The Position in Tort of Public Authorities after *Beatty v The Rent Tribunal*

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In October 2005, the Supreme Court delivered a judgment of crucial importance for the law of torts in the case of *Beatty v The Rent Tribunal* [2005] IESC 66 (Supreme Court, Unreported, October 21, 2005). In *Beatty*, the court considered at length whether the Rent Tribunal ("the Tribunal"), a statutory body, could be sued in negligence. Although the members of the court were in agreement in determining that, on the facts, the negligence claim must fail, there was an important divergence in the approach taken by the different judges in arriving at that conclusion. Fennelly J was satisfied that the negligence claim must fail on an application of the third limb of the restated negligence test enunciated by the Supreme Court in *Glencar Explorations plc and Andaman Resources plc v Mayo County Council* [2002] 1 IR 84, that is, that it would not be "fair, just and reasonable" to impose a duty of care on the tribunal in the circumstances. McCracken J agreed with this approach. However, Geoghegan J (with whom Denham and Hardiman JJ agreed) preferred to fasten his rejection of the negligence claim to the notion of an immunity from suit in negligence of public authorities exercising statutory duties in the public interest.

Beatty is evidently a significant judgment for a number of reasons. Extensive consideration was afforded to the position of public authorities as defendants in negligence actions, with detailed analysis of *Ward v McMaster* [1988] IR 337 and related case law. In this commentary, we restrict our analysis to three distinct issues arising from *Beatty*. First, we consider the competing approaches between Geoghegan J on the one hand, and Fennelly and McCracken JJ on the other, concerning the propriety of ascribing immunity from suit in negligence to the defendant tribunal. This debate is arguably at the heart of cases such as *Beatty*, and we afford it greatest attention. We next consider briefly the judgments in the case in respect of their treatment of a claim for misfeasance in public office, and finally reflect on the "missed opportunity" occasioned by the court's postponement until another occasion of a consideration of the scope in Irish tort law of recoverability for economic loss. We analyse each of these three aspects of the decision in turn.

BACKGROUND AND JUDGMENT AT FIRST INSTANCE

The Rent Tribunal is a statutory body established pursuant to the Housing (Private Rented Dwellings) (Amendment) Act 1983 ('the Act'). It enjoys the rent-fixing function formerly assigned to the District Court. A decision of the tribunal is final and conclusive (section 12(3) of the Act), although s 13(1) permits an appeal to the High Court on a question of law. The respondents in *Beatty* were the landlords of a controlled dwelling within the meaning of the Act. Rent for the landlords' dwelling had been determined by the Tribunal in 1995 at £300 per month. In July 2000, the landlords applied to have a new rent determined by the tribunal, whereupon the rent was raised to £500 per month. This figure fell below even the figure proposed by the tenant's valuer. The landlords had concerns about the procedures followed by the tribunal in the course of performing its rent-fixing function and about the form of the decision itself. They sought an application for judicial review and Finnegan J (as he then was) granted an order of *certiorari* quashing the tribunal's decision. In the landlords' subsequent High Court action for damages against the tribunal, the key question was whether, as a matter of law, the tribunal could be liable in damages to compensate the landlords for the consequences of its invalid decision. O'Donovan J answered this question in the affirmative and awarded damages. In October 2005, the Supreme Court unanimously allowed the appeal by the tribunal against the decision of O'Donovan J.

NEGLIGENCE CLAIMS AGAINST PUBLIC AUTHORITIES: IMMUNITY OR ABSENCE OF DUTY?

In terms of the outcome of the Supreme Court appeal in *Beatty*, nothing turned upon whether the public body in question was held to be immune from suit or whether it was simply relieved of liability on the grounds that no duty of care arose. However, in recent years courts in most common law jurisdictions have expressed reluctance to have recourse to the language of

immunity in such cases, preferring instead to relieve a defendant public authority from liability when satisfied that policy considerations warrant that no duty of care be recognised in a given case. In light of this, given that there is evident in *Beatty* of a divergence of approach between the members of the court on this issue, the competing approaches are worthy of analysis.

The first of these two approaches was favoured by Geoghegan J (with whose judgment Denham and Hardiman JJ concurred) who framed his refusal to impose liability on the tribunal in terms of an *immunity from suit altogether* rather than on an application of the "fair, just and reasonable" third limb of the *Glencar* formulation. The relevant passage in Geoghegan J's judgment is worth quoting *in extenso*:

> "There is a single and simple reason why I believe that the appeal should be allowed and the claim for damages dismissed. Even though the Rent Tribunal ... is a tribunal which essentially determines rent disputes as between private parties it is a statutory body exercising statutory duties in the public interest. In these circumstances, I am quite satisfied that provided it is purporting to act *bona fide* within its jurisdiction it enjoys an immunity from an action in ordinary negligence .... In this respect it is in no different position from a court whether such court be traditionally categorised as "superior" or "inferior" ... I think that judicial immunity is a free standing independent concept and should not be swallowed up by the wider concepts of the general law of negligence".

