

THE PUBLIC RIGHT TO FISH: IS IT FIT FOR PURPOSE?

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INTRODUCTION

The comment: ‘we live on an island made of coal surrounded by a sea full of fish, only an organisational genius could arrange a shortage of both at the same time’, is attributed to Aneurin Bevan. The Royal Commission on Environmental Pollution,¹ the European Union,² Downing Street³ and even this journal’s editor⁴ have highlighted the need for radical reform to stop over-fishing taking place in our seas. In response, the UK Government has set aside time for legislation in the form of a Marine Bill. Reform of the structure of UK fisheries administration will play a key part of that Bill.⁵ It is therefore timely to consider the role which the public right to fish plays in the current legal structure of fisheries, as it is an important one and often overlooked by the commentators. By looking at its context, history and extent, this article will investigate whether there are mechanisms within common law to counter over-fishing or whether the public right itself needs to be reformed.

DESCRIPTION OF THE PUBLIC RIGHT TO FISH

The public right to fish⁶ was described by Moore and Moore⁷ as follows:

In tidal waters, estuaries and arms of the sea below the high water mark of ordinary tides situate within the limit of the kingdom ... the public as subjects of the realm, have the right to fish to the exclusion of the subjects of all foreign powers, except in such parts of those tidal waters as have been legally appropriated as private fisheries.

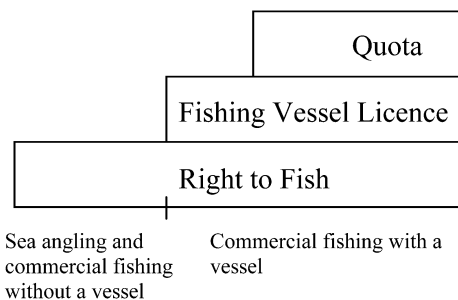
Since the Moores’ time, UK territorial waters have expanded from 3 to 12 miles⁸ from the coast and the UK has created an exclusive fishing zone extending to 200 miles.⁹ In neither case did the legislation set out clearly on what basis British and European fishermen would be operating in these additional waters but in the absence of any specific grant on the subject, it is likely that the public right extended to the 12 and 200

mile limits.¹⁰ It is also likely, after the *Factortame*¹¹ case, that the public right has extended to EU citizens.

In practice the public right to fish in law means that the entirety of territorial waters and the exclusive fishing zone have a primary use as a fishery using the most intensive methods possible, unless those rights have been specifically excluded. This is in contrast to the European Commission’s targets for the Common Fisheries policy of *responsible and sustainable* fisheries practice.¹² There is no mechanism in the public right to fish for seeding the sea or allowing it to lie fallow in the no take reserves proposed by the Royal Commission on Environmental Pollution.¹³

CONTEXT

Property lawyers would recognise three¹⁴ rights granted by the Crown or UK Government departments to commercial fishermen. These are the public right to fish, some of whose users have a fishing vessel licence (of which there are a restricted number),¹⁵ some of whose users qualify for quota (for specific endangered stock).¹⁶ The structure of rights in fishing can be shown diagrammatically as follows:



Quota and vessel licences have been used as tools to restrict fishing effort, either by restricting the number of vessels in the UK fleet or by restricting the catch of species in danger of decline. They also contain contractual restrictions and obligations. Fishing vessel

1 Royal Commission on Environmental Pollution *Turning the Tide Addressing the Impact of Fisheries on the Marine Environment* (HMSO 2004).

2 *Green Paper – The Future of the Common Fisheries Policy* (European Commission 2001).

3 Prime Minister’s Strategy Unit *Net Benefits: A sustainable and profitable future for UK fishing* (Cabinet Office 2004).

4 W Howarth *Water Law* 12 [2003] 1–4.

5 *A Marine Bill: A Consultation Document* (Defra 2006) 4.

6 Sometimes known as the common law right to fish.

7 S Moore and H Moore *The History and Law of Fisheries* (Stevens and Haynes 1903) 95.

8 Territorial Sea Act 1987.

9 Fishery Limits Act 1976.

10 The Australian Supreme Court confirmed this to be the case in *Commonwealth of Australia v Yarmir* (2001) 208 CLR 1.

11 *R v Secretary of State for Transport ex parte Factortame* (*Factortame II*) [1991] ECR I–4586.

12 *Green Paper – The Future of the Common Fisheries Policy* (n 2) 254 at 11.7.

