

ANOTHER VIEW OF THE PUBLIC RIGHT TO FISH – AND THE QUESTION OF REGULATION OR OWNERSHIP

Are there limitations on fishing methods that may damage the benthic fauna or flora?

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Tom Appleby's article 'Damage by fishing in the UK's Lyme Bay – A problem of regulation or ownership?'¹ is an interesting analysis, albeit from a somewhat partisan standpoint, of the scope that exists for state bodies to take measures to limit damage to benthic fauna or flora of nature conservation interest caused by a particular method of fishing, and by fishing in general. This article represents an alternative viewpoint.

Appleby argues that there are intrinsic common law limitations to the right to fish, irrespective of statutory prohibitions or restrictions on the public right. The implications of this are that the exercise or purported exercise of the public right to fish by particular methods may constitute a civil tort actionable by the owner of the seabed; that where that owner is a state body, there may be a specific obligation to take action against the tortfeasors, and the existence of the civil tort may then render other provisions of criminal law applicable against the tortfeasor.

Appleby specifically suggests, by analogy with private law doctrines in relation to easements and *profits à prendre*, that there can be exceedence of the public right. He also discusses the possibility that collateral environmental damage from fishing operations may be considered ancillary to the public right of fishery.

The public right of fishing is Appleby's central concern. He argues in this article, and indeed elsewhere that, on the basis of the Irish case of *Whelan v Hewson*² and the Canadian case in relation to boundaries *Attorney General for Canada v Attorney General for Quebec*:³ 'Under the public right, fishing is limited to what is legal, reasonable and to activities which do not interfere with the rights of the owner of the "solum" or seabed'. Appleby then prays in aid reasonableness in the interpretation of what is legal and activities interfering with the rights of the owner of the foreshore or fundus.

WHELAN v HEWSON

The emphasis Appleby places on *Whelan v Hewson* both in this article and in his submission to the European Commission justifies particular consideration of the extent to which this authority, if accepted as persuasive in the English and Welsh courts, supports the proposition of a qualified right of public fishery. The decision is of particular interest to those practising in areas involving pollution and other activities injurious to fisheries because of the engagement of the special damage rule of public nuisance. This is controversial in common law jurisdictions: authorities in Canada and Australia suggest that those who exercise the public right of fishery cannot maintain an action in nuisance because, fishing *qua* members of the public, their loss is in theory no different from that of other persons. Other Canadian and US authorities have not followed this principle in relation to interferences with the rights of common fishery and of navigation.

Whelan v Hewson happened to uphold the right of action of a person exercising the public right of fishery in a licensed fishery; ie where the class of persons who could exercise the right of fishery was artificially restricted by statute through a licensing system. However, the judgments do not expressly determine this point, and the judgment of the Chief Baron relied upon the suffering of special damage in the exercise of the public right.

It would be more precise to state that the appellate court did not disturb the action of the trial judge, who allowed the question of particular and individual damage to be decided by the jury. Consequently the plaintiff was determined by the jury to be able to maintain an action.

The defendant, interestingly, was purporting to exercise the public right of fishery but in an area where the exercise of the public right was prohibited, except where it was carried on under a right of several, or private, fishery. It was held that the defendant's fishing operations were illegal, not because of the nature of the nets used but because he was fishing in an area prohibited under the fisheries code. Therefore when Appleby advances on the authority of *Whelan v Hewson* the view that: 'Under the public right, fishing is limited to what is legal, [and] reasonable ...', it would

¹ (2007) 18 WL 30. The full text of this article is available on www.lawtext.com.

² *Whelan v Hewson* [1872] IR VI 283.

³ *Attorney General for Canada v Attorney General for Quebec* (1921) 56 DLR 358.

seem the first part of the proposition is effectively a tautology, and the second is not supported by the particular authority cited.

ATTORNEY-GENERAL FOR CANADA v ATTORNEY-GENERAL FOR QUEBEC

In *Attorney-General for Canada v Attorney-General for Quebec*, the issues principally concerned the extent to which the particular principles of French law, which constitutes the common law of Quebec, were applicable in relation to fisheries in place of the English common law, and the relationship between the Dominion and provincial authorities in the grant of fisheries. The only relevance of the judgment to the issue of the conflict between the right of fishery and rights associated with the soil refer to the rights of the owner of soil to install and/or licence fixed engines, ie fishing structures.