This "single and simple reason" prompts a number of comments. What is important about the above passage is the readiness with which Geoghegan J concludes that the tribunal, because of its capacity as a creature of statute acting in the public interest, is thereby immune from suit in negligence. Geoghegan J apparently regarded an immunity from suit as flowing directly from recognition of the tribunal as a public body exercising such duties in the public interest. It may be suggested that such a conclusion is not a *sine qua non* once the body in question is identified as performing public duties which are primarily in the public interest. Moreover, Geoghegan J's comparison between the tribunal in this case and the immunity enjoyed by judges provides a telling indication of the stout nature of the protection of statutory bodies which Geoghegan J envisages. The immunity of the judiciary is premised upon policy considerations unique to that organ of government; to extend the cloak of protection to all public bodies exercising an adjudicative function is generous indeed to public authority defendants but carries with it the danger of denying recourse in negligence to worthy plaintiffs.

This approach was not shared by all the members of the Supreme Court. Fennelly J in his judgment opted instead to avoid the concept of "immunity" in favour of the conclusion that a negligence action will not lie if, in all the circumstances, it would not be just and reasonable to impose a duty of care. McCracken J delivered a separate concurring judgment in which he indicated his preference for the approach adopted by Fennelly J. McCracken J approached with great caution the attaching of immunity to a statutory body, noting that, since the tribunal is a creature of statute, there was nothing to prevent the Oireachtas from specifically providing for an immunity from suit in negligence. As McCracken J noted, "[t]he Oireachtas chose not to take that course". McCracken J stressed that it was not correct to conclude that it is public policy to grant immunity to all public bodies in the absence of immunity being granted by statute. Like Fennelly J, McCracken J arrived at the conclusion that the tribunal's appeal must be allowed on an application of the "fair, just and reasonable" analysis common to general principles of negligence, and explained that such a threshold would be difficult to surmount in cases involving public authority defendants:

> "Where a public body, such as the [Tribunal], performs a function which is in the public interest, then in many cases, and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear or threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals. Whether it does or not, of course, is a matter for decision based on consideration of the position of any particular public body".

While general public policy considerations are of importance in considering this "fair, just and reasonable" limb, McCracken J explained that other considerations also required analysis. In the instant case, these included, *inter alia*, the nature and functions of the particular body, the nature and expertise of its members, and the extent to which there is a public policy element to the nature of its decisions. In the present case, McCracken J had "no doubt it would not be fair and reasonable to impose liability, taking these considerations into account".

ANALYSIS

It may be suggested that, of the two approaches posited by Geoghegan J on the one hand and Fennelly and McCracken JJ on the other, as to whether the plaintiffs had an actionable claim, that of Fennelly and McCracken JJ is to be preferred. As a matter of principle, it seems fair to state that the courts in the common law world in recent years have been slow to cleave to the upholding of blanket immunities from suit in negligence. Rather, instead of foreclosing the possibility of a duty of care *ever* arising in a given context, the courts have tended to allow of that possibility and have accepted that, in an appropriate case, a duty of care could be established between the parties even where the relationship in question or role of the particular defendant was one which involved special considerations of sensitive policy. As Lord

Nicholls of Birkenhead memorably put it in his judgment in the case of *Phelps v Hillingdon Borough Council*, "'Never' is an unattractive absolute in this context" ([2001] 2 AC 619, 667).

A good example of this is the approach of the English courts in the context of negligence claims against barristers. Starting from the position in the famous case of *Rondel v Worsley* [1969] 1 AC 191 to the effect that barristers enjoyed an immunity from suit in negligence (at least insofar as the impugned conduct of counsel concerned court proceedings), a reappraisal of *Rondel* finally led to an abolition of that immunity from suit in the landmark case of *Hall v Simons* [2002] 1 AC 615. However, in its recent decision in *Moy v Pettman Smith (a firm)* [2005] UKHL 7; [2005] 1 WLR 581, the House of Lords has indicated that it will be difficult indeed for plaintiffs to make out a negligence claim against barristers. Thus, while English law in this context repudiates the notion that a particular class or body should enjoy an immunity from suit, a balance can be struck by the imposition of a high threshold for plaintiffs mounting negligence actions against such persons. This more nuanced approach to the question of the existence of a duty of care seems preferable to the "all or nothing" presciptiveness of a blanket immunity – particularly in light of the right enshrined in Art 6(1) of the European Convention on Human Rights to have access to the courts. It is instructive in this regard to refer to a recent judgment of the House of Lords in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495. Although not referred to in the judgments in *Beatty*, the case turns upon the very same issue, that is, the propriety of perpetuating immunities from suit in negligence claims when the defendant in question is a statutory body.

