

The Social Action, Responsibility And Heroism Bill

European Convention on Human Rights

Memorandum prepared by the Ministry of Justice.

INTRODUCTION

1. This memorandum addresses issues arising under the European Convention on Human Rights (“the ECHR”) in relation to the Social Action, Responsibility and Heroism Bill. This memorandum has been prepared by the Ministry of Justice. The Justice Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions are compatible with Convention rights.

SUMMARY OF THE BILL

2. The Bill contains 5 clauses.

Clause 1 provides that the provisions of the Bill apply where a court is determining the steps that a person was required to take to meet a standard of care for the purposes of proceedings in negligence or for breach of statutory duty.

Clauses 2 to 4 provide that the court making such a determination must have regard to the following matters:

- whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members (clause 2);
- whether the person, in carrying out the activity giving rise to the claim, demonstrated a generally responsible approach towards protecting the safety or other interests of others (clause 3);
- whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger and without regard to the person’s own safety or other interests (clause 4).

Clause 5 contains provisions about the extent and short title of the Bill and about its commencement.

CONSIDERATION OF THE BILL

Introduction

3. The effect of the Bill is to require the courts determining negligence claims and claims for breach of statutory duty in which the claimant must establish a breach of a standard of care, to take into account particular matters.

4. A court considering a claim in negligence is currently required to determine whether the defendant took such care as was reasonable in all the circumstances. The relevant standard of care in a claim for breach of statutory duty will be determined in accordance with the relevant legislation. This Bill does not change that position. The court will already take account of a range of matters in determining whether a defendant's conduct in relation to an activity has fallen below the standard of care. In particular a court will consider the nature of the activity in question, the degree of care which the particular risk or likelihood of injury justified, the gravity of the harm which might be suffered and the cost of mitigating the risk. Particular matters which case law (and case law as codified by section 1 of the Compensation Act 2006) suggest might be considered in a particular case include:
 - whether the activity required special skill¹;
 - whether the defendant was acting in an emergency²;
 - whether the defendant was acting as a rescuer³;
 - the impact on the future conduct of the activity⁴.

5. In terms of the nature of the activity, when determining what was required to discharge the standard of care in a particular case, factors which might be relevant could include the social value of the activity, its purpose (for example the fact that it was contributing to a life saving activity), the expectations of

¹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

² *Day v High Performance Sports Ltd* [2003] EWHC 197.

³ *The Ogoogo* [1971] 2 Lloyd's Rep 410.

⁴ *Tomlinson v Congleton Borough Council* [2004] 1 AC 46.

the participants (for example in relation to sporting activity), or whether the activity involved inherent risk accepted by its participants.⁵

6. Clauses 2 and 4 of the Bill draw the particular attention of the court to certain features of the activity in question and it will need to take those matters into account within the existing legal framework, which involves consideration of all the circumstances. The court will not be required to reach any particular conclusion in a particular case as a result of the effect of the Bill.
7. Clause 3 requires the court to consider wider aspects of the defendant's conduct than are typically considered by the courts in such cases at present. Whilst it is not intended that this will change the court's overall approach, it may be the case that the requirement to consider this wider context will change the court's analysis. However the court will retain its discretion to make such determination as is just in the particular circumstances.

Article 6

8. We have considered whether the provisions of the Bill engage article 6(1) of the ECHR. In general article 6(1) protects the procedural aspects attending civil cases and is not engaged by a change to the substantive law⁶. However the dividing line between procedural and substantive matters is not always easy to identify and there is authority for the proposition that a change to the substantive law which operates to exclude liability can engage article 6(1)⁷. Whilst the case law does not always point to a clear distinction between substantive and procedural rights the European Court of Human Rights has said that "it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) if a State could without restraint remove from the jurisdiction of the courts a whole range of

⁵ *King v Sussex Ambulance NHS Trust* 2002 EWCA civ 953; *Wooldridge v Sumner* [1963] 2 QB 43.

⁶ See for example *Powell and Rayner v UK* 12 EHRR 355.