As to the rights of the owner of the soil, which in Appleby's view conflict with the manner of the exercise of the public right, the judgment of the court acknowledges:

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the solum kiddles, weirs or other engines of the kind. That is because the solum is not vested in the public, but may be so in either the Crown or private owners.

In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines.

The last comments, expressed in the actual decision on the case, in fact acknowledge the opposite principle to that propounded by Appleby, namely that the rights of the owner of the soil may not be exercised in such a way as to interfere with the right of the public to fish.

Neither of the authorities upon whom Appleby principally relies in support of his thesis of the qualified right to fish seems to support the qualifications for which he argues. Consequently, it is appropriate to turn the question on its head, and to consider the issues from the perspective of the fisheries comprised in the public right.

A FISH, AND HOW IT MAY BE TAKEN

The traditional view of the public right of fishery is based on the idea that all the king's subjects have an unlimited common law right to take fish as far as the tide flows. The term 'fish' has a fairly settled meaning, which includes fin fish, crustaceans and molluscs. It does not include aquatic mammals or worms, hence the very limited justification held to exist in *Anderson v Alnwick DC* for the right for an individual to take worms for personal use as bait in fishing.

The right to take is, in technological terms, unqualified at common law, and is understood to mean by any

mobile means employed to capture fish, or to make them more amenable to capture. Fishing techniques using mobile equipment (gears) have developed over centuries, and more recently over decades and even during the last few years. At no point has there been a requirement for the manner of the exercise of the right to be evidenced by custom or long user, and the proposition that the nature of this exercise of the public right can be qualified according to the manner of its exercise at any particular time is not supported by any authority. The analogy Appleby seeks to draw with the prescriptive acquisition of *profits-à-prendre* is not appropriate. If anything, the analogy would be with public rights of way. Once the public has a vehicular right of way, the intensity of its use and the weight or speed of vehicles able to use it are unlimited by common law. The invention of the first steam carriages and then vehicles powered by internal combustion engines did not give rise to any exceedance of the public right.

ACCESS AND THE RIGHTS OF THE OWNER OF THE SOIL

A fisherman needs to get to a position from which fish can be taken. This may be achieved by the right of navigation of vessels, by swimming in the waters (interestingly, seemingly without the benefit of any right whatsoever), or by proceeding across the foreshore on foot (which is accepted as ancillary to the public right of fishery). The use of land-based vehicles upon the foreshore to access a fishery or to remove fish taken from it is not ancillary to the public right, although various attempts have been made to license such vehicular use as ancillary. The use of amphibious vehicles which can be grounded as ancillary to the right of navigation for the more effective exploitation of a fishery gives rise to more interesting questions. Such vehicles are frequently used in France in connection with licensed mollusc culture.

Vehicular access to a fishery forms one of the purported ancillary aspects of fishing which does constitute an infringement of the rights of the owner of the soil, unless the access is with the owner's consent. It may also be a criminal offence under the Road Traffic Act 1964 s 34.

Other infringements of the rights of the owner can be expressed thus: no right is ancillary to the right of fishery if its continuation would entail, by long user, the acquisition of new rights against the owner of the soil. The installation of nets attached to fixed posts, or fixed engines, has always been a trespass against the owner of the soil unless carried out with consent, and for this reason the general proposition stated above is related to mobile fishing equipment (gear).

By the same token, although it is argued to be ancillary to the right to fish, laying down fish taken into possession through capture on the foreshore or fundus has the capacity through long user of establishing rights against the owner of the soil, and therefore is not part of the public right.

THE LIMITS WITHIN WHICH THE PUBLIC RIGHT OF FISHERY CAN BE EXERCISED

Apart from these issues, the public right of fishery is to take the fish within the boundaries of the tidal zone irrespective of their physical location in the vertical dimension relative to the body of water, or their degree of attachment to any physical object. On the one hand there is little doubt that a fisherman can take a fish which at the moment of capture is not in the water – for example jumping out of it – but if it is in the area between the tidal waters and the benthos, interesting questions arise which are probably best illustrated by molluscan fisheries.

Mussels and oysters attach themselves by byssus threads to rocks or other substrates or to posts or the shells of other creatures. They can be fished by breaking or cutting them off or by the use of a shallow dredge basket which cuts into the fundus to a small distance. In most cases the use of such a device has been accepted as not being a trawl for the purposes of sea fishery committee gear byelaw approvals.