The reader may remember the famous English case of *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (a case taken by the family of Jacqueline Hill, the last victim of the Yorkshire Ripper) involving a negligence claim against the police force in the context of an investigation to apprehend a serial killer. The House of Lords held that the claim could not succeed since the police force enjoyed an immunity from suit in negligence for the bona fide conduct of an investigation. In the 2005 *Brooks* case (which concerned the investigation by the police force of the notorious racially-motivated killing of teenager Stephen Lawrence), the status of *Hill* was challenged in argument before the House of Lords. Significantly for present purposes, Lord Steyn at para [27] of his judgment expressed his preference for dealing with such cases in terms of a finding of an *absence of a duty of care* rather than declaring an outright immunity from suit. It was stated above that Art 6(1) of the ECHR is significant in this regard and provides further justification for preferring the approach of Fennelly J to that of McCracken J. In the *Brooks* case, Lord Steyn took up this ECHR theme when he explained that:

> "since the decision of the European Court of Human Rights in *Z and others v United Kingdom* (2002) 34 EHRR 97, para 100, it would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity".

This approach seems compelling and provides further support for the approach adopted by Fennelly and McCracken JJ in *Beatty*.

MISFEASANCE IN PUBLIC OFFICE

In an important earlier decision this year, *Kennedy v The Law Society* (unreported, Supreme Court, April 21, 2005), Geoghegan J reviewed the state of the law in this jurisdiction relating to the tort of misfeasance in public office. This was the first occasion on which the landmark decision of the House of Lords in *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1 on misfeasance in public office was considered in an Irish court. In *Three Rivers*, the House of Lords held that deliberate wrongdoing is not always necessary to ground an action for misfeasance in public office. Subjective recklessness may suffice. In his judgment in *Three Rivers*, Lord Steyn explained that:

> "[r]eckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort [of misfeasance in public office]."

Delivering the judgment of a unanimous Supreme Court in *Kennedy*, Geoghegan J endorsed the application in this jurisdiction of the approach of Lord Steyn in *Three Rivers*. In *Beatty*, both Fennelly and Geoghegan JJ agreed that, despite the recognition in *Three Rivers* that subjective recklessness short of deliberate misconduct may be sufficient, it nevertheless remains the case that "bad faith in the exercise of public powers ... is the essence of the tort". (*per* Geoghegan J in *Beatty*). The court was satisfied that no evidence of such bad faith could be displayed in the instant case, and thus the claim for misfeasance could not succeed. Geoghegan J, in an important *obiter* passage in *Beatty*, added that he would have "considerable doubt" as to whether an action would lie against a judge or a statutory tribunal for misfeasance in public office in circumstances where the court or tribunal was acting within jurisdiction.

In light of the *Beatty* and *Kennedy* cases, what can be said of the Irish position relating to the tort of misfeasance in public office? Briefly, the reformulation adumbrated in the English House of Lords' decision in *Three Rivers* has been accepted as forming part of Irish law, with the result that subjective recklessness will suffice as a mental element for the tort to be made out. However, establishing this subjective recklessness will prove no easy task for plaintiffs, as both *Beatty* and *Kennedy* demonstrate.

ECONOMIC LOSS

Finally, it is significant that in the *Beatty* judgments no attempt was made on the part of the Supreme Court to

tie up the somewhat loose ends created in the context of the economic loss debate by the court's earlier landmark *Glencar* decision. It will be recalled that in *Glencar*, Keane CJ had expressly reserved for another occasion a full consideration of the scope of Irish law relating to recovery of damages for economic loss in a negligence action. It might have been hoped that *Beatty* would represent just such a "further occasion" upon which this question would be explored. Regrettably, resolution of the question has now been postponed yet further. In his judgment in *Beatty*, Geoghegan J acknowledged that the law on this question has not been finally determined in Ireland, but deemed it unnecessary to express any views on that question in the *Beatty* appeal. Nor did Fennelly or McCracken JJ dwell upon the question of pure economic loss. What is to be made of this latest display of reluctance at Supreme Court level to grapple with the question of the recoverability of economic loss in Irish law? On one view, *Beatty* appears to represent the latest example of possible hostility at Supreme Court level towards recovery for economic loss arising from negligence. It must be stressed that the court has never ruled of late that such loss is irrecoverable. However, a certain trend is discernible, in our view, through *Fletcher* [2003] 1 IR 465, *Glencar*, and *Beatty*, of a judicial unease with permitting recovery for pure economic loss. Notwithstanding that the Supreme Court has once again postponed until another occasion authoritative resolution of this question, in our view, the decision in *Beatty* is the latest example of a circumspect approach towards negligence claims and an overarching concern that liability in negligence be confined within narrow and readily identifiable limits. This is in keeping with the approach adopted by the court in recent years. Nevertheless, *Beatty* seems something of a missed opportunity insofar as a treatment of economic loss is concerned, and we await a future case in which the question is taken up by the Supreme Court.