⁷ For example *Markovic v Italy* (2006) 44 EHRR 1045 (lack of review was not a procedural bar but a substantive legitimate limit to the court's power) and *Osman v UK* (1998) 29 EHRR 245 (rule of substantive law that granted effective immunity to the police from negligence fell to be considered under article 6(1) as a restriction on access to the court), Contrast *Z v UK* (2002) 34 EHRR 97 where the court held no breach of article 6(1) where the domestic court held there was no duty of care for public policy reasons since this was a question of substance not procedure.

civil claims, or confer immunities from civil liability on large groups or categories of persons.”⁸. In the context of negligence, the article 6(1) case law has been concerned with whether a rule of law has operated to exclude liability in relation to a particular class of defendant or for a particular kind of case and whether such a rule amounts to a substantive or procedural rule.

9. We do not consider the Bill could be said to restrict the circumstances in which an individual has access to the courts. Nor does it confer immunities from civil liability on large groups of persons. We do not, therefore, consider that article 6 is engaged.

Articles 2, 3 and 8

10. To the extent that the provisions in the Bill affect the State’s duty to put in place an effective legal framework for the protection of those rights it might be argued that articles 2, 3 and 8 of the ECHR are engaged..
11. The rights guaranteed by article 2 (right to life) require the State to establish a framework of “laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life” (see *R (Middleton) v HM Coroner for West Sussex* [2004] 2 AC 182 at paragraph 2). The criminal law will be the most important method of securing those rights but civil law can play a part. Nevertheless it is clear that article 2 is not a generalised provision protective of life irrespective of the specific death or threat (see *R (Gentle) v the Prime Minister* [2008] 1 AC 1356 at paragraph 7, and the reference to “reasonably practicable” in *Middleton* above). The State is not therefore required by article 2 to provide redress in every case of death.
12. In relation to article 3 the State has a similar positive obligation to take steps to prevent torture, inhuman or degrading treatment at the hands of private individuals and to provide an effective mechanism for investigating allegations of such treatment. Given the minimum level of severity required to establish a breach of article 3 this obligation will also principally be met

⁸ *Fayed v UK* 18 EHRR 393 (at paragraph 65).

through the criminal law and through other state measures which permit interventions, for example, to protect children and the vulnerable from abuse and through proceedings which permit the investigation of such allegations.

13. Article 8 requires the State to adopt measures to secure respect for an individual's right to private and family life. In *Botta v Italy* (1998) 26 EHRR 241 the European Court of Human Rights confirmed (paragraph 33) that this could include an obligation to adopt measures designed to ensure respect for private life even in the sphere of private relations. Though this can sometimes require the availability of civil proceedings, especially in cases where a criminal offence has not been committed, the *Botta* case confirmed that the concept of respect was not precisely defined and that the State was free to strike the balance between the general interest and the interest of the individual and had a wide margin of appreciation in doing so. In *Stubbings v United Kingdom* (1996) 23 EHRR 213 the Court has also stated that "Article 8 does not necessarily require that States fulfil their positive obligation to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation".
14. Whilst therefore it may be argued that, in principle, articles 2, 3 and 8 are engaged by the provisions of the Bill, we do not consider the clauses infringe these rights. The provisions of the Bill are designed to draw a court's attention to specific features of a case which will be relevant in determining whether a duty of care has been discharged. Although they require the court to have regard to those matters they can only affect the court's reasoning to the extent that they are relevant in a particular case and, where relevant, will only be one of the many factors to which the court will have regard. In all cases the new provisions will operate on the court's determination of whether the defendant's actions have fallen below the required standard of care and they are not to be seen as a defence to be considered once that question has been determined.
15. Where the provisions of the Bill apply, the seriousness of the actual or likely consequences of the activity in question would be an important circumstance

16. Whilst we acknowledge that proceedings in negligence or for breach of statutory duty can sometimes be the mechanism by which Convention rights are guaranteed we are not aware of any case law which suggests that the requirement to assess a defendant's behaviour against a particular standard of care in such cases would, as a matter of principle, constitute a breach of convention rights. Nor are we aware of any cases in which it has been held as a general proposition that developments in the law of negligence, whether by statute or case law, are incompatible with a State's obligations under the Convention.
17. The provisions of the Bill are not intended to exclude access to the courts in particular cases (and do not do so), the legal definition of the standard of care will not change and the courts will be free to consider all the relevant circumstances, including any allegations relating to breach of Convention rights. Where such rights are in play the courts will of course also be obliged to take them into account in determining the particular outcome of the case (section 6 of the Human Rights Act 1998).
18. In all these circumstances we do not believe that the law of negligence, as affected by the provisions of the Bill, is either incompatible in principle with convention rights or likely to lead to a breach of convention rights in practice.

Ministry of Justice

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