13 Royal Commission on Environmental Pollution Ch 8 p 206.

14 Excluding for simplicity shellfish orders and salmon licensing.

15 Sea Fish Conservation Act 1967 s 4.

16 Normally quota are imposed as part of the common fisheries policy under s 30 of the Fisheries Act 1981.

licences only operate in respect of the vessel. It is the public right which permits a fisherman to catch fish.¹⁷ In England and Wales this public right has been managed traditionally¹⁸ by the creation of byelaws from Sea Fisheries Committees¹⁹ and Ministerial Orders from Defra²⁰ (often implementing EU policy).²¹ These consist mainly of limitations on the public right, which are often highly technical and site specific.²² The result is that some fisheries, such as commercial fishing from boats, are embroiled in a complex web of bureaucracy, while others, such as recreational sea angling or commercial capture of fish without a boat, are barely regulated at all.²³

HISTORICAL JUSTIFICATION

The first recorded reference to a public right to fish was in the sixth century in the Byzantine legal codification, the *Digest of Justinian*. An owner of an estate tried to retain tuna fishing rights when he sold the estate. It was decided that, although the contract itself was binding upon the purchaser, a contract could not be imposed upon the sea 'because by nature it is open to all'.²⁴ This Roman law did not arrive in England until the twelfth century when it was transposed by the English jurist Henry Bracton.²⁵ Prior to that many tidal fisheries had been given away or sold by the Crown.²⁶ The public right is still excluded from these ancient private fisheries to this day.²⁷ If the Norman kings of England were able to exclude the public right to fish in tidal waters, it suggests that such exclusion was workable and not against nature as the *Digest of Justinian* would have us believe.

Many authorities (including *Halsbury's Laws*)²⁸ cite the Magna Carta as the reason the Crown made no further private fisheries. There is no such reference in the statute itself,²⁹ however, this mistake has now become settled law by virtue of the case of *Malcolmson v O'Dea*.³⁰ Because of its constitutional importance, the erroneous involvement of the Magna Carta lends weight to sentimental arguments that somehow the public right to fish is a basic human right to all men; it is submitted that is not a tenable argument.

In Scotland the public right to fish was created by statute.³¹ The preamble of the Act cites two reasons for

its creation, because the fishery: 'considerably adds to the national wealth, but is moreover, a fruitful nursery of able seamen for the public service'. The economic argument can only be sustained, if common public ownership remains the optimum mechanism for ownership of marine fishing rights. The decline in Britain's naval importance makes the second argument less relevant.

None of the historic justifications behind the creation and maintenance of the public right to fish seem particularly germane today.

INTERESTING CASE LAW

There have not been a great number of cases on the nature and extent of the public right to fish. Those that there are therefore take on special significance. Many de-mark the technical extent of the right, but a few provide something more.

Adair v National Trust

The Northern Irish case of *Adair v National Trust*³² confirmed shellfish collection on the foreshore was part of the public right and bait digging for personal use was ancillary to the public right. The case also contained some useful obiter on the judge's perception of the extent of the public right, as arguments of nature conservation had been raised in the case:

The public right to fish in sea waters and on the foreshore was a common law development of some antiquity and emerged in an age that failed to recognise the environmental and ecological impact that flows from an *untrammelled* right to reap the harvests of nature. The public right to fish paid no regard to the threat of depletion of fish stocks or to the impact such a depletion would have on the natural chain.³³

Girvan J then goes on to state that it is for Parliament via the Fisheries Acts to limit the public right. It seems a rather fatalistic approach from the judiciary to accept that environmental destruction (and therefore the consequential reduction in the utility of the public right) is inevitable. In the absence of workable regulation from Parliament, it is for the court to determine whether modern industrial fishing techniques can be authorised by a right which was granted in ancient times to people using sail, oar and wooden boats. It is submitted that it is a case of fact and degree depending on the circumstances.

The concept of an '*untrammelled*' public right contrasts with the approach of the court in other areas. It can be compared with the concept of '*excessive user*'³⁴ in *McAdams Homes Limited v Robinson*. Here an intensification in the nature of the user of a dominant tenement can revoke its rights over a servient tenement. On the public highway the courts have established a '*reasonable user*'³⁵ test. Indeed Moore and

17 On Defra's view see D Symes and S Boyes *Review of Management Regimes and Relevant Legislation in UK Waters* (University of Hull 2005) 58.