Cockles, however, are generally found deeper in the sediment, and can be gathered by hand using various means, for example raking or dredging. In some areas the use of jumbos or tables which are rocked on the sand encourages the cockles to come to the surface where they can be gathered more easily.

In the *Waddensee* case,⁴ exploitation of a cockle fishery was compared by the court with mechanical exploitation of minerals in the bed of the sea. There is no question that fishing for cockles by hydraulic dredge from fishing vessels is at common law a lawful exercise of the right of public fishery. The operation of such a dredge involves extracting part of the seabed together with the fish contained in it, and then screening out the smaller physical components, together with undersized cockles. Larger rock fragments are retained on the vessel until the screen has been cleared.

Burrowing razor clam species such as *ensis* are found even deeper and can be gathered from their burrows by the use of hydraulic dredges. Alternatively, they can be persuaded to leave their burrows by the application of salt, as is traditional in northern parts of the United Kingdom, or by a more recently developed technique using relatively weak electrical fields. They are then gathered by divers, which constitutes the fishing operation in the strict sense.

Scallop dredging, on which Appleby particularly focuses in the context of the conservation of features of nature conservation interest in Lyme Bay, Dorset, does not involve the penetration of the gear into the benthos to anything like the same extent as does fishing for other species. Scallops do not burrow into the seabed, nor attach themselves to the fundus in the same way as mussels and oysters. The particular concerns with regard to scallop dredging centre on the physical impact of the equipment used if it collides

with hard features of interest especially, in the case of Lyme Bay, reefs. However, in terms of the appropriation to the fisherman of physical components of the substrate, this technique pales in comparison with the operation of hydraulic dredges.

The response so far in the United Kingdom has been to prohibit under statutory powers the use of such dredge gear in relation to particular reef areas as and when particular concerns arise. This is a more robust approach in terms of protecting specific areas of nature conservation interest than Appleby's discussion of the potential application of s 9(1) of the Wildlife and Countryside Act 1981. As Appleby correctly points out, there is a specific defence under s 10(3)(c), although this has now been eroded in relation to European protected species to which Annex IV of the Habitats Directive applies.

The fact that scallops can be, and frequently are, gathered by divers does not affect the lawfulness of other techniques to take them, any more than the potential for divers to gather razor clams makes other techniques to take razor clams unlawful, regardless of the questions which have been raised in relation to the green credentials of diving for scallops. For this reason there appears little prospect of establishing that the s 10 defence does not apply to the exercise of the public right of fishery unless the exercise of that right is restrained by specific statutory provision.

The rights of the owner of the fundus are subject to the rights of the public in relation to the fishery, and therefore the exercise of the right of fishery, by whatever technique, is not an interference with the owners' rights. Indeed, the actions or defaults of the owner of the soil have the potential to be actionable in principle at the instance of those who exercise the right of common fishery. Illustrations of that can be found in the installation of fixed moorings. These are not authorised under the public right of navigation. If the owner installs or permits to be installed fixed moorings in such a way as to interfere with the exercise of a right of fishery in the waters immediately above, then that can constitute a nuisance, as well as being actionable, for example, under the Sea Fisheries (Shellfish) Act 1967 s 7.

While it is readily accepted that any state body which holds an interest in the seabed or foreshore may have an obligation to use civil powers based on common law principles to achieve a result specified by European or domestic legislation, and the Crown Estate has felt obliged to act in that way in granting leases of the seabed or foreshore or rights over them pending full transposition of European directives, to the extent that the public right of fishery is exercisable over such seabed or foreshore there is no potential for the regulation of fishery through common law actions. Appleby's discussions of trespass and negligence in this context, and the implication of an obligation upon Defra based upon it, are simply inapplicable.

In conclusion, it is not possible to justify Appleby's view of the limitations of the common law right of public fishery by reference to the environmental impacts of fishery techniques, and there is no indication

4 *Landelijke Vereniging tot Behoud van de Waddensee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* Case C-127/02 7 September 2004.

that the lawfulness of any of the techniques discussed is affected by a concept of 'reasonableness', as he claims. Appleby argues that the public right to fish is overdue for review, and that the common law basis for the right should be removed and replaced by a qualified statutory right.

The abrogation of the common law public right does present technical difficulties, not least in relation to some traditional fisheries to which Article 8 of the European Directive on Human Rights probably applies, and fisheries in relation to which European legislation applies. More significantly, the proposition that a statutory limited right of fishery could be appropriately formulated to cover all times, places, and techniques appears impossible of achievement.

Reform is certainly required, and has been sought for many years by the sea fisheries committees and others, but minimising damage to fragile marine environments and damage and disturbance to relevant fauna and flora must be achieved through appropriate management systems operating as restrictions on all relevant activities in the coastal zone (not merely fisheries).

POSTSCRIPT

Isle of Anglesey County Council and Crown Estate Commissioners v The Welsh Ministers and Others [2008] EWHC 921 (QB) (Davis J, 6 May 2008)

The interactions between fishing rights (common law and statutory) and both development and other environmental controls of the foreshore and fundus of fisheries came into sharp focus in proceedings arising from a marina project at Gallows Point at Beaumaris, Anglesey. While the issues directly concern the nature of the rights enjoyed under a statutory several (that is to say, exclusive) fishery, the judgment turns on an analysis of the nature of the rights enjoyed under the common law right of public fishery.⁵

The site is within an area where an order under section 1 of the Sea Fisheries (Shellfish) Act 1967⁶ granted to North West and North Wales Sea Fisheries Committee (NWNWSFC) powers not only to regulate/licence the sea fisheries for certain molluscs but also to create by lease a several right of fishery to enable particular areas to be used for on-growing and harvesting. These rights have been extensively taken up, and as a result the Menai Strait has become the largest producing area of mussel culture in the United Kingdom.

The planning application for the marina made by the claimants in this case, Anglesey County Council (Anglesey CC) and the Crown Estate, was called in

and recommended for refusal by the inspector in relation to landscape impacts and impacts on the mussel fishery; the National Assembly of Wales (NAW) however gave planning consent. Again, an application for permission to carry out the works for the marina below high water mark under section 5 of the Food and Environmental Protection Act 1985 was recommended for refusal by the Marine Consents and Environment Unit of Defra in view of the impacts on the mussel fishery, but NAW again elected to determine the application, and approved it in April 2006.

Judicial review proceedings had already been instituted in the Administrative Court in London by the mussel farmers on the grounds (i) that the deposit (of dredging for the works for the marina) would be unlawful because it would involve the Crown Estate Commissioners in an offence under section 7 of the 1967 Act of damaging the fisheries (ii) that it interfered with the rights of the fishery (iii) Article 1 of Protocol 1 of the ECHR (iv) irrationality given the environmental information under Directive 85/337/EEC.⁷

Further proceedings were instituted by the claimants, owners of the foreshore and the sea bed out to the 12 mile limit (Anglesey CC and the Crown Estate) to challenge the validity of the 1962 order, alternatively to assert that the order was subject to the right of the owners of soil to carry out development. In the event, as the licence challenged in the first proceedings was about to expire, the judgment given on 6 May 2008 by Davis J was on the second proceedings only.

The judge gave fairly short shrift to arguments that the grant of a several order to the NWNWSFC was legally ineffective. In relation to the claim that the order preserved to Anglesey and the Crown the right to act in any manner not necessarily consistent with the grant of a several fishery, the judge inferred that this would mean that the claimants could, without the consent of the several fishery, periodically dredge the entire seabed or extract sand and aggregates, resulting in the complete destruction of the fishery.

The judge identified the central issue in the proceedings as argued to be in the construction of the 1962 Order, that an owner of foreshore or seabed had no entitlement to exercise his right of ownership so as substantially to interfere either with public rights of navigation or with public rights of fishery. He then carried out a review of the authorities discussed, and concluded that the provisions of the 1962 Order which protected the Crown Estate Commissioners or Anglesey CC⁸ reflected the position as it existed prior to the order being made, where neither claimant had an

5 Davis J stated: 'For the avoidance of doubt, [...] in these proceedings and in this judgment I have not been required to decide, nor do I decide, whether or not the proposed marina on balance would or would not be desirable on planning, environmental, economic or other grounds. My decision is only on the legal issues raised before me' (judgment para 111).

6 This Act amended and replaced the Sea Fisheries Act 1868. The relevant sections for present purposes are contained in Part III of the 1868 Act, and the 1967 Act does of course post-date the '1962 Order' (judgment para 34).

7 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment OJ L 175, 5.7.1985.

8 Articles 16 and 18 of the 1962 Order. 'Articles 16 and 18, which on their wording do not confer any greater rights on the Crown Estate Commissioners or Council than they already had, are to be taken as reflecting the position, so far as tidal foreshore and seabed are concerned, which then existed. Accordingly at the time of the 1962 Order no entitlement substantially to interfere with the then public fishery existed: and no such entitlement with regard to the new several fishery was created by the 1962 Order' (judgment para 97).

entitlement substantially to interfere with the then public fishery, and no such entitlement with regard to the new several fishery therefore could arise by virtue of the saving provisions.

The judge continued to identify that because neither the Crown Estate nor Anglesey CC were ‘the grantees’ of the order, then they could neither carry out the works applied for nor grant the right to carry them out, as these were prohibited acts for all but those named ‘grantees’ under the Order. He then ultimately concluded that the construction of the marina would undoubtedly constitute an offence under section 7 (4) of the 1967 Act.

The judgment therefore is particularly interesting as a modern application and reaffirmation of the traditional authorities discussed above,⁹ and supports the view that the powers of owners of soil to interfere with and/or regulate fishing activities through common law action are very limited. While the judgment is under appeal

to the Court of Appeal with a date of 25 November 2008, given the standing of the older authorities it may well be that a judgment of the House of Lords could be required if there is to be a reapportionment of powers between owners of soil and fishery.

There will in any event need to be a resolution of the position under which the Crown Estate’s consent is required for the creation of new several fisheries, and therefore for the achievement of the objectives of the European Union and the UK government for the development of molluscan aquaculture. Should the Crown Estate, in the light of this decision, be minded to veto new grants because of the potential loss of commercial development opportunities, the Marine Bill would appear to allow an opportunity for an amendment of the 1967 Act to enable a grant to proceed without Crown Estate consent, and if necessary to enable determination or modification of orders to facilitate development subject to compensation.

RESPONSE TO ‘ANOTHER VIEW OF THE PUBLIC RIGHT TO FISH – AND THE QUESTION OF REGULATION OR OWNERSHIP’

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It is undeniable that there is an outer limit on the appalling mess that is the public right to fish. The difficult question, which has not been coherently addressed by the courts in the rag tag and bobtail of old, first instance and foreign decisions, is where does that limit lie?

The vagueness and inconsistency of the cases is such that one can legitimately take a tight view of the interpretation of the right to fish as have I, or a broad view as has Scott in his response. Without the matter being settled in the courts neither of us can be sure which view is correct. With regard to the specifics contained in Scott’s arguments there are many points on which, unsurprisingly, I do not agree. For reasons of space I will only counter a few here.

Whelan v Hewson [1872] IR VI 283 is cited by Halsbury’s *Laws of England*¹⁰ as authority for a

‘reasonable’ limit on the public right to fish. Scott is quite right in saying that nowhere in this case does it mention reasonableness, but the text may be taken just to be a restatement of the basic principles of reasonableness which underpin the common law. Tim Bonyhady in his remarkable work *Law of the Countryside* points out that:

*It is likely in fact that the suggestion that the right of fishing be exercised reasonably is no more than a restatement of [the prohibition on fixed engines] since fixed engines can be excessively destructive of fish.*¹¹

It remains to be seen whether other excessively destructive methods are similarly beyond the scope of the public right to fish.

Scott then goes on to shoot himself in the foot, by using the analogy of the public right to use the highway for his broad interpretation of users’ rights under the public right to fish. Rights to use the highway have been firmly established to be limited to reasonable use in the case of *DPP v Jones* [1999] 2 AC

⁹ The general position in law seems to be that “all citizens of the Crown are entitled as a matter of public right to fish in tidal waters including the high seas, estuaries and tidal watercourses as well as from the foreshore”: Halsbury’s *Laws of England* (2007 Reissue) Vol.1(2) at para 800; *Malcomson v O’Dea* (1863) 10 HL Cas 593’ (judgment para 93).
¹⁰ Vol 1 (2) 801.

¹¹ T Bonyhady *The Laws of the Countryside* (Professional Books Abingdon 1987) p 255.

240. Prior to that case highway users' rights were construed even more narrowly.¹²

There is plenty of case law supporting the argument that injunctions can be obtained to stop rights being used excessively, such as *Peacock v Custins* [2001] 2 All ER 827 and *McAdams Homes v Robinson* [2005] 1 P&CR 520. These are the bread and butter issues of any property practice and these decisions have been rigorously upheld by the courts despite the restrictions that this places on land development in the UK and the knock on economic impacts on the UK economy. It would involve no great leap of faith to apply these principles to the disproportionate damage of inappropriate fishing methods.

