law duty of care exists, the Court can now follow the well-trodden path laid down in \textit{Barrett} and \textit{Phelps}. The Court must first be satisfied that the matter is justiciable before applying the standard tests of a common law duty of care laid down in \textit{Caparo Industries plc v Dickman} [1990] 2 AC 605 and \textit{Henderson v Merrett Syndicates} [1995] 2 AC 145. “Justiciability” is a slippery concept, but one assistance can be found in Lord Hutton’s speech in \textit{Barrett} (at 583): a case is justiciable if it does not involve the weighing of competing public interests and is not dictated by considerations which the courts are not fitted to assess.

A noteworthy (pre-\textit{Gorringe}) recent application of the \textit{Caparo} principles is to be found in \textit{R(A) and another v SSHD} [2004] EWHC 1585 (1585) Admin. Here, Keith J decided that that the Home Secretary owed a duty of care to two asylum applicants to take care in the implementation of immigration decisions concerning them. Significantly, in both cases the claimed breach had led to the applicants to suffer pure economic loss alone. If the decision is upheld by the Court of Appeal early in 2005 it will represent a considerable extension of the previously recognised boundaries of negligence claims against public bodies.

\textbf{Omission or action}

The Court must also ask itself which of the following categories most accurately characterises the claim before it:

1. Is this a case in which there has been an omission and it is said that there exists a duty of care to do or to refrain from doing something?
or

2. Has the public body has actually done an act or entered into a relationship or undertaken a responsibility which gives rise to a common law duty of care?

Omission cases

In broad terms, omission cases are still governed by the principles set down in *Stovin v Wise*: in other words, public authorities cannot generally be held liable for a failure to act, so long as they have not actually created the danger themselves.

*Gorringe*, however, has refined *Stovin* still further. In the former, Lord Hoffmann left open (at 953D) the possibility that a public body could be held liable for a failure to exercise a statutory discretion where (1) the failure to do so is *Wednesbury* unreasonable or irrational and (2) there are exceptional grounds for holding that the policy of the statute requires compensation.

In *Gorringe*, Lord Hoffmann revisited this possibility (at paragraph 26), and concluded that it represented no more than possibly “ill-advised” speculation upon the basis that the duty of care actually existed. Their Lordships also expressly disapproved the conclusion of the Court of Appeal in *Larner v Solihull MBC* [2001] LGR 255, in which Lord Woolf CJ had held (at paragraph 15) that s.39 Road Traffic Act 1988 could give rise to a common law liability where the Council had acted “wholly unreasonably” in refusing to exercise its discretion.

Although the question has not been finally determined, the tenor of their Lordships’ speeches in *Gorringe* suggests that, in the absence of a right of action for breach of statutory duty and in the absence of any underlying common-law duty owed by that public body to an individual, there will in fact be no situations in which the omission on the part of the public body can found a private law right of action by that individual. This will be so no matter how irrational that failure to act.
Non-omission cases

On proper analysis, however, it may be found that the claimant’s claim discloses an action on the part of the public body and/or some step which indicates that it has entered or undertaken a responsibility towards the claimant. As soon as the claimant can take the claim out of the realm of pure omission, then the Court must consider the matter on the conventional Barrett and Phelps analysis outlined above.

It must be said that the line between omission and action cases is not always easy to draw. In particular, it is often appears to be the case that it is, in fact, drawn with more than half an eye to policy considerations. Such considerations, for instance, must be seen to underline the distinction that, while a failure to provide an ambulance on time can give rise to a liability in tort (Kent v Griffiths [2000] 2 WLR 1158), a failure on the part of the fire services to respond to an emergency call does not give rise to such liability (Capital and Counties plc v Hampshire CC [1997] QB 1004).

I note that both Morland J and the Court of Appeal in Thames Trains v HSE left open the question as to whether HSE’s alleged failure to act to take steps in respect of the signalling system and infrastructure at Paddington should be characterised as pure omission where that failure to act took place (per Morland J at paragraph 58 of the first instance judgment) “despite detailed special knowledge, input and involvement in relation to the dangerous signalling system over a period of three years.” If, as this suggests, an omission can be rendered actionable on the basis of knowledge alone, this only blurs further the distinction between the two categories of case.

Conclusion

Claimant practitioners advising on claims against public bodies have multiple weapons in their armoury, for instance complaints of maladministration before the local government ombudsman and claims under s.7 Human Rights Act 1998. However, even
this brief tour d’horizon suggests that the range of claims brought in negligence will only continue to expand with the passage of time. They will continue to be extremely difficult to bring to fruition – an entire article could be written on, for instance, the evidential problems inherent in bringing successful claims in educational negligence. Nonetheless, on proper analysis, the decision in Gorringe should help both claimant and defendant practitioners assess whether there is even a cause of action in the first place.