18 Devolution has created some jurisdictional questions for Defra/Welsh Assembly Government for marine matters.

19 Sea Fisheries Regulation Act 1966 s 5.

20 Various statutory authorities.

21 Sea Fisheries Act 1981 s 30.

22 Symes and Boyes (n 17) 51.

23 Hence the Chinese cocklepickers tragedy at Morecambe Bay.

24 *The Digest of Justinian* Book VIII Title IV 13 translated by S Scott *The Civil Law* (The Central Trust Company – Liberty Library of Constitutional Classics 1932).

25 Bracton *De Legibus Consuetudinibus Angliae (The Laws and Customs of England)* 1230s. See <http://www.hls.law.harvard.edu/bracton>, vol II p 40.

26 S Moore and H Moore (n 7) xlii.

27 See earlier description of the public right.

28 *Halsbury's Laws* vol 18 para 615.

29 S Moore and H Moore (n 7) xxxix.

30 (1862) 10 HL Cas 593.

31 Act 29 Geo II c23.

32 *Adair v National Trust for Places of Historic Interest or Natural Beauty and Another* [1998] NI 33.

33 *ibid* 44 per Girvan J.

34 [2004] EWCA Civ 214.

35 *DPP v Jones* [1992] 2 AC 240 at 256B–C per Lord Irvine of Lairg LC.

Moore's *History and Law of Fisheries*,³⁶ *Halsbury's Laws*³⁷ and many others state that the public right should be exercised *reasonably* but there is no specific authority for this assertion. Over-fishing is a consequential response to the *untrammelled* use of the resource, each new piece of fishing equipment, implicitly authorised by an untrammelled right intensifies the effort on a dwindling stock. The question for the government, the fishing industry and the courts to consider is whether it is *reasonable* for such intensification to be authorised *prima facie* without any thought for the future sustainability of the stock.

Yarmirr v Queensland

Shortly after Australia extended its territorial boundaries from 3 to 12 miles native people from the Croker Islands region of the Northern Territories (which lay between the 3 and 12 mile limits) laid claim to various rights under domestic Australian legislation which protected native title. Part of the claim was that the native people had fished exclusively in an area off the Croker Islands and they sought confirmation through the courts that the public right to fish would not apply to the area, which they viewed as exclusively belonging to them. The case reached the High Court of Australia under the name of *Commonwealth of Australia v Yarmirr*³⁸ and Kirby J made some useful findings:

... the public right to fish is based on the (now unscientific) notion that uncontrolled catching of fish in sea areas cannot diminish the stock. The claimants do not concede the right of others to fish in the determination area except in accordance with licences granted under valid legislation ... In an area of pre-existing native title, the common law right to fish may operate subject to, and be defeated by, the underlying native title rights and interests in the claimant's sea country.

Kirby J decided that the claimants must sufficiently discharge proof that it was their custom exclusively to fish an area and that this custom had not been interrupted since the inception of the common law (which in the case of Australia was 1828 rather than the date of the Magna Carta).³⁹ Kirby J then went on to confirm that in making this decision he had not changed the common law, as it already recognised those private fisheries created before the Magna Carta.⁴⁰ The case does not set a clear precedent for local communities in the UK, which have customarily excluded newcomers, claiming a private fishery. However, many UK fisheries particularly inshore are only fished commercially by members of a local fishing community and sometimes according to voluntary agreements among that community.⁴¹ The case acknowledges that exclusive fisheries can operate acceptably inside the common law system, but sets a hurdle in the UK context that such communities must have native title rights, which are peculiar to Australia's

relationship with its aboriginal population.⁴² No such relationship exists in the UK; however, the basis of this argument is on the restrictions of the Magna Carta (and the subsequent case of *Malcolmson v O'Dea*).⁴³ Given the lack of evidence for such restriction on the Crown in the Magna Carta, it may be appropriate to revisit *Malcolmson v O'Dea* to create circumstances where UK communities can prove exclusive local fisheries.

Canada v Quebec

The case of *Attorney-General for Canada v Attorney-General for Quebec*⁴⁴ is a complex constitutional case concerning whether provincial governments had the power to grant exclusive rights to fish in the sea and thereby exclude the public right. Part of the decision dealt with the placing of fixed fishing traps. Viscount Haldane commented:

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the solum (soil) kiddles (salmon traps), weirs, or other engines of this kind. This is because the solum is not vested in the public but may be so in either the Crown or private owners.⁴⁵

The implication is that attaching a fixed engine to the seabed is incompatible with the seabed owner's rights because such attachment is a right associated with ownership. Many fishing techniques involve serious interference with the *solum*.⁴⁶ Where such techniques are being operated it is open for debate as to whether such activities go beyond the rights over the seabed owner's freehold.