To my mind, whether specific methods of fishery are acceptable is a question of fact and degree. I don't think that an individual who rocks tables on the mud of Morecambe Bay can be compared with a high-powered diesel engine dragging a dredge indiscriminately across the seabed. Rather than try to describe in words the action of a dredger on the seabed I have placed some University of Plymouth footage on the web at: www.youtube.com/watch?v=gKqM3hXwcRs. Or put scallop dredge footage into the you tube search engine. I am afraid if Scott's assertion that scallop dredging 'does not involve the penetration of the gear into the benthos to anything like the same extent as does fishing for other species' is true then those other fishing methods must be truly devastating.

Scott's reference to Article 8 of the European Convention on Human Rights – rights to respect for private and family life – would have little impact here. As he correctly points out by his oblique reference in his discussions about nuisance to the Canadian authority of *Hickey v the Electric Reduction Company of Canada Limited* [1970] 21 DLR (2nd) 368 the commercial sector is very likely to have no actionable property rights in the fishery. Such rights as exist 'belong' to the general public. It would therefore be unlikely that there would be any infringement of Article 1 First Protocol of the European Convention on Human Rights or the rules of natural justice, which are more conventionally used to protect property rights from state interference. Indeed compensation claims by fishermen may rank as a subsidy and can raise complex legal issues under European competition and fisheries law.

Scott's argument that '*The proposition that a statutory limited right of fishery could be appropriately formulated to cover all times and all places and techniques appears impossible of achievement*' is perhaps more true than he realises. The complex web of EU regulations, ministerial orders, vessel licences and sea fisheries committees' byelaws imposing limitations on the public right to fish, shows that fishery managers are currently trying to use the approach that Scott so correctly denigrates. A statutory right limited to reasonable user within safe environmental limits and

putting responsibility on fishers to use appropriate gear would at least set the boundaries and stop the development of fisheries which are obviously harmful *prima facie*. It would not even be particularly difficult to envisage a position where a fishing method had to be demonstrated to be sustainable before it was permitted. Far from being the drafting horror anticipated by Scott, a limited statutory right would be a fairly simple exercise. Instead, under Scott's broad interpretation of the public right to fish, there is a substantial delay for a damaging fishery to be regulated in the manner Scott describes by a confusing number of local, national and international regulators, by which time the damage has often been done.

Rewriting the public right to fish would have serious repercussions on the fishing sector and its management, but then so perhaps would be a complacent statement that it would be too difficult. Callum Roberts in his recent book *The Unnatural History of the Sea* states that:

*Extrapolation of current trends suggest that the availability of fish will fall to about 70% of today's levels by 2050.*¹³

Perhaps Roberts is overstating the case, but the fact remains there is an unbridled race for fish charged by weak property rights. It is likely therefore, particularly given Roberts' role in the Royal Commission on Environmental Pollution that a court would consider this science to be sound.

For this reason I do not think my approach has been partisan, I am merely applying appropriate common law and commercial principles based on the reasonable user of a potentially sustainable resource.

Much as I have enjoyed Scott's article and I am very grateful to him for continuing the discussion on this important issue, I cannot find that he has provided anything which alters my view that the public right to fish is out of control and should be rationalised, so that it operates on a proper professional basis. Neither do I think that the courts should feel restricted in their power to carry out such a rationalisation, if the opportunity arises. The public right to fish is, after all, a creature of the common law, so there is no reason why the common law should not tame it, much as it has developed tort and contract law. It is understandable that Scott may wish to propose an alternative view, but as a commercial lawyer, it must be evident to him that use of the public right to fish is a very roundabout and complex method of allocating the commercial exploitation of a public resource.

Finally, I note that Defra have now banned scallop dredging in a large part of Lyme Bay, on the basis of the scientific advice they have received and after a public consultation. Would it not have been better if the broad interpretation of the public right to fish had not allowed the development there of a fishery in such a contentious manner in the first place?

12 K Gray, *S Gray Elements of Land Law* (4th edn, Oxford University Press) p 325.

13 C Roberts *The Unnatural History of the Sea* (Island Press 2007) p 318.