Whelan v Hewson

In the Irish case of *Whelan v Hewson*⁴⁷ salmon fishing (possible under the public right to fish in Ireland at the time) had been excluded by statute in the mouth of a river, while those upstream fished under licence. Hewson fished in a proscribed area at a time when Whelan was fishing under licence further upstream. As a result Whelan claimed that Hewson had captured fish which he would otherwise have caught and he had therefore suffered a loss.

The result shows that it is possible to develop fisheries protective measures using torts rather than criminal liability and state enforcement. Hewson's defence raised the argument that as Whelan was one of a number of licensed persons fishing, the injuries complained of were not actionable. All the licensed fishermen may have suffered as a whole, so Whelan would have difficulty proving his individual loss. However, Chief Baron Pigot found:

Nothing beyond public notoriety is needed to show, that if at certain seasons, salmon are caught while pursuing their

36 S Moore and H Moore (n 7) 96.

37 *Halsbury's Laws* vol 18 para 613.

38 *Commonwealth of Australia v Yarmirr* (n 10) 282.

39 *ibid* 289.

40 *ibid* 290.

41 Such as the Lyme Bay voluntary agreement fostered by Devon Sea Fisheries Committee.

42 *Commonwealth of Australia v Yarmirr* (n 10) 299.

43 *Malcolmson v O'Dea* (n 30) 593.

44 (1921) 56 DLR 358.

45 *ibid* 367 per Viscount Haldane.

46 V Bradshaw, L Veale, A Hill and A Brand *The Effect of Scallop Dredging on Irish Sea Benthos: Experiments Using a Closed Area* (Hydrobiologia 465 Kluwer Academic) 129–38.

47 [1872] IR VI 283.

upward course against the stream, damage must ensue to those who have a right to fish, and endeavour to exercise that right, in the upper waters.⁴⁸

The legal argument was fleshed out in the finding of Baron Fitzgerald. He found that, although licensed, in this case it was the public right which was infringed, rather than a new private right to fish created by a licence. The licensing process merely reduced the number of people who could exercise the right, rather than taking it away entirely. Thus, for liability to exist in tort it was not sufficient for there to be a breach in the statutory provisions, as it was the public, rather than the licensee, who owned the right:

Of such public rights the Crown is guardian, and proceedings to redress any disturbance of the right belong exclusively to the Crown, unless the party disturbed can show special damage to itself.⁴⁹

The court found for the plaintiff, Whelan, and established that it was possible to claim in tort for injuries arising from unauthorised fishing, because he had sustained those special damages.

Because there is a public perception demonstrated in *Adair* that the public right to fish is 'untrammelled' in principle, it is easy to overlook the existing common law restrictions. It is unlikely that the man on the Clapham omnibus would wish for the public right to extend beyond reasonable activity. *Yarmirr* gives a glimpse of a future where customary rights of inshore fishermen can be protected from newcomers. *Canada v Quebec* shows that interference with the seabed may well be beyond the public right. *Whelan v Hewson* shows that it is possible to claim damages against those acting outside the public right, by breaching current statutory arrangements. These are the kernels of a common law protective legal network which has not yet fully developed.

CIVIL LITIGATION FOR FISHERIES PROTECTION

There is scope for further development of litigation but a systematic series of claims has not come about.

Negligence

Fishermen owe a duty of care to other fishermen as exercisers of a public right in much the same way that roads users owe each other a duty of care. The main question is whether over-fishing is a breach of that duty. The standard for a breach of duty is that of an ordinary person⁵⁰ and that they are merely carrying out common practice is not a defence.⁵¹ Thus, a fisherman whose livelihood has been affected by the damaging operations of a destructive fishing practice could possibly have the basis for a claim, if it could be shown that practice in that particular area would not be considered *reasonable* by an ordinary man.

Proving negligence is on the balance of probabilities and would very much depend on the individual

circumstances. It would need to be reasonably foreseeable that damage would be caused⁵² which would result in loss or injury to the claimant. However, a single fishing act by one boat, which so destroyed a fishery that it did not recover, would be the kind of circumstances which would be likely to lead to liability. The more complex the fishery, the less likely such a claim would be to succeed.

As fish stock cannot be replaced the courts would be likely to award compensation on the basis of what was fair for the circumstances. Courts do not normally grant injunctions for negligence.

Negligence has certain drawbacks as a method of environmental protection, as it can only be applied by those who suffer a direct loss.

Public nuisance

This is a complex area of law which is not really a tort at all but a crime:

Every person is guilty of an offence at the common law known as public nuisance who does an act not warranted by law, or omits to discharge a legal duty if the effect is to endanger life, health, property, morals or comfort of the public or to obstruct the public in the exercise of rights common to all Her Majesty's subjects.⁵³

The first question on this basis for the courts to decide is whether a fishing activity complained of goes beyond the public right to fish. This is one of fact and degree. If an activity is illegal an action would be possible (as happened in the case of *Whelan v Hewson*). If more limited interpretations are placed on the right to fish (such as limitation to reasonable activities for instance) actions in public nuisance may also be available.

The second question is whether the activity complained of falls into the list of potential nuisances. *Whelan v Hewson* is helpful here too as it sets the precedent for allowing public nuisance for obstruction by removal of the fish, to be an obstruction of the public right to fish itself.

The action is *prima facie* available to the general public. As members of the public cannot sue, it would need to be a 'relator action' by the Attorney-General taking the case on their behalf. In doing so the Attorney-General must be sure that a substantial enough number of people are affected⁵⁴ and that there is a strong enough case to lend his name to. From an environmental protection point of view, this action is very useful because it allows people who are not financially interested in the proceedings to take the case. Interest groups wishing to protect stock from destructive fishing methods could conceivably take action.

The action of public nuisance is also available to private individuals, if they can claim special damages and it thereby becomes a tort. This would be a similar

48 *ibid* 287 per Pigot CB.

49 *ibid* 290 per Fitzgerald B.

50 *Hazell v British Transport Commission* [1958] 1 WLR 169.

51 *Lloyds Bank v Savory* [1933] AC 201.

52 *The Wagon Mound (No 1)* [1961] AC 388.

53 *Archbold's Criminal Pleading and Practice* (1985) paras 27-44.

54 *Attorney-General v PYA Quarries* [1957] 2 QB 169.

situation to a negligence action and be particularly available to those who could show loss or damage in the recreational as well as commercial sector. An injunction against the activity as well as damages would be available as potential remedies.

Traditionally, the fishing industry has not settled its differences in the courts.⁵⁵ There are other arenas for conflict resolution within fisheries organisations, the government or a mixture of the two,⁵⁶ but these tend not to award the type of damages which would act as an effective deterrent for destructive activities.

SUMMARY

The public right to fish is the legal basis for over-fishing. By having very few perceived parameters it establishes the principle that a fisherman can carry out any fishing activity regardless of the long-term health of the stock, unless it is specifically excluded.

The public right to fish is based in law upon erroneous reference to the Magna Carta. Its historic justifications are not appropriate today and even those judges who have gone on to uphold the great breadth of the public right have done so acknowledging that: 'the public right to fish is based on the (now unscientific) notion that uncontrolled catching of fish in sea areas cannot diminish the stock'.⁵⁷

There has been little case law on the subject; however, case law could be developed limiting the public right to reasonable activity, reducing its effect on the seabed and allowing the development of exclusive rights for local communities.

Mechanisms exist in tort law to take action to protect the long-term viability of the stock. These torts have not been developed, as much of the management effort has been carried out by the government, fishermen's organisations or a mixture of the two. As a result the deterrent of damages has not been applied.

CONCLUSION

The public right to fish in tidal waters as it is currently understood is the legal embodiment of a culture and philosophy of over-fishing. Over time it is inevitable that the scope of the right is re-interpreted as the courts have the courage of their convictions and limit it to those activities which are reasonable and sustainable and reflect the cultural mores of today. That development may not be soon enough to save the stock. In the Marine Bill we should be investing in more considered limitations and definitions of the public's right to fish. This will encourage a civil legal framework to protect a reasonable and sustainable fishery as the command and control model⁵⁸ of centralised fisheries management does not seem to be working.

55 For example see *Fishing News* 10 February 2006 letter by P Stewart of the Clyde Fisheries Association.

56 See J Eagle *Democracy and Natural Resources: British and American Approaches to Public Participation in Fishery Management*, British Council 2004.

57 *Commonwealth of Australia v Yarmirr* (n 10) 282.

58 *Symes and Boyes* (n 17